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MAINE REPORTS

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CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

FEBRUARY, 1905—DECEMBER, 1905

100

GEO. H. SMITH

REPORTER

PORTLAND, MAINE

WILLIAM W. ROBERTS

1906

PRESS OF
The Thomas W. Burr Ptg. & Adv. Co.
Bangor, Maine

LAW.

"Of LAW there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world; all things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempted from her power." HOOKER.

"When LAW ends, tyranny begins." PITT.

"Let us consider the reason of the case. For nothing is LAW that is not reason." SIR JOHN POWELL.

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 Courts.

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

ATTORNEY GENERAL.

HON. HANNIBAL E. HAMLIN.

ASSISTANT ATTORNEY GENERAL.

HON. WARREN C. PHILBROOK.

REPORTER OF DECISIONS.

GEO. H. SMITH.

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1905.

LAW TERMS.

BANGOR TERM, First Tuesday of June.

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

PORTLAND TERM, Fourth Tuesday of June.

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

AUGUSTA TERM, Second Tuesday of December.

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

TABLE OF CASES REPORTED.

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TABLE OF CASES CITED.

BY THE COURT.

CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

In Equity.

WILLIAM B. PEIRCE, Spec. Admr., *vs.* FRANK H. WOODBURY.

Penobscot. Opinion February 27, 1905.

Equity. Issues. Decree. Findings of Fact. Executors and Administrators. Assets of Estate. Appropriation by Decedent. Chancery Rules 27, 28, 29.

In a bill in equity, an allegation of material matter and a direct denial of that allegation in the answer frames an issue of fact.

Neither our statute, nor the usage and practice in courts of equity, require any finding of facts, as preliminary to the validity of a decree in equity. While it is a growing practice in this state to file a finding of facts with the decree, yet the propriety of doing so rests wholly within the discretion of the sitting justice.

In a majority of cases the finding of facts by one who has heard the case is both satisfactory to the parties and helpful to the appellate court.

But if the justice does make a finding of fact, and therein declares none inconsistent with the allegations of the bill, the omission to find other facts that might have been found will in no way affect the validity of the decree.

To constitute, in law, an appropriation for special purposes so that the executor or administrator has no right to the fund appropriated, it must appear that the conditions upon which the deposit was made are performed. The very essence of the rule of special appropriation is that all directions are complied with by the depositary.

On appeal in equity by defendant. Appeal dismissed.

The facts sufficiently appear in the opinion.

T. W. Vose, Charles Hamlin, and Hugo Clark, for plaintiff.

P. H. Gillin, T. B. Towle, C. A. Bailey and T. D. Bailey, for defendant.

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

SPEAR, J. This is a bill in equity and comes up on appeal by the defendant. The bill avers that the plaintiff's decedent had on deposit in the Savings Banks of Bangor the sum of thirty-nine hundred fifty-eight and 21-100 dollars; that, being advised that she could live but a few months she gave said deposits to her son, in trust, for the following purposes, viz:

The whole or any part thereof to be paid over to her and her creditors from time to time for her use, care, comfort and convenience during her lifetime, to pay her funeral expenses, erect a tablet at her grave similar to the one at the grave of his father in Exeter, Me., and pay all her debts, and the remainder, if any, keep for his own use and benefit; and it was further agreed that said sums when taken from the said banks were to be by him kept in a box in some safety deposit vault, he to keep one key thereof and one to be kept by his cousin, her nephew, Fred B. Robinson; that the defendant accepted said deposits for the purpose of executing said trust and carrying out said agreement and promised to do so; that he had not only neglected and refused to keep his promise but claimed that said deposits were not transferred to him in trust but as an absolute gift. Further reference to the provisions of the bill are not necessary as the finding of facts by the justice hearing the cause fully states the case, as follows:

"The plaintiff, Mary H. Deering, being confined to her home in Brewer with a lingering and painful disease in February, 1903, had money on deposit in the Bangor Savings Bank and Penobscot Savings Bank amounting to nearly $4000. She had at the time next hereafter named no other money or property. About February 20th of that year she gave orders on each bank transferring the entire sum in each to her son Frank A. Woodbury. He drew out all the money

from both banks, and instead of depositing it to his own credit, he converted it all into coin or currency, and deposited the coin and currency in a safe deposit box in the vaults of Tyler, Fogg & Co.

"She did not give him the money as an absolute, present gift, but she entrusted it to him and he accepted it as her bailee or treasurer to pay over to her, on her order, on demand during her life, as she might call for it, and if any remained at her death to pay certain bills, and if any then remained to keep such remainder as his own. Out of the sum so received by him Mr. Woodbury has paid to her and her order during her life certain sums, and has also since her death paid certain bills according to her expressed wish before death." The last paragraph of the finding being embodied in the decree is omitted.

Upon this finding the court decreed:

1. The bill is sustained with costs, and the injunction heretofore issued against the said Frank A. Woodbury in this cause is continued.

2. All the money, funds, coin and currency received by the said Frank A. Woodbury from the said Mary H. Deering as set forth in the bill was, and continues to be, the money, funds, coin and currency of the said Mary H. Deering until her death, and the same now are of the estate of the said Mary H. Deering in the hands of the plaintiff as special administrator thereof.

The decree then appointed a special master in chancery with the consent of the parties to examine the accounts and vouchers of the said Frank A. Woodbury and state the account between the said Frank A. Woodbury and the said Mary H. Deering. The special master reported that he found funds in the hands of the defendant to be turned over to the adminstrator in the sum of $2893.68.

Objection was made to the acceptance of the report by the defendant but the objection was overruled and the report accepted, to which ruling the defendant excepted, and the exception was overruled. The case then came on to be further heard upon the master's report and the justice further decreed:

"That the above named defendant, Frank A. Woodbury, shall and is hereby ordered to pay, transfer and deliver the coin, currency, and monies in whatever form entrusted to him by the said Mary H.

Deering in her lifetime as her bailee, as alleged in the said bill in equity and as heretofore adjudged, to the full amount of twenty-eight hundred and ninety-three dollars and sixty-eight cents, ($2893.68) to William B. Peirce, special administrator of the estate of the said Mary H. Deering now deceased, within ten days after service upon him of a copy of this decree."

After a careful investigation of the evidence we find no occasion whatever for disturbing the decree upon the merits of the case. The decree necessarily finds that the defendant failed to perform the conditions upon which the deposits entrusted to him were to become his vested property, and is amply supported by the evidence. The testimony is so overwhelmingly against the contention of the defendant upon this point that we deem it unnecessary to again allude to it upon this branch of the case.

The defendant raises several legal objections, however, to the validity of the decree.

1. He says the bill sets forth a trust, a purely equitable relation; that Mrs. Deering, the plaintiff's decedent in her deposition claimed a trust; that the answer denied a trust but asserted a gift; and that after hearing the evidence the justice found no trust and also no gift, but only a bailment, a purely common law relation.

2. That the decree does not follow the allegations in the bill, the justice finding no trust but a bailment, and that, upon such a finding the bill should have been dismissed; that a person cannot allege one state of facts, prove another and obtain relief; that evidence without allegation is as futile as allegation without evidence.

3. That the decree cannot stand and that the bill should be dismissed because the plaintiff's decedent by her own will duly proved and allowed dismissed this whole proceeding, since the justice did not find that the conditions imposed by the will were not performed.

The first and second objections may be considered together both being based upon the assertion that the justice in his decree found no trust. That is, his counsel, in their brief, say "assuming for the sake of argument that the judge who tried the case is correct in his findings of fact then the defendant claims that the decree cannot be

sustained because it does not follow the pleadings." Let us see just what the issues tried out in the case were.

The bill alleged 1, a trust; 2, certain conditions to be performed under the trust; 3, that, if the conditions were performed, then whatever was left of the trust fund should become the absolute property of the defendant. On the other hand the defendant in his answer, does not merely set up an absolute perfected gift of the trust funds to himself, but "denies that the plaintiff ever gave him any money to hold in trust for her support and maintenance." Support and maintenance are very broad terms and as used in the defendant's answer traversed the substance of the plaintiff's whole bill.

Now an allegation in a bill of a material matter and a direct denial of that allegation in the answer we confidently assert frames an issue of fact. In the case at bar this issue was not only framed and joined but thoroughly tried out as the defendant's own testimony will disclose. A single question and answer of the defendant's, bearing directly upon this issue, is amply sufficient to show that the defendant in his testimony not only set up a gift but denied the existence of any condition under the trust as alleged in the bill. Q. Whether your mother at any of the conversations between you and her made it a condition that you should let her have what money she wanted while she lived? Ans. She never made any condition. The rest of the answer was not responsive but emphasized the denial. In fact the defendant was subjected to a long and searching cross examination upon this very point. The testimony of the plaintiff was fully developed upon this issue.

There can be no question but that the pleadings framed an issue that was thoroughly tried out, and the proof strictly followed the allegations.

But the defendant also says in these two objections that, even if the allegations were proven as a matter of fact the justice in his findings of fact and decree filed negatived the existence of a trust; found that no trust existed.

This interpretation cannot be placed upon either the findings of fact or the construction of the decree. But suppose they do not affirmatively find a trust, then arises a question in equity practice to

which it may, perhaps, be interesting to allude. Does our equity practice require any finding of facts as a necessary prelude to the validity of a decree? We are unable to find any such requirement. The statute does not mention it nor does the usage and practice in courts of equity require it. Rules 28 and 29 of chancery practice of this court relating to decrees are silent upon the matter, but by implication clearly show that a statement of facts is not necessary. Rule 28 provides that when a party is entitled to a decree in his favor "he shall draw the same and file it, and give notice." Most certainly the "party" would not be expected to make a finding of facts as a part of the decree. Rule 29 provides for the filing of a bare decree and prescribes the form.

It is undoubtedly true that in other jurisdictions the practice is quite common, and is a growing practice in this state, for the justice hearing the cause to file a finding of facts with the decree. But the determination of this question rests wholly in the discretion of the sitting justice. In a majority of cases a finding of facts by one who has heard the case is both satisfactory to the parties and helpful to the appellate court. But cases may arise and do occur, when the presiding justice may feel that the rights of the parties should not be influenced, upon the one side or the other, by the effect of a finding, which has all the force of a verdict of a jury. There was no legal obligation resting upon the justice hearing the cause to find any statement of facts at all. But if he does make a finding of facts and therein declares none in contradiction of the allegations of the plaintiff's bill, the omission to find other facts, that might have been found, will not in any way affect the validity of the decree sustaining the bill. A bare decree is all that our statutes or equity practice requires; hence it would seem reasonable that if the decree is valid without any facts found, it certainly should not be declared invalid, because some are found and others omitted, when the facts that are found are in harmony with the allegations of the bill.

Did the sitting justice in the finding of facts negative the existence of a trust, as asserted by the defendant? We think it will clearly appear that he made no negative finding whatever; hence there was no finding of facts repugnant to the allegations of the bill.

The defendant's third objection to the decree is because he says the plaintiff's decedent by her own will duly approved and allowed dismissed this whole proceeding. This objection is based upon the fact that Mary H. Deering after she entered into the alleged trust relation with her son executed a will in which she referred to the trust relation with her son as follows:

"To my son Frank A. Woodbury of Brewer, Maine, I give the sum of one dollar. He now holds all the money I lately had on deposit in the Bangor Savings Banks in trust, however, for the following purposes, the whole or any part thereof to be paid over to me and my creditors from time to time for my use, care, comfort and convenience so long as I live; to pay my funeral expenses, erect a tablet at my grave as hereinbefore requested and pay all my debts. If he faithfully executes said trust the remainder I give to him. If he does not so execute said trust such remainder shall become a part of the residuum of my estate and pass under the third clause hereof."

The defendant says "this constituted in law an appropriation for special purposes and the executor had no right to the fund unless the defendant had not performed the conditions. The issue as to whether the defendant had fulfilled the conditions was not raised, tried out, or decided. The issue raised by pleadings was whether defendant took the money as a gift or in trust. Yet the judge who heard the case, ignoring the provisions of the will made a decree that defendant should turn the money over to the executor, who we say was not entitled to it until he proved his right."

We have practically covered the ground of this objection in discussing the question of what issues were framed by the pleadings and tried out by the evidence. But there is another rule which will apply to the solution of the question raised by the last objection. Rule 27 of Chancery Practice declares that "all allegations of facts well pleaded in bill, answer or plea, when not traversed, shall be taken as true." Now if it were a fact that the defendant's answer put in issue only the question of a gift or trust, the other allegations in the bill, setting forth the conditions of the trust and that those conditions had not been fulfilled, would under the rule be taken as true.

But as a matter of fact as we have hereinbefore seen the question of whether the conditions of the trust were fulfilled was put in issue and tried, hence there is no occasion for the application of the rule.

The decree sustains the bill, and therefore supplements the finding of facts, and by necessary implication declares that the allegations in the bill, setting out the conditions of the trust and their non-performance, are true. And the conditions not being performed the doctrine of special appropriation invoked by the defendant does not apply. As stated in defendant's brief, 11 Am. & Eng. Ency. of Law, 835, "If a decedent in his lifetime deposit with a third person money or property with directions to use it for particular purposes, and such directions are complied with by the depositary, though after the death of the decedent, he is not liable to the executor or administrator as for assets of the decedent in his hands." But the very essence of this rule is that the "directions are complied with by the depositary."

The defendant also contends as a reason independent of the merits of the case or the other legal questions involved, that the appeal should be sustained and the case remanded as he was denied his constitutional right of a trial by jury. But this claim is based upon the assumption that the relations existing between the plaintiff's decedent and the defendant were legal and not equitable. But this assumption cannot prevail. The constitutional right asserted did not exist.

The bill, in this case, alleges equitable relations. The answer, as before seen, traversed the allegations of the bill and framed issues of fact that were fully tried out. The decree sustains the bill, and by necessary implications confirms all the facts alleged in the bill not expressly negatived in the decree or finding of facts filed with the decree.

Appeal dismissed. Decree below affirmed with additional costs.

GEORGE H. McCOSKER *vs.* JOHN A. WEATHERBEE.

Penobscot. Opinion February 27, 1905.

Dog. Keeper. R. S. 1903, c. 4, § 52.

While it is true that a person, not the owner of a dog, may be liable as its keeper, yet the mere fact that the dog is kept by its owner on the premises of another, with the knowledge or acquiescence, or permission of the owner of such premises, does not of itself make the owner of said premises, the keeper of the dog.

On exceptions by plaintiff. Overruled.

Action of trespass under the statute to recover damages of the defendant as the alleged keeper of a dog by which the plaintiff was bitten.

The case is stated in the opinion.

T. P. Wormwood, for plaintiff.

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

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

SPEAR, J. This is an action of trespass, under R. S., chapter 4, sec. 52, to recover damages of the defendant as the alleged keeper of a dog by which the plaintiff was bitten. When the evidence was completed the presiding justice directed the jury to return a verdict for the defendant, to which order the plaintiff seasonably excepted. The only question therefore presented for consideration is whether a verdict of the jury, if rendered for the plaintiff, could be sustained upon the evidence. We think it could not. The testimony shows that the dog in question was kept at the stable of the defendant, and was about the premises, more or less, and this is all that appears in the case that tends to prove the allegation that the defendant was keeper. On the other hand, it is proven beyond controversy that the dog was owned by the defendant's son, who was thirty-three years of

age, having been received by him as a present; that the defendant, instead of harboring the dog, both forbade and prevented his presence in his house; that he did not want any dog at all upon the premises and had nothing whatever to do with this one; that the son had the care, custody and control of the dog, and, whenever absent from home, employed the hostler to take charge of him, and that the hostler, at such times, did take charge of the dog and procure food for him. Upon this state of facts, it cannot be asserted that the defendant had the care, custody and control of this dog. But unless he had he cannot be charged as keeper.

It seems to us clear that Albert W. Weatherbee, the son, was, under the evidence, not only the owner but the keeper of the dog within the meaning of the statute.

This position is fully sustained by *Whittemore* v. *Thomas*, 153 Mass. 349, a case very similar to the one at bar, in which it is held: "But while it is true that a person, not the owner of a dog may be liable as its keeper, the mere fact that the dog is kept by its owner on the premises of another, with the knowledge, or acquiescence, or permission of the owner of such premises, does not of itself make the owner of said premises, the keeper of the dog."

See also, *Mitchell* v. *Chase*, 87 Maine, 174; *Collingill* v. *Haverhill*, 128 Mass. 218, and *Boylan* v. *Everett*, 172 Mass. 453.

Exceptions overruled.

JOHN F. PROCTOR

vs.

THE MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion March 1, 1905.

Adverse Possession. Constructive Occupation.

Where a grantor conveyed a parcel of land to which he had the title, and the deed contained a grant of another parcel to which he had no title, and his grantee occupied only that parcel to which he had obtained the title, although he also *claimed* the other parcel, this does not operate as a disseizin of the owner of the parcel to which the grantee had not obtained the title unless the grantee actually entered upon and occupied the same.

Occupation by one of land which he owns cannot be regarded as constructive occupation of that to which he had no title.

To constitute adverse possession such as will work a disseizin of the lawful owner, there must be actual possession and occupancy of the premises adversely for the requisite period.

See *Same* v. *Same*, 96 Maine, 458.

On motion and exceptions by plaintiff. Exceptions sustained, motion not considered.

Real action. Plea, nul disseizin.

Verdict for defendant.

The case sufficiently appears in the opinion.

Charles P. Mattocks, W. K. and A. E. Neal, for plaintiff.

J. W. Symonds, David W. Snow, Charles Sumner Cook and Charles L. Hutchinson, for defendant.

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

STROUT, J. This is a real action to recover possession of two parcels of land, mostly flats, on Fore river, Portland. The title to both is in the plaintiff, unless title thereto has been acquired by adverse possession of defendant and those under whom it claims.

Defendant introduced a deed from David A. Crosswell to Frederick W. Clark, dated January 9, 1852, conveying a piece of upland running to the Cumberland and Oxford canal, adjacent to the flats in controversy. The title to this lot was then in Crosswell, and passed by this deed to Clark. The deed also contained another grant,— "also all of said lot west of said canal to Fore river, including that part covered by said canal." This last description includes the land in controversy, but it was not owned by Crosswell at the date of his deed. The defendant now holds the title which Clark acquired under the Crosswell deed, and also all title to the flats, if any, which Clark may have acquired by adverse possession. Notwithstanding Clark acquired no title to the flats in controversy under his deed, defendant claimed that he did acquire title thereto by adverse possession from January 9, 1852, the date of his deed, to December 14, 1885, when he conveyed to Rollins, who subsequently conveyed to defendant, and that the adverse possession of Clark was continued and maintained without interruption by his grantees and the defendant.

Upon this question the presiding Justice instructed the jury that "if under that deed he (Clark) entered into the possession of the territory described in that deed, claiming to own it to the full boundaries of the deed, and continued an occupation for twenty years or more, which was open and notorious and adverse and exclusive and uninterrupted, of the territory that he had actually occupied, then by force of law the jury would have a right to say that his occupation extended to the boundaries that his deed included,—that is, if the deed covered the flats, it would extend to the flats. But that would only be true in case he claimed adversely, and the boundaries in the deed would not extend it beyond what he actually claimed. It would extend the constructive possession, but it does not extend the claim itself."

"You may consider whether having a deed which embraced the flats, he claimed them or not. If he didn't claim the flats, of course he wouldn't get any title to them, no matter how long the possession might be, but if he claimed to the full extent of his deed, and occupied adversely some portion of it, then the jury have a right to

consider whether he didn't intend his occupation to include the whole. If he occupied part, intending to claim the whole, then the boundaries of that deed would mark the extent of his right."

If Clark ever occupied any part of the land covered by that deed and "claimed to own, or claimed to hold to the limits of his deed and so claiming occupied for twenty years, under such circumstances as would be adverse and open, notorious, exclusive, and uninterrupted, it would work a constructive possession to the boundaries of the deed." The case is here on exception to these instructions.

It may be that under some state of facts, as, for instance, if the grantor of Clark had no title to any part of the land attempted to be granted, and a third party in fact owned it all, the instructions would be appropriate. But, applied to the facts in this case, they were erroneous. They authorized the jury to find that if Clark occupied only that part of the land described in the deed to which he had undoubted title, claiming all that was described in the deed, it operated a disseizin of the owner of the flats, even if Clark never in fact entered upon and occupied them. Title to the flats by adverse possession could only be acquired by actual possession and occupation of them for the requisite period. The instructions did not require this.

Occupation by Clark and his successors of the land which he and they owned cannot be regarded as constructive occupation of that to which they had no title. Such occupation cannot be regarded as notice of claim to the flats to their owner, and afforded him no ground of complaint. *Walsh* v. *Wheelwright*, 96 Maine, 174, is a case in point.

Exceptions sustained.

In Equity.

HORATIO W. BLOOD, et als.,

vs.

F. O. BEAL, Mayor, et als.

Penobscot. Opinion March 1, 1905.

Constitutional Law. Municipal Indebtedness. Equity Jurisdiction. Municipal Corporations. Passage of Order. Assets. Article XXII of the Amended Constitution of Maine. R. S., c. 79, § 6, par. XI.

1. The Supreme Judicial Court of Maine under its decisions and by virtue of its enlarged equity powers, is fully invested with jurisdiction to enable it to prevent a manifest violation of Article XXII of the Amended Constitution of the state.
2. Where the court is asked to enjoin and restrain a city from creating an indebtedness which, with its previous debts or liabilities, would place it beyond its debt limit under the Constitution, the statute giving full equity jurisdiction undoubtedly confers upon the court sufficient authority to restrain a violation of the fundamental law. Unless equity can intervene, the amendment can be transgressed with impunity. The court know of no other process by which the constitutional inhibition could be enforced against a liability created for a legal purpose.
3. Unlike a statute which applies only to a liability created for a "purpose not authorized by law," the constitutional amendment applies with equal force against a liability whether created for a legal or illegal purpose. It makes no distinction whatever in this respect. The court is clothed with ample jurisdiction to prevent it, whether the debt or liability, which is calculated to violate the constitutional prohibition, is created for a legal or illegal purpose. The purpose for which the debt incurred or contemplated is immaterial, if it exceeds the five per cent limitation specified in the amendment.
4. While punctuation cannot be regarded of paramount importance in the construction of a statute, or other written instrument, and should never be allowed to overturn what seems to be the plain meaning of the instrument, yet when it is so used as to enable the language to bear an interpretation which will make the whole instrument rational and self consistent, it is entitled to consideration as much as the language itself.

5. Where the rules and orders of a city council provide that certain orders "shall not be passed unless two-thirds of the whole number of each branch of the city council vote in the affirmative, by a vote taken by yeas and nays," and the whole number composing the council of the city was twenty-one, and the number voting in the affirmative upon the passage of the order was ten, such order is void for want of the requisite number of votes.
6. When money collected from taxes is paid into the city treasury, without appropriation for any particular purpose, such money becomes an asset of the city and may be used for any legitimate expenditure.
7. A temporary loan in contemplation of Article XXII of the Amended Constitution, is one made for a temporary purpose to be paid during the municipal year in which it is made, from taxes assessed and collected within the same year. And if such loan although temporary in its inception, or any part thereof, is carried over, in any form, into the next municipal year, it then loses its temporary character and becomes a debt or liability of the city within the inhibition of the aforesaid Arcticle of the Amended Constitution.

Equity. On report. Bill sustained. Decree in accordance with opinion.

Bill in equity brought by fourteen taxable inhabitants of the city of Bangor, under the provisions of R. S., chapter 79, section 6, paragraph XI, asking that F. O. Beal, as mayor, and H. O. Pierce, as treasurer, be restrained from paying out any money, and that a special committee appointed for the purpose, be restrained from making a contract, for the purchase of two steel spans for the Bangor and Brewer bridge, under the authority of a certain order passed by the city Common Council.

At the hearing before the Justice of the first instance, a temporary injunction was issued, and the case was reported to the Law Court to render such judgment as the legal rights of the parties require.

The case sufficiently appears in the opinion.

Louis C. Stearns and T. D. Bailey, for plaintiffs.

E. C. Ryder and H. L. Fairbanks, for defendants.

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

SPEAR, J. This is a bill in equity brought by fourteen taxable inhabitants of the city of Bangor, under Chapter 79, section 6, R. S.,

asking that F. O. Beal, as mayor, and H. O. Pierce, as treasurer, be restrained from paying out any money, and that a special committee appointed for the purpose be restrained from making a contract, for the purchase of two steel spans for the Bangor and Brewer bridge, under the authority of the following order passed by the city council, viz:

"In common council October 14, 1904, order for purchase of bridge spans taken from the table by yes and nay vote. Order for appointment of committee to consist of Street Engineers, one alderman and the President of common council, to contract with the lowest bidder for the two spans as advertised for the Bangor and Brewer bridge, so called, as soon as a contract is signed with the Public Works Company for crossing. Passed by yes and nay vote."

The plaintiffs base their claim for an injunction upon two grounds: (1) because the common council in passing the order violated the rules adopted by it for its procedure when in session; and (2) because the consummation of a contract for the purchase of the two steel spans by the committee appointed, would create an indebtedness which, with its previous debts or liabilities, would place the city of Bangor beyond its debt limit under Article 22 of the amended constitution of the State.

The position of the defendants is (1) that the purpose of the contract being a proper one, and one which the city has a legal right to make, the court has no equity jurisdiction to enjoin the proceedings; (2) that if there were any irregularities in the passage of the order, it was simply a failure on the part of the lower board to observe its own rules, and that the result of the vote was the same as it would have been had there been a formal motion to reconsider; and (3) that the city has the constitutional right to enter into the contract contemplated by the order.

The first objection raised by the defendants is settled in favor of the petitioners in *Reynolds* v. *Waterville*, 92 Maine, 292.

This was a bill in equity brought by the plaintiffs, being 12 taxable inhabitants of the city of Waterville against the city, the city hall commission, created by special laws of 1897, and M. C. Foster & Son, who were alleged to have contracted with the city hall

commission for the erection of a city hall building in the city of Waterville.

The whole office of this commission was to make the contract in avoidance of the city debt limit for the erection of the city hall for the present use of, and ultimate payment by, the city. Such contract was consummated with M. C. Foster & Son, and of this transaction, Chief Justice Peters says; "These are all very commendable provisions, but only go to show the true relations which the city was to hold towards this city property, and indicating that the city was really to build the new hall as its own property. And does not the very mischief here arise which the constitutional amendment was designed to prevent, the city thus getting their hall in the present, and having thirty years of continuous annual taxations with which to pay for it?" But the Reynolds case only indirectly involved a contract which, as the court found, was calculated to load the city beyond its constitutional debt limit, while the case at bar, not indirectly, but directly involves such a contract. While the decisions promulgated before the adoption of the present constitutional amendment in 1877, and before the conferring of full equity jurisdiction upon the court in 1874, hold that an injunction will lie only to restrain a city or town from raising or paying out money for a purpose not authorized by law under the statute, *Johnson* v. *Thorndike*, 56 Maine, 32, yet the court, not only under the decision in the Reynolds case, but by virtue of its enlarged equity powers, is fully invested with jurisdiction to enable it to prevent a manifest violation of the constitutional provision referred to. In the Johnson case the statute gave special jurisdiction to prevent a violation of the statute. In the case at bar, the statute giving full equity jurisdiction undoubtedly confers upon the court sufficient authority to restrain a violation of the fundamental law. Unless equity can intervene, the amendment can be transgressed with impunity. We know of no other process by which the constitutional inhibition could be enforced against a liability created for a legal purpose.

But unlike the statute which applies only to a liability created for a "purpose not authorized by law", the constitutional amendment applies with equal force against a liability whether created for a legal

or illegal purpose. It makes no distinction whatever in this respect. The court is clothed with ample jurisdiction to prevent it, whether the debt or liability, which is calculated to violate the constitutional prohibition, is created for a legal or illegal purpose. The purpose for which the debt is incurred or contemplated is immaterial, if it exceeds the five per cent limitation specified in the amendment. Having jurisdiction, we now approach the consideration of the first ground, upon which the plaintiffs assert they are entitled to an injunction, that the parliamentary irregularities, involved in the final passage of the order, are fatal to its legality. When considered in connection with the provisions of section 7 of the rules and orders of the city council this contention must prevail. The mere omission of the common council to reconsider and take the order from the table in accordance with the usual parliamentary rule, of itself, was not the fatal point in the proceedings.

The record shows that the common council non-concurred with the board of alderman, in passing the order authorizing the contract for the purchase of the bridge spans, and referred it to the next city council. The order was then returned to the board of aldermen who insisted upon their former action and asked for a committee of conference. The common council, without any action by way of reconsidering or revoking the reference to the next city council, then concurred in the action of the aldermen and appointed conferees. A week later the report of the conferees that they were unable to agree, was accepted in concurrence, and the appointment of new conferees refused by the common council. Here the whole matter rested several months until Oct. 14, when the order was taken from the table by a yea and nay vote, ten voting yea and seven nay.

The formal defect in the parliamentary procedure would not necessarily be insurmountable, if the action of the city council had complied with the requirements of section 7 of the rules and orders above referred to.

Section 7 is as follows: "In the present and every future financial year, after the resolve making the annual appropriations shall have passed, no subsequent expenditure shall be authorized for any object, unless provision for the same shall be made by a specific transfer

from some of the appropriations contained in such annual resolve, or by expressly creating a city debt, in the latter of which case, the order shall not be passed unless two-thirds of the whole number of each branch of the city council vote in the affirmative, by a vote taken by yeas and nays."

No language can be plainer than the above. Laying aside all parliamentary informalities and assuming that the city council undertook to do, in a purely parliamentary way, just what this section permitted them to do, then it becomes a mere matter of mathematical calculation to determine whether the order, authorizing the contract, and an implied city debt to carry it into effect, was passed in accordance with the rule.

The whole number composing the common council of the city of Bangor under their charter was twenty-one. The number voting in the affirmative upon the passage of the order in question was ten; but it is readily apparent that ten is not two-thirds of twenty-one. Therefore, if the order had been otherwise legally voted upon, it was void for want of the requisite number of votes. There is no pretense, however, whatever the parliamentary procedure or number of votes, that the city council made any attempt to raise the money to meet the requirements of the proposed contract, either by a specific transfer or by expressly creating a debt, in accordance with the provision of rule 7.

But after the passage of the annual appropriation bill, the preceding March, no other way was open by which the money could be provided; yet, the passage of the order, authorizing a contract on the part of the city wherein it incurred a liability for the payment of $38,537, by implication created a debt, which the city government had no right to incur except in one of the ways above described. The payment of money upon such a debt would therefore be "for a purpose not authorized by law," and bring this phase of the case within the purview of R. S., chap. 79, sec. 6, item XI.

That is, suppose the order had provided for the purchase of the spans, and expressly authorized payment therefor, from the city treasury, it would then have been a manifest violation of said section 7, and, being entire, would have been void. Instead of an order for

express payment, the city government passed an order for implied payment, from the city treasury, as if the order had expressly provided for it. But this order passed in violation of said rule was void, and placed the city government in the position of voting to pledge the credit of the city "for a purpose not authorized by law."

While the decision of this case might rest upon the above conclusion, and further consideration thereof be omitted, yet, it is obvious that the real issue in the case is based upon the second ground upon which the plaintiffs claim an injunction, namely, that the city has no constitutional right to enter into the contract contemplated by the order.

We therefore think it just to all parties concerned that this branch of the case, which involves the substance of the contention, and not its form, should be determined.

Article 22, of the amendments to the constitution provides: "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 temporary loans to be paid out of money raised by taxation, during the year in which they are made."

Under this provision, is raised the single question whether the liability contemplated by the above order passed by the city council of Bangor did, with the "previous debts or liabilities" of the city, exceed the five percentum limitation prescribed by the constitutional amendment. We think it did.

The valuation upon which the five percentum is to be computed is the last regular valuation of the city as made by its assessors. *Reynolds* v. *Waterville*, 92 Maine, 292. It is not in controversy that such valuation, for the purposes of this case, was $16,381,651.00. It is also conceded that the total indebtedness of the city at the time of the hearing was $771,231.20, and that there was outstanding in addition to this amount $75,000 in the form of a note, the balance of a temporary loan authorized by a vote of the city council in March 1903.

This branch of the case turns entirely upon the character of the $75,000 note. If it was a temporary loan at the time of the hearing, October 1904, there is no question but that the city debt, with the additional amount contemplated in the order for the purchase of the bridge spans, $38,537.00, would fall about $10,000 below the constitutional debt limit on the above valuation. On the other hand, if the $75,000 note had become a city liability to be added to the other city indebtedness, it clearly exceeded the limit.

In discussing this phase of the case we will assume that the loan, of which $75,000 is a part, was, in its inception, a temporary loan, within the meaning of the constitutional amendment. Then arises the question, how long can a temporary loan remain unpaid and still retain its temporary character? We think the language and punctuation employed to give expression to the constitutional amendment settles this question. After stating the prohibition, the amendment proceeds; "provided, however, that the adoption of this article shall not be construed as applying to temporary loans to be paid out of money raised by taxation, during the year in which they are made." While punctuation cannot be regarded of paramount importance in the construction of a statute or other written instrument, and should never be allowed to overturn what seems to be the plain meaning of the instrument, yet when it is so used as to enable the language to bear an interpretation which will make the whole instrument rational and self consistent, it is entitled to consideration as much as the language itself. The punctuation employed in the proviso of the above amendment is of the latter character, and impresses upon the proviso precisely the meaning, which, we believe, the legislature intended, considering the nature of the evil to be prevented.

It is apparent from the language, the punctuation and the purpose of the amendment, that the legislature intended that the proviso should exempt all loans, and parts thereof, that should be actually paid within the year in which they were made from taxes assessed and collected during the same year.

The conclusion is irresistible that the legislature, in submitting the resolve for the amendment to the people, if they had intended the construction claimed by the defendants, would have made their purpose

clear by the use of appropriate language; but failing in this, it certainly could not be reasonably assumed that they also inserted the comma after the word "taxation" in the proviso where it would manifestly oppose such purpose, rather than after the word "money", where by fair construction it might be said to favor it.

Non constat, if the legislature had punctuated as in the latter case, that a different construction than that now placed upon the proviso would follow.

The defendants contend, however, that the proviso should be construed to mean that the temporary loan may be paid at any future time provided it is paid out of taxation raised during the year in which the loan was made. But such a construction would operate to effect a complete evasion of the amendment and become subversive of its very purpose.

For instance, in the case at bar, the city carried over from the municipal year 1903 to the municipal year of 1904 a loan of $75,000, which was, or is, to be paid, as the defendants contend, at some future time, from the uncollected taxes of 1903. But the city treasurer said at the hearing Oct. 4, 1904, "there is as a matter of fact $30,000 or $40,000 of these 1903 taxes that are not collected yet." Assume that every dollar of this sum will be collected and applied to the payment of the $75,000 loan and yet $35,000 will remain unpaid and become a liability of the city which must be met, not from the taxes of 1903 for they are all embraced and applied in the $40,000, but from future taxation. If this was done in 1903, it could be repeated in 1904 and 1905, and so on, until the unpaid balance of the temporary loans might reach an enormous sum. Another claim is made from the testimony of the city treasurer, which is not fully in accord with the above statement in regard to the amount of taxes due, the inconsistency of which is undoubtedly due to lack of explanation, that the treasurer had collected $38,000 against this loan and expected to collect $25,000 more by the end of the year. Admit these amounts to be true, and yet we have no evidence that the amount said to have been collected has ever been applied to the loan. In fact, there is no pretense that it has. The case simply shows that it has become an asset of the city, and that, so

far as we know, may be the end of its relation to the payment of the $75,000 liability.

It would be unsafe to assume with respect to the payment of a temporary loan that any sum of money that had been collected from taxes and turned into the city treasury should be regarded as a credit upon such loan, until it was either actually paid, or specially set apart by a vote of the city council, for the special purpose of application to such payment.

In other words, when money collected from taxes is paid into the city treasury, without appropriation for any particular purpose, such money becomes an asset of the city and may be used for any legitimate expenditure.

A temporary loan, then, in contemplation of the constitutional amendment is one made for a temporary purpose to be paid during the municipal year in which it is made from taxes assessed and collected within the same year. And if such a loan although temporary in its inception, or any part thereof, is carried over, in any form, into the next municipal year, it then loses its temporary character and becomes a debt or liability of the city within the prohibition of the above amendment.

The $75,000 note, in October, 1904, had lost its character as a temporary loan, and had become a debt or liability of the city, in determining the total indebtedness, to which was to be applied the constitutional test of the right of the city to create further indebtedness. And the application of this test, as before seen, prohibits the city from making the proposed contract for the purchase of bridge spans and expending the amount of money therein, by necessary implication, appropriated.

The defendants comprising the committee of purchase further say as a defense, that they do not intend pledging the credit of the city for any amount to be paid from the Treasury until the work contracted for is completed, and until an appropriation has been made and tax assessed covering the amount of the contract. But there are two reasons why this proposition cannot prevail. First, the question is not what the committee intend to do, however good their intentions, but what they are empowered to do under the order giving them

authority to act. The law must be applied upon the assumption that they may do, what they are authorized to do; and they undoubtedly have the power to create a city liability; and second, we have already determined that a contract for the purchase of the bridge spans under the enabling order, by necessary implication does create a city liability sufficient to liquidate the payment of the purchase price specified in the contract.

The other defendants, the Mayor and the City Treasurer, file a separate answer and assert that whatever view the court may take of the questions in issue, no injunction should issue against them, because, as they say, they are not authorized in the order to make any contract, and have no intention of doing so. But the order of the city council in full, a record of which we have been considering, reads as follows:

"That the Street Engineers, one Alderman and President of the Common Council be and they are hereby authorized to contract with the lowest bidder for the two spans as advertised for the Bangor and Brewer bridge, so called, as soon as a contract shall be signed with the Public Works Company for the crossing of their street cars over said bridge at an annual rental of $1500 per year. The Mayor and City Treasurer for and in behalf of the City of Bangor are hereby authorized to execute a contract with the Public Works Company for said annual rental."

By this, it will be observed that a contract with the Public Works Company for the passage of their street cars over said bridge, to be executed on behalf of the city by the Mayor and City Treasurer, was a condition precedent to the execution of the contract for the purchase of the bridge spans. If the Mayor and the City Treasurer should proceed under the authority given them, and, for a valid consideration make a contract with the Public Works Company for the passage of their cars over the proposed bridge, it might raise complications of irreparable detriment to the city. Both the authority to purchase the spans and to make the contract with the Public Works Company are embraced in the same order and become a part of the same transaction. It seems proper therefore, inasmuch as the proposed contract for the purchase of the bridge spans is held to be ultra vires, and the committee enjoined from making it, that the Mayor and

City Treasurer should also be restrained from consummating any contract or paying out any money by virtue of the order in question.

Bill sustained against all the respondents named therein without costs, and against whom perpetual injunction is to issue.

Decree in accordance with this opinion.

GEORGE H. MARDEN

vs.

PORTSMOUTH, KITTERY AND YORK STREET RAILWAY.

York. Opinion March 2, 1905.

Street Railways. Negligence. Duty of Traveler at Crossings. Evidence.

In an action on the case for negligence on account of a collision between a team and an electric car, it is *held:*

1. That between street crossings, the car, from the fact that it must pursue one course, and cannot turn out, necessarily has a paramount right to be exercised in a reasonable and prudent manner.
2. That when approaching a public street junction, the rule is that the motorman shall be held to anticipate that any person approaching such junction from either side may turn his team into it, and shall then exercise all due care to have his car under such control as to be able to stop it at the crossing, if necessary, to avoid an accident.
3. At such crossings the car has no right superior to that of other vehicles. The car and vehicle are on an equality.
4. The rule of caution required in approaching the crossing of a steam road does not fully apply to the crossing of an electric road.
5. In approaching such crossings, it is not incumbent upon the traveler upon foot or with a team, as a matter of law, to look and listen. He must however, be in the exercise of reasonable care.
6. Whether a traveler, as above, is in the exercise of reasonable care, is a question of fact for the jury, depending upon the circumstances of each particular case.
7. The speed of a car is a fact from which an inference of negligence may be drawn.

8. In crossing a car track at the junction of a street, the traveler is not required to look the whole length of the visible track to see if a car is coming, but along the track far enough to warrant an ordinarily prudent man having in mind his own safety, under like circumstances, to conclude that no car was in such proximity as to endanger his safety in crossing.

On motion by defendant. Overruled.

The facts sufficiently appear in the opinion.

H. H. Burbank and John G. Smith, for plaintiff.

J. C. Stewart, Emery & Sims and Orville Dewey Baker, for defendant.

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

SPEAR, J. This is an action on the case for negligence resulting from a collision between the plaintiff's cart and the defendant's electric car. The case shows that the plaintiff on the 15th day of June 1901, was driving a covered butcher's cart along a public street in the town of Kittery in an easterly direction, parallel with the defendant's road about three feet northerly thereof, the track being on the southerly side of the road. The highway and the track descend quite sharply towards the east, the grade being about six feet in one hundred. At the bottom of the grade, a cross street called Williams Avenue runs substantially at right angles and southerly from the highway on which the plaintiff was driving. When the plaintiff reached the mouth of Williams Avenue he attempted to turn his team into it, thereby squarely crossing the defendant's rails. While crossing the track the front part of the off hind wheel of the plaintiff's cart was struck by the defendant's car and the injuries were produced of which the plaintiff complains. After a long trial involving more than 250 pages of testimony, the jury returned a verdict for the plaintiff of $1103.73. The case comes up on motion to set this verdict aside as against the law and the evidence. The real issues to be considered are whether the defendant was guilty of negligence with respect to the speed with which they were running their car at the time the accident occurred, and whether the plaintiff was guilty of contributory negligence. The evidence upon the one side and the

other upon the point of speed is conflicting, the plaintiff and some of his witnesses contending that the car was running from 15 to 20 miles an hour down the grade towards the crossing, while those of the defendant assert the car was moving at a rate of only 4 or 5 miles an hour. There was also testimony on the part of the plaintiff bearing upon the question of speed tending to show that the cart and horse were thrown bodily in the air when the car struck them, the cart some 40 feet and the horse half that distance, and that the car itself ran from 150 to 200 feet beyond the center of the crossing before it could be stopped, although the motorman claims that he did all in his power to check the car in the quickest possible manner after he discovered that the plaintiff was about to cross the track in front of it. In finding the defendant guilty the jury must have come to the conclusion that they were running their car at the time of the collision at an unsafe and unreasonable rate of speed.

But the defendant says, admitting its negligence as found by the jury, it is not guilty because the plaintiff's own testimony, allowing it to be true, clearly discloses the fact that, by his own negligent acts, he contributed to the accident which caused his injuries. Whether the plaintiff in his connection with the accident was guilty of contributory negligence, assuming the guilt of the defendant, may depend in a large degree upon the duty which the defendant, under the particular circumstances in this case owed to the plaintiff. This consideration involves a question with respect to the relative rights and duties of electric cars and vehicles, while concurrently approaching and passing over public street crossings. The law upon this subject seems to be well settled in many states. While the contention has been made that a person approaching an electric road with the intention of crossing the track, should observe that same degree of watchfulness and care as when attempting to cross a steam road, it is readily obvious that the cases are entirely dissimilar. The steam road is invariably possessed of a private roadbed, protected by law, and vested with the right to punish, as a trespasser, any person who may invade its property outside of that part of its premises made public for the prosecution of its business. They are also permitted by law to propel their trains at a tremendous rate of speed, so that it is impracticable,

if not impossible, to stop them quickly or within a short distance. The law recognizes these facts and, not only for the protection of the individual who may undertake to cross a steam railroad track, but for the safety of the many who may be riding in the public coaches, requires the individual, when he approaches the passageway of such an engine of destruction, within a proper distance of the track to look and listen, not only with his eyes and ears, but with his mind, to discover whether a train is approaching. The law makes it imperative for travelers to do this and a failure to comply with this law presumes them to be guilty of contributory negligence, if they are injured by a collision with a passing train. This is undoubtedly a wise and judicious law in its application to steam roads, but it should not be fully applied to the use of electric and other street railroads.

An electric road is installed and operated upon a principle entirely different from that of the steam road. Our court has said in *Briggs* v. *Horse R. R. Co.*, 79 Maine, 367, that "the laying down of rails in the street and running the street cars over them for the accommodation of persons desiring to travel that street is only a later mode of using the land as a way, using it for the valuable purpose for which it was originally taken. It may be a change in the mode, but it is not a change in the use. The land is still used for a highway." This rule of law applies equally, whether the motor for propelling the car is a horse, steam or electricity. It is apparent therefore, that the electric cars which are now becoming of very common use, not only in our cities but in our villages and country towns, are operated for the most part within the limits of the legally located highways, as said in *Benjamin* v. *Holyoke St. Ry. Co.*, 160 Mass. 1, where "the use of the street for electric cars and by the general public is concurrent; and the defendant is bound in using the street to have reference to its reasonable use by others." Unlike steam cars, the electric cars run, or may be run at times, through streets crowded with people and vehicles, and therefore, instead of being vested with the right to run at a rapid rate of speed, they are required to make a reasonable use of the streets, consistent with the rights of other persons and vehicles who may occupy the streets in conjunction with

them. Upon this point the court in *Driscoll* v. *West End St. Ry.*, 159 Mass. 146, holds that "the drivers and conductors of street railway cars, whatever the motive power, have in general the same rights and duties with reference to other vehicles, crossing their course that the drivers of omnibusses have, for example, or that the driver of any other vehicle has. *O'Neil* v. *Dry Dock, East Broadway & Battery Ry.*, 129 N. Y. 125. In *Commonwealth* v. *Temple*, 14 Gray, 69, 75, it is said; "Where the entire public, each according to his own exigencies, has a right to the use of the highway, in the absence of any special regulation by law, the right of each is equal. Each may use it to his own best advantage, but with a just regard to the like right of others." See also *Newark Passenger Ry. Co.* v. *Black*, 55 N. J. L. 605. But a reasonable use must be measured by the relative facility with which cars and other kinds of vehicles are able to move about with respect to one another in the streets. It must be recognized that cars are confined to a track and are unable to turn to the right or to the left, that they are permitted to occupy the streets for the purpose of facilitating travel, and that teams and travelers as far as practicable must keep out of their way, and not impede their progress more than is absolutely necessary. It is perfectly obvious that a team can move with ease, while a car cannot, but is confined to one course; hence a reasonable use of the streets, having reference to the relative facility with which the locomotion of teams and cars can be controlled, necessarily gives the car between street crossings certain privileges over other vehicles. These superior privileges are well stated in *O'Neil* v. *Railroad*, 129 N. Y. 129, as follows:

"As the cars must run upon the tracks and cannot turn out for vehicles drawn by horses, they must have the preference and such vehicles must, as they can, in a reasonable manner, keep off from the railroad tracks so as not to prevent the free and unobstructed passage of the cars. In no other way can street railroads be operated. As to such vehicles the railways have a paramount right to be exercised in a reasonable and prudent manner."

But in the end, what is a reasonable use is a question of fact depending upon the circumstances of each particular case, having

reference to the manner in which street railroads are obliged to be operated and the purpose for which they are designed. 57 Am. St. Rep. 729; *Driscoll* v. *West End St. Ry.*, 159 Mass. 142.

Yet the defendant seems to assume in its brief, that the same rule with respect to approaching a public street crossing traversed by electric cars, applies to electric as to steam roads, and assert that, on this point, this case falls clearly within the decision of *Blumenthal* v. *Railroad* and *Day* v. *Railroad*, both reported in 97 Maine. But the same rule does not apply. While it may be found as a matter of fact, in any case involving an accident by crossing in front of an electric car, that it was the duty of the person undertaking to so cross, to look and listen, it cannot be laid down as a rule of law that a failure to do this does, per se, constitute negligence. That is, whether the failure of the party injured to look and listen, before undertaking to pass in front of an electric car, constitutes negligence, is a question of fact while the failure to do so in attempting to pass in front of a steam car, is a matter of law. Our court has directly passed upon this distinction with respect to the duty imposed upon one approaching the crossing of steam and electric railroad tracks, in *Fairbanks* v. *Railway Co.*, 95 Maine, 78, and *Warren* v. *Railway Co.*, 95 Maine, 115; but the question is now so distinctly raised anew and becomes so material in determining the rights of the parties in this case, that a more extended consideration may also be proper. The defendant claims as a matter of law that the plaintiff should have looked and listened immediately before going upon the crossing, but both of the cases last cited in the 95th Maine hold to the contrary, and the weight of authority and the soundness of reasoning are, also, clearly the other way. This question was sharply raised in a recent Massachusetts case, *Robbins* v. *Springfield St. Ry.*, 165 Mass. 30. The defendant requested the judge to give the following instruction: "If the plaintiff failed to look and listen, when by looking and listening, he could have perceived the approach of the car, and the plaintiff drove in front of the car, and such failure to look and listen contributed directly to his injuries, then he cannot recover, and the verdict should be for the defendant." The judge refused to give the instruction. Chief Justice Field, in passing upon

the ruling of the court said: "The question of the due care of the plaintiff and of the negligence of the defendant's servants, we think, were for the jury on the evidence which appears in the exceptions." He then holds, alluding directly to the above request, that, "the third request could not properly have been given as an absolute rule of law. The decisions of this court show that a distinction has been taken with respect to the duty to look and listen, when crossing the tracks of a steam railroad where a railroad train has the exclusive right of way, and when crossing the tracks of a street railway company in the public street where the cars have not an exclusive right of way, but are run in the street in common with other vehicles and travelers. The fact that the power used by the street railway company is electricity instead of that of horses, has not been deemed by the court sufficient to make the rule of law which has been laid down concerning the crossing of the track of a steam railroad exactly applicable to a street railway." In *Hall* v. *West End St. Ry.*, 168 Mass. 461, the court say: "There is no absolute rule of law that, to be in the exercise of due care, one about to cross a public street must look and listen for approaching vehicles," and cite *Robbins* v. *Springfield St. Ry.*, supra. In this case the verdict was directed for the defendant because, under the peculiar circumstances, the inference of fact was conclusive that the plaintiff's failure to look and listen constituted negligence and contributed to the accident. Again it is held in *Benjamin* v. *Holyoke St. Ry. Co.*, 160 Mass. 4, that "the court rightly refused to instruct the jury that a mere failure to look would prevent her from recovering. This has been so held even in cases of collision, 55 Am. St. Rep. 629. *Shapleigh* v. *Wyman*, 134 Mass. 118, *French* v. *Taunton Branch Railroad*, 116 Mass. 537. This question was left to the jury with proper instructions."

In *Hall* v. *Ogden City St. Ry. Co.*, 13 Utah, 243, 57 Am. St. Rep. 733, it is held: "Persons traveling on the public street along or across the street railway track are not held to the exercise of the same degree of care and precaution as they are when traveling along or upon or across an ordinary steam road."

In *Consolidated Traction Co.* v. *Scott*, 58 N. J. L. 682, 55 Am. St. Rep. 629, we find the rule stated in this way: "It may be said

with reference to this request to charge, that the proposition that one, to be in the exercise of due care, must look and listen before crossing a steam railway, is well established, but this duty does not apply with equal force to one crossing the track of a street railway."

Wendall et al. v. *N. Y. C. & H. R. Co.*, 91 N. Y. 429, holds: "The rules of conduct which should govern the approach of travelers to crossing over street railways or in the track of vehicles whose rate of progress is under the control of their drivers, are necessarily quite different from those applicable to the crossing of the track of steam railroads, whose trains traverse vast distances carrying great burdens and moving with a momentum necessarily destructive to bodies with which they come in contact." This case was against a steam railway company and the above quotation is employed to show the distinction between the rights and duties of steam and electric roads.

It is said in *Evansville St. Ry. Co.* v. *Gentry*, 147 Ind. 408, 62 Am. St. Rep. 423: "The rules that govern as to the crossing of steam railroads by travelers upon the highway are not fully applicable to street railway crossings in cities. . . . The rule therefore, to stop and look and listen cannot apply as it does to a crossing on a steam railroad track."

In *White* v. *Worcester St. Ry.*, 167 Mass. 43, Mr. Justice Holmes, as late as 1896, stated the proposition in this way: "But we suppose that the request was intended to embody a statement of the rights of electric cars irrespective of practice and to put street railways on very nearly the footing of steam railroads. Whatever may be the law as to the latter, there is a great difference between the two cases. Electric cars are far more manageable and more quickly stopped than trains upon steam railroads."

The duty imposed upon street cars when approaching public street crossings also clearly shows that the same rule with respect to such crossings cannot be invoked for both electric and steam cars. The very fact that the law, as far as we have been able to discover almost universally holds that upon the approach of public street crossings, the rights of street cars and vehicles are equal, that neither has a paramount right over the other, necessarily modifies the rule applicable to the approach of steam car crossings.

If it was not incumbent upon the plaintiff, as a matter of law, to look and listen, what was the duty of the defendant to the plaintiff in the management of their car in approaching a public crossing in conjunction with the plaintiff? We can readily see, if the law gave the defendant an absolute right of way to the seclusion of all else like a steam car, and also required the plaintiff to look and listen, and if he saw a car coming, however far away, and was injured, make him guilty of negligence, and, if he did not see the car, make him guilty for not seeing it, that the defendant could run its cars at almost any rate of speed, however negligent, without being chargeable with liability, on account of necessary contributory negligence on the part of the plaintiff.

But under the above principles of law, applicable to the reasonable use of the highway by electric cars, and to the duty of travelers in their relations with them, we think the safe rule to lay down with respect to the management of electric or other motor cars at street crossings is this, that the motorman, when approaching a public street junction shall be held to anticipate that any person, approaching such junction from either side, may turn his team into it, and shall then exercise all due care and have his car under such control as to be able to stop it at the crossing if necessary to avoid an accident. This rule places upon the railroad using the highway, only that degree of care that is commensurate with public safety and with a reasonable use of the road. It is also well settled law. And it is proper to here observe that the decisions impose a special duty upon cars operated in the streets when approaching street crossings,—a duty which, instead of clothing them with the paramount rights conceded between crossings, places them upon an equal footing with other vehicles rightfully occupying the streets. In the great state of New York with its numerous cities and large towns, in which without doubt the necessity for rapid transit is as imperative as in any state in the Union, we find the distinction fully and clearly stated in the O'Neil case above cited. After the quotation above alluded to, finding, as to vehicles moving in the streets, that the railways have a paramount right to be exercised in a reasonable and prudent manner, the court then proceeds to define their rights upon approaching crossings in

this language: "But a railway crossing a street stands upon a different footing. The car has the right to cross and must cross the street and the vehicle has the right to cross and must cross the railroad track. Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other and the right of each must be exercised in a reasonable and careful manner so as not to unreasonably abridge or interfere with the right of the other."

Driscoll v. *West End St. Ry.*, 159 Mass. 142, involving an accident at a street crossing, also recognizes the difference between the privileges of street cars while moving along the streets and when approaching street crossings, and expressly differentiates *Commonwealth* v. *Temple*, 14 Gray, 69, relative to the rights of cars running between crossings. The court say: "Street railway companies under the decisions of *Commonwealth* v. *Temple*, 14 Gray, 69, in running their cars have certain rights in the streets different from those which belong to the drivers of ordinary vehicles, but none of these rights is directly involved in the case at bar," and then lay down the principle, "The drivers and conductors of street railway cars, whatever the motive power, have in general, the same rights and duties with reference to vehicles crossing their course, that the drivers of omnibusses have, for example, or the driver of any other vehicle has," and cite and adopt the O'Neill case in the 129th N. Y., supra, which specifically distinguishes the rights of cars at street crossings.

In *Richmond Ry. Co.* v. *Garthright*, 92 Va. 627, 53 Am. St. Rep. 844, it is held: "The people of a city and vehicles have the same right to pass along an intersecting street as the car has to go across it. The car has the right to cross and must cross the street; and vehicles and foot passengers have a right to cross and must cross the railroad track. Neither has a superior right to the other. *O'Neill* v. *Dry Dock, etc., R. R. Co.*, 129 N. Y. 125, 26 Am. St. Rep. 512; *Buhrens* v. *Dry Dock, etc., R. R. Co.*, 53 Hun. 571; affirmed, 125 N. Y. 702; *Chicago City Ry. Co.* v. *Young*, 62 Ill. 238; Booth on street railway law, sec. 304, and cases there cited. And it is gross negligence in a street railway company to overcrowd and load down

its cars with passengers beyond any reasonable and proper limit, and consequently not be able to control and stop them readily as they approach an intersecting street in case it may be necessary to do so to avert a collision or prevent an accident."

Evers v. *Pa. Traction Co.*, 176 Pa. State, 376, 53 Am. St. Rep. 674, holds: "The fact that more caution should be exercised in running over crossings than on the street between them warrants no inference that the car can be run without caution except on approaching crossings. In the one case, rapid running is of itself evidence of negligence; in the other it is not. This case distinctly holds that it is negligence per se to run an electric car rapidly over a crossing.

Buhrens v. *Dry Dock Ry. Co.*, 53 Hun. 571 note; 25 Am. St. Rep. 477 note. "But at street crossings the right of the street railway to the street and its right to the use thereof, in respect to other vehicles, are precisely the same as those of such other vehicles."

Anderson v. *Minneapolis Ry. Co.*, 42 Minn. 490, 18 Am. St. Rep. 525, also holds: "The driver of a street car must be in a place and condition to exercise a reasonable degree of care and diligence in watching the street ahead of him so as to prevent collision and avoid injuries to pedestrians lawfully traveling thereon."

In *Evansville St. Ry. Co.* v. *Gentry*, 147 Indiana, 408, 62 Am. St. Rep. 423, it is held: "The street car therefore, ought to be under full control as it passes over the crossing and as said in *Cincinnati St. Ry. Co.* v. *Whitcomb*, 66 Fed. Rep. 915, it is not the law that persons crossing street railway tracks in the city are obliged to stop as well as look and listen before going over such tracks, unless there is some circumstance which would make it ordinarily prudent to do so." See also other authorities cited showing that the rules which must be observed in crossing the tracks of the steam railroads do not strictly apply to the crossing of electric or cable lines in cities.

In Joyce on Electric Law, section 589, we find the following: "An electric car has no paramount right of way over pedestrians or other vehicles at street crossings and the rights of each are equal." See also numerous cases cited in the note.

If it was the duty of the motorman, and we find that it was, to run his car in approaching a public crossing, at a rate of speed that

would enable him to have it under the degree of control prescribed by the above rules of law, then arises the first question of fact put in issue in this case. Did the motorman in approaching the crossing at which the plaintiff was injured, have his car under proper control or, e converso, was he running it at an unreasonable and negligent rate of speed? The undisputed evidence shows that the approach to this crossing was down a sharp grade, upon which the speed of the car would, from gravity alone, naturally be rapid. As before stated the testimony of the plaintiff's witnesses tend to show that the car was moving at a rate of 15 to 20 miles an hour, and this testimony seems to be corroborated by other evidence relative to the distance which the horse and cart were carried by the impact of the car, and the distance which the car traversed before it finally stopped. All this evidence is controverted by the defendant's witnesses, but a careful reading of the testimony, while it might leave the question of speed somewhat in doubt, nevertheless, warranted the jury in concluding that, under all the circumstances, the defendant's car in approaching the crossing was propelled at an unreasonable and dangerous rate of speed. "In determining whether the cause should go to the jury, we must give plaintfff the benefit of the most favorable view of his facts and of every reasonable inference therefrom. *Buck* v. *The People's St. Ry., etc., Co.*, 108 Mo. 186."

Upon this point, then, assuming that the finding of the jury was correct, arises the legal proposition, does an unreasonable rate of speed by a street car constitute negligence? Our courts have repeatedly held that the speed of a car is a fact from which negligence may be inferred, and that whether such speed in any particular case constituted negligence, was peculiarly a question for the determination of the jury.

In *Paul* v. *Ogden St. Ry. Co.*, 13 Utah, 243, 57 Am. St. Rep. 726, we find this principle: "Some courts hold that where speed is greater than that permitted by the ordinances, it is negligence per se, but the better rule and the one sustained by the weight of authority, appears to be that it is a circumstance from which negligence may be inferred and is always proper to be considered by the jury in determining the question whether or not the railway company was guilty of negligence."

In *Birmingham Co.* v. *City Stable Co.*, 119 Ala. 615, 72 Am. St. Rep. 957, the court say, "But if he had a right to drive on the track for the purpose of crossing it at this particular place, then it became their duty, not only to keep a lookout to observe him but also to run the car at such a rate of speed on approaching the place and to retain such control over it as to be able to bring it to a full stop before striking the horse." In *Newark Passenger Railway Co.* v. *Block*, 55 N. J. L. 614, in the court below, the defendants requested the judge to rule in effect that they had a right to run their cars through the streets at a high rate of speed, to accomplish the object of "rapid transit," and that it was the duty of other occupants of the street, at their peril, to keep out of the way of a moving car, and the court held: "It is a proposition applicable to a crossing the highway by the lines of a steam railroad. It is inapplicable to the crossing of the street railway, the cars on which must not exceed such speed as will permit the lawful customary use of the highway by others with reasonable safety."

But it is unnecessary to cite further decisions upon this point. Not only all the authorities, but good common sense invoke such to be the law. We therefore must let the verdict of the jury stand with respect to the rate of speed at which the defendants were running their car in approaching the crossing at the time of the collision, causing the accident to which the plaintiff attributes his injuries.

The only remaining question to be determined is whether the plaintiff, under the circumstances in this case, in attempting to pass over the crossing as he did, was guilty of contributory negligence. We have already seen that he was not required, as a matter of law, to look and listen. The question therefore now arises whether, as a matter of fact, under all the testimony, the exercise of ordinary care and prudence required him to do so, otherwise than the undisputed testimony shows he did, at a distance of 20 feet from the track? Upon this point, the defendant's contention is that, "if the plaintiff looked at all when 20 feet away from the crossing, he looked carelessly and failed to see what was in plain sight. There can be no legal difference between negligence in the manner of looking and negligence in not looking at all." This may be a correct proposition

of abstract law, but it does not fully apply to the facts in this case. Whether the plaintiff was negligent, if he looked and did not see, was a question of fact, depending upon the measure of the duty devolving upon him to see. If this had been a steam road it would undoubtedly have been the duty of the plaintiff to have observed the track to the fullest extent of the view to see if a train was coming, because ordinary care in such a case requires it, the degree of care on his part being commensurate with degree of danger incident to the irresistible degree of speed and momentum acquired by steam cars when in motion. In like manner the degree of care to be observed by the plaintiff in crossing the defendant's track at the street junction is to be measured by the correlative duty of the electric car in approaching the same junction. But we have already determined that a car in approaching a crossing has only the same rights as other vehicles and must be under control. Hence, as a corollary of this proposition, the plaintiff had a right to rely upon the assumption that the defendant would discharge its legal duty in approaching the crossing by having their car under control, and such assumption is embraced within the rule of ordinary care in its application to the plaintiff's duty. Under this rule, the plaintiff was not necessarily required to look the whole length of the visible track to see if a car was coming, but along the track far enough to warrant an ordinarily careful and prudent man, having in mind his own safety, under like circumstances, to conclude that no car was in such proximity, if properly managed, as to endanger his safety in crossing. *Hill* v. *West End St. Ry.*, 158 Mass. 458.

The decisions amply sustain this position. *Newark Passenger Railway Co.* v. *Black*, 55 N. J. L. 605, is a case in which the relative rights and duties of a street railroad in operating its cars in the streets and of other occupants of the street, are fully discussed and carefully considered. The decision arose upon the following request: "If the jury believe the account of the plaintiff and her witnesses as to the fact that one car stopped at Prince street and passed the other below that street, it was the duty of plaintiff to wait long enough before crossing to allow the down car to pass far enough for her to see whether another car was coming and if she neglected that duty

she was guilty of contributory negligence and cannot recover, although the jury may believe that the up car was going at an unusual rate of speed, the track being straight and the car visible far enough to avoid it at any possible speed." The judge declined to give this request otherwise than he had already done and exceptions were taken. The court then proceeds to say. "The contention of plaintiff in error rather takes this shape. It asserts that its cars, propelled by electricity, are capable of being run at greater speed than other vehicles in the highway, and that the public convenience demands for passengers carried in such cars what is called "rapid transit", and it draws the inference that its cars may therefore be run at such speed as will satisfy this public demand, and that other persons lawfully using the highway in the customary modes must govern themselves and use the highway accordingly. Judicial opinions have been cited to us which appear to support these extraordinary propositions. I am unable to subscribe to the notion which, carried to its logical conclusion, would permit this company and other companies running cars in public highways, propelled by electricity, cables, etc., to run at any rate of speed which they may deem a demand, undefined and unrecognized by law to require.

"But the request before us brings into question the extent to which one crossing the roadway on foot must extend his observation. Its claim is that such observation must be extended to any approaching car, no matter how distant. But this is obviously an exaggerated notion of the duty required. The most prudent man would never suppose himself required to thus observe. If such rule of duty were adopted and practiced in a crowded city, the crossing of many streets would be barred to pedestrians for a great part of the time. The general rule to which we have recurred does not justify this excessive view of the duty required. It will require one crossing the roadway on foot to extend his observation only to the distance within which vehicles proceeding at customary and reasonably safe speed would threaten his safety."

"Prudence doubtless requires one about to cross a railroad track to use his eyes to observe any approaching car within his vision. But, as has been shown, prudence does not require one crossing the

track of a street railway to extend his observation to the whole line of track within his vision, but only to such distance as, assuming the required care in their management, approaching cars would imperil his crossing."

While the last two paragraphs apply particularly to pedestrians we think that they are equally applicable to the duty devolving upon teams, in their use of the streets in connection with electric or other motor cars, or, as, expressed in the opinion, upon "persons lawfully using the highway in the customary modes." In fact the opinion quoted bases its discussion of the principle therein ennunciated upon the relative rights of cars using the streets and of "persons lawfully using the highway in the customary modes," which of course embraces both teams and pedestrians. Under these rules of law governing the duty of the plaintiff, was he, in crossing the defendant's tracks, under all the circumstances involved, as a matter of law, guilty of contributory negligence; or was the question, whether his conduct on that occasion constituted contributory negligence, one of fact for the jury? The plaintiff testifies as to what he did with respect to the exercise of care in looking for the car as follows:

Q. Did you allow your eye that day as you looked back, to travel back as far as you could see at your point of the view? A. That I could not say, I know I looked back to see if there was a car coming,—I know I looked back beyond Mrs. Morse's. The undisputed evidence shows that the Morse house referred to was 244 feet from the crossing. Another witness testifies positively, that at the time the plaintiff was making a turn to cross the track into Williams Avenue, the electric car was just coming by the end of the Morse house, as the evidence shows 244 feet away.

The motorman testified as follows:

Q. When did you observe Mr. Marden turning to cross. A. When I was most to the Avenue. Q. How far? Between 40 or 50 feet, somewhere along there. Q. How near was Mr. Marden's team to the rails when he made the turn or attempted to make the turn? A. Five feet. Q. Did Mr. Marden at any time from the top of the hill until he made the turn to Williams Avenue, drive his horse to the other side of the road? A. I did not see him do

that. Q. Did Mr. Marden or anybody else look out from the front end of the cart back towards the car? A. No sir. Q. Was the rear end of the cart closed or open? A. Closed. Q. Was the cart entirely covered or an open cart? A. Entirely covered. Q. When Mr. Marden turned his horse to cross the track, what did you do? A. I set up my brakes as hard as I could." And this, as far as the evidence shows, was the first act on the part of the motorman towards any effort to check the car so as to have it under control at the crossing?

Can the court say, under the law applicable to the duty respectively resting upon cars and teams in approaching a street junction, that it was negligence per se, for the plaintiff to undertake to cross the car track into another street when the track was clear for a distance of 244 feet? We think it cannot. We think it was a question for the jury to determine. If the jury believed, as they might, that the plaintiff, 20 feet therefrom, looked up the track a sufficient distance to discover whether a car was in such close proximity as to imperil his crossing the track, and, discovering none, undertook to cross, they well might find that the plaintiff was not guilty of contributory negligence, and that the failure of the motorman to apply the brakes until within 40 feet of the accident, was a clear case of negligence.

Driscoll v. *West End St. Ry.*, 159 Mass. 146, already cited is a case, which, in many of its elements is not unlike the case at bar. The court say: "In the present case, we think the question of due care on the part of the plaintiff and of the defendant's servants, were for the jury. One circumstance to be considered is that the plaintiff's horse was across the defendant's track at the time the wagon was hit. When two vehicles are approaching at reasonable rates of speed on converging lines, the question arises as to which should gfve way, one circumstance to be considered is, which, according to the rates of speed they are going, will first reach the point where the lines of travel cross each other. The plaintiff's testimony is that the car was nearly 400 feet from him when he proceeded to cross Hanover street diagonally to Elm street. It seems to have been daylight and although it does not appear when the driver of the car first saw

the plaintiff, no reason appears why he should not have seen him long before he applied the brakes. The evidence was that he put on the brakes five or ten seconds before the collision and when the front of the car was about twenty feet from the plaintiff. It was the duty of the driver of the car to keep a reasonable lookout for teams coming from cross streets and reasonable control of his car so as to avoid collision and we think that there was evidence for the jury that this was not done. Neither can we say that there was not evidence for the jury that the plaintiff was in the exercise of due care. Apparently, if the speed of the car had been seasonably checked, the collision would have been avoided, and the danger was not immediate when the plaintiff undertook to cross the track."

This case, we think, is fully applicable to the one at bar. In this case the motorman was running his car down a sharp grade in plain daylight, having the plaintiff in view all the time, approaching the crossing of a street at this time "considerably used for vehicles" as the evidence shows, charged with the duty of anticipating that the plaintiff might turn into the Avenue, as he did, and of having his car under control, and yet he did not set the brakes for the purpose of controlling his car until within 40 feet of the crossing. We feel inclined to affirm of this conduct what was said in the last case cited, "Apparently if the speed of the car had been seasonably checked the collision would have been avoided, and the danger was not immediate when the plaintiff undertook to cross the track."

Motion overruled. Judgment on the verdict.

JOB LEARD *vs.* THE INTERNATIONAL PAPER COMPANY.

Penobscot. Opinion March 4, 1905.

Master and Servant. Negligence. Assumption of Risk.

1. When there is known to an employee a safe method of doing the work assigned to him, and he nevertheless uses an unsafe method without direction to do so from his employer, he does so at his own risk, and the employer is not liable to him for any resulting injury.
2. An employee of mature age working at taking down tiers of pulp twelve feet high must be held to have known there was danger of single tiers falling if deprived of the support of adjacent tiers, and that such danger could be avoided by reducing the heights of all the tiers nearly simultaneously. If, nevertheless, he took one tier down separately and in consequence the next tier being thus left without support fell upon him to his injury he must bear the loss and cannot shift it upon his employer.
3. That such an employee was only one of several engaged in the same work, and that he used the unsafe method only in concurrence with them, or at their suggestion, does not relieve him from the risk thereby incurred.
4. To throw such risk upon his employer, the employee must at least show that he was specifically directed by his employer, or by his agent in charge of the work, to use the unsafe method. It is not enough that some or a majority of the workmen in the crew, or some other employee of the same employer having no charge of that work, give such directions.
5. In this case the plaintiff has not produced evidence from which his own due care can be inferred, and the uncontradicted evidence clearly shows that he assumed the risk of injury in doing the work as he did.

On motion by defendant. Sustained.

Action on the case for personal injuries sustained by the plaintiff while in the employ of the defendant. Plea the general issue. Verdict for plaintiff for $803.00. Defendant filed a general motion for a new trial.

The case is stated in the opinion.

P. H. Gillin, for plaintiff.

C. J. Dunn and F. J. Martin, for defendant.

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

EMERY, J. From the evidence for the plaintiff and the undisputed evidence for the defendant the following must be assumed to be the facts of the case: The defendant company was a manufacturer of pulp at its "Piscataquis Mill" so called. The manufactured pulp was put up in bundles about 30 inches long, 15 inches wide, and 6 inches thick. A large number of these bundles awaiting shipment on board cars at the mill had been piled up in a warehouse adjoining the railroad track. They were piled in tiers as cordwood is piled in tiers, the end of the bundles in the back tier being against the wall of the warehouse, the next tier piled in the same way against that and so on until a stack some 175 feet long and ten tiers wide had been formed. The height of the stack and tiers was some 12 feet. There was no tying of tier to tier, but each tier stood alone except that it was in close contact with the next tier. When shipments were made, bundles would be taken by workmen from this stack and placed on trucks to be wheeled out to be weighed and placed on the cars.

The plaintiff in the employ of the defendant was directed to act with a crew of other workmen in taking bundles from this stack for shipment. At first the crew, the plaintiff with them, removed bundles from the tops of several of the tiers in succession, so that the height of the rear tiers were reduced in proportion as bundles were taken from the front tiers. This method kept up the support given by the front tiers to the back tiers, and prevented the latter falling forward for want of that support. This method evidently protected the workmen from the danger of unsupported tiers falling over upon them. No tiers fell or were likely to fall while this method was pursued.

Later, however, the crew, the plaintiff with them, changed their method and took bundles exclusively from the front tier until only two feet of height of that tier was left, while the next tier was still nearly twelve feet high. Being thus deprived of the support of the tier in front this next tier fell forward under the influence of

vibrations caused by the locomotive and cars near by, and then the next tier to that also fell forward from the same causes. By this fall of these tiers the plaintiff was injured.

The plaintiff insists that the pulp was negligently piled in that the tiers were not tied together, but before coming to that question we have to consider whether the plaintiff must be held to have assumed the risk, or whether the evidence shows due care on his own part.

The plaintiff was sixty-seven years old, had worked in the woods, had worked at cutting and (presumably) piling cord wood, shovelling coal, etc. We think he must be held to have known that there was some danger of high narrow tiers of wood or pulp, as high and narrow as these, falling over if unsupported. He had worked on this stack of tiers of pulp five days before a tier fell. If ordinarily attentive as he must show he was, he must have noticed that the tiers were not tied, but depended on adjoining tiers for support. Knowing this, as we must hold he did, he was bound to exercise care not to incur the danger of the tiers falling for want of support, and if he did incur such danger, the risk of injury from it was his. In changing from a safe method to an evidently unsafe one, the plaintiff acted at his own risk.

The plaintiff, however, urges that this change of method was imposed upon him by the defendant. He at first testified that Mr. Ross gave him and the other workmen the order to change the method. Subsequently he testified that the order came from Mr. Ross or another man, Mr. Morrow, but that he could not tell which. There is no evidence, however, that either Ross or Morrow had authority over the plaintiff or over the method of taking the bundles from the tiers. Mr. Ross was unquestionably merely the shipping clerk with only the duty of counting, weighing and recording the bundles as they were put aboard the cars, while Mr. Morrow was only a laborer like the plaintiff and working with him, but not over him. Giving full credence to the evidence for the plaintiff it does not show against undisputed evidence of the defendant that the change of method can be imputed to the defendant.

The plaintiff cites *Millard* v. *Railway Company*, 173 Mass. 512.

In that case the plaintiff had not been at work upon the pile of lumber and had no occasion to notice how it was piled. The defendant's superintendent suddenly ordered the plaintiff to go on the pile, telling him "to get up there quick and throw that piece of timber into the water". The plaintiff obeyed and while prying off the timber the pile gave way. There was a quick hurrying order which the plaintiff instinctively obeyed without stopping to examine the pile which he had not had occasion to notice. For this reason the case cited is not in point.

Motion sustained. Verdict set aside.

KENNEBEC STEAM TOWAGE COMPANY *vs.* ABRAM RICH.

Kennebec. Opinion March 4, 1905.

Scire Facias. Jurisdiction of Kennebec Superior Court. R. S., c. 78, § 19, c. 79, § 75, c. 88, § 67.

1. A writ of scire facias to obtain an execution upon a judgment is a judicial, not an original, writ and should issue from and be returnable to the court which rendered the judgment and has possession of the record.
2. R. S., c. 79, § 75, which provides that the Kennebec Superior Court "has exclusive jurisdiction of scire facias on judgments and recognizances not exceeding five hundred dollars," does not in terms nor by necessary implication take away the inherent jurisdiction of that court over scire facias to obtain execution upon its judgments even though the debt and costs in the aggregate exceed five hundred dollars.

On exceptions by defendant. Overruled.

Action of scire facias on a judgment for $482.22 debt or damage and $29.08 costs, recovered by the plaintiff against the defendant in the Superior Court for Kennebec County. No execution was issued within one year after judgment. This action of scire facias was then brought in the same court to obtain execution on said judgment, and the defendant seasonably filed a motion to dismiss the action alleging

it was not within the jurisdiction of said Superior Court. The presiding Justice of that court ruled that the action was within the jurisdiction of said court, to which ruling the defendant excepted.

The case is stated in the opinion.

George W. Heselton, for plaintiff.

Williamson & Burleigh, for defendant.

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

EMERY, J. The plaintiff recovered against the defendant in the Superior Court for Kennebec County a judgment for $482.22 debt and $29.08 costs, the whole judgment aggregating more than $500. The time within which execution could be issued as of course having elapsed, the plaintiff has sued out this writ of scire facias from the same court, and returnable to the same, to obtain execution on this judgment. The defendant insists that the Superior Court which rendered the judgment has no jurisdiction to issue this writ, or to proceed upon it. He cites the statute R. S., ch. 79, sec. 75, which provides that the Kennebec Superior Court "has exclusive original jurisdiction of scire facias on judgments and recognizances not exceeding five hundred dollars." His argument is that by necessary implication that court is prohibited jurisdiction of scire facias upon even one of its own judgments in which the debt and costs together exceed five hundred dollars.

If the defendant's doctrine is sound the legislature has revolutionized the long established law of actions of scire facias upon judgments, without apparent reason or purpose. It has always been held that the writ of scire facias based upon a judicial record is a judicial writ and should issue from, and be returned to, the court where the record is. *Com.* v. *Downey,* 9 Mass. 520; *Osgood* v. *Thurston,* 23 Pick. 110; *Gray* v. *Thrasher,* 104 Mass. 373, 375; *Mitchell* v. *Osgood,* 4 Maine, 129; *State* v. *Brown,* 41 Maine, 535.

Further, independent of authority the action of scire facias to obtain execution upon a prior judgment should in the nature of things be heard and determined by the court which rendered the

judgment and which alone has the record of it. The form of the writ as prescribed by statute requires this, for it recites the judgment "as to us appears of record." This is necessarily the record of the court which is to issue the writ and determine the matter.

Again, the writ in this case is not sued out to obtain a new judgment. It does not initiate a new action. Its only effect is to obtain an execution upon an existing judgment. Only the court which rendered the judgment and has the record of it can issue execution upon it. That court's jurisdiction over the matter would seem to be inherent.

As indicating that the legislature had no intention to make such a radical change of the law as the defendant contends, it may be noted that it is still provided in R. S., ch. 78, sec. 19, that when an execution is levied on real estate and no title obtained, the writ of scire facias shall issue from the Clerk's office issuing the original execution; also that it is still provided in R. S., ch. 88, sec. 67, that the writ of scire facias against a trustee shall issue from the court which rendered the judgment. No limitation as to amount is imposed in either case. No exception of the Kennebec Superior Court is made in either case.

Reading the statute cited (R. S., ch. 79, sec. 75) in the light of the long settled law and uniform practice as to writs of scire facias, in the light of the nature and purpose of the writ and in the light of other existing statutory provisions to the contrary, we think it clear that the inference urged by the defendant is not necessary, nor even reasonable, and that the legislature did not intend thereby to take away the inherent jurisdiction of the Kennebec Superior Court to take cognizance of this proceeding by writ of scire facias.

Exceptions overruled.

WALTER COWETT, Pro Ami,

vs.

THE AMERICAN WOOLEN COMPANY.

Somerset. Opinion March 4, 1905.

Negligence. Master and Servant. Assumption of Risk.

1. One cannot be lawfully held guilty of negligence by reason of an act or omission which would not lead an ordinarily prudent, observant man giving the matter thought, to apprehend danger from it.
2. The existence upon the collar of a revolving shaft of a small set screw with an oval head one fourth of an inch in diameter and projecting only one sixteenth of an inch above the surface of the collar, is not such a circumstance as would lead such a man to apprehend danger from it to a workman having no occasion to grasp or touch the collar.
3. *Cowett* v. *American Woolen Company*, 97 Maine, 543 affirmed.

On exceptions by plaintiff. Overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff alleged to have been caused by the negligence of the defendant. After the evidence for the plaintiff was in, and on motion of the defendant, the court ordered a nonsuit. To this ruling the plaintiff excepted.

The case is stated in the opinion.

Forrest Goodwin, for plaintiff.

Danforth & Gould, for defendant.

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

EMERY, J. This is the second time this case has come before the law court on motion for a new trial. The opinion of the court at the former hearing may be found in 97 Maine, 543. The verdict for the plaintiff was then set aside mainly on the ground that his own testimony did not support his theory that the cause of his hurt was his finger being hit by the small set screw on the collar of a small

shaft revolving in close proximity to where his hand was employed cleaning a carding machine. On page 546, however, the court further declared that, granting the plaintiff's theory that his finger was hit by the set screw, the existence and condition of the screw did not show any breach of duty by the defendant.

The court said (p. 546) "That the oval head of the set screw projecting one sixteenth of an inch from the revolving collar near the plaintiff's hand, by coming in contact with his finger would cause him injury, or cause him to make any such involuntary movement as would be the occasion of such an accident or injury as that complained of in the present case, was a possibility so remote, a thing so unlikely to happen that it could not be foreseen or anticipated by the defendant in the exercise of reasonable care."

At the second trial there was perhaps more evidence that the plaintiff's finger was hit by the screw, but the evidence as to the location and condition of the screw was the same as at the first trial. The plaintiff frankly conceded that the screw was all he complained of and now urges that the defendant was guilty of negligence because an oval screw head about one-fourth of an inch in diameter, with the usual slot, projected a sixteenth of an inch from a collar on a revolving shaft. We have re-examined the proposition in the light of his second argument, and are satisfied that the circumstance was too trivial to constitute negligence.

The small thin screw head was hardly anything more than a scarcely appreciable roughness on the surface of a shaft which the plaintiff had no duty to touch. It would be clearly unreasonable to hold that the defendant should have apprehended danger from it to any person having no occasion to come in contact with it.

The nonsuit was properly ordered.

Exceptions overruled.

CITY OF ROCKLAND *vs.* INHABITANTS OF UNION.

Knox. Opinion March 11, 1905.

Pauper Settlement. Residence and Taxing. Intention. Evidence.

Neither the act nor the omission of the assessors in the assessment or non-assessment of a tax on an individual, can be evidence for or against a town on the question of the residence of such individual.

The assessment of a tax against a person is no admission on his part unless coupled with its payment or his recognition of it in some manner as an existing liability.

At the most the assessment or non-assessment of a tax but represents the opinion of the assessors upon the question of the residence or non-residence of the person at the time, and cannot be evidence of the fact itself before another tribunal.

In 1883 the pauper joined a Masonic lodge at Islesboro. Defendant town offered a deposition to prove that the rules governing the residential jurisdiction of Masonic lodges in Maine at that time required that an applicant must have been a resident of that town for six months prior to his joining the lodge. This regulation was not shown to have been brought to the pauper's notice or acted upon by him.

Held: that the evidence was properly excluded. All that it tended to prove as to the pauper's residence was the opinion of the persons who invited him to join the lodge and admitted him to membership, a matter irrelevant to the issue.

On motion and exceptions by defendants. Overruled.

The case is stated in the opinion.

D. N. Mortland and James E. Rhodes, 2d, for plaintiff.

R. I. Thompson and Joseph E. Moore, for defendants.

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

POWERS, J. Action for pauper supplies furnished to one William L. Knowlton. The case comes here on exceptions and motion by the defendants.

It was admitted that the pauper had his derivative settlement in the town of Lincolnville, but it was claimed by the plaintiffs that he acquired a settlement in the defendant town by having his home

there, without receiving pauper supplies, during the five years from his becoming of age on March 20, 1875, to March 20, 1880. Defendants did not claim that the pauper received any pauper supplies during that period or that he thereafter acquired a settlement in any other place. The issue at the trial therefore was narrowed down to the single question whether the pauper had his home in the defendant town for the five years named. This the defendants denied and claimed that the pauper left Union without any intention of returning to it as his home and lived in Rockland a part of that time. In support of their contention the defendants offered to prove that the pauper was not assessed a poll tax in Union during the years from 1875 to 1879 inclusive and that he was so assessed in Rockland from 1877 to 1880 inclusive, but made no claim that he had paid such tax or acknowledged it as an existing liability.

The first exception is to the exclusion of this evidence. This court has recently held for reasons which it is unnecessary to restate at length here that: "assessors of taxes are not agents of the town but public officers. Their acts in omitting to assess a tax against an individual are but expressions of their opinion, and not only do not conclude the town as to the fact of residence, but are not entitled to be considered as evidence upon that question." *Rockland* v. *Farnsworth*, 93 Maine, 178. Standing alone neither the act or omission of the assessors in the assessment or non-assessment of a tax on an individual can be evidence for or against a town on the question of the residence of such individual. The doings of its assessors in the assessment of taxes are not the acts or admissions of the town for they are not its agents. The assessment of a tax is no admission on the part of the pauper, unless coupled with its payment or his recognition of it in some manner as an existing liability. At the most the assessment or non-assessment of a tax but represents the opinion of the assessors upon the question of residence or non-residence of the pauper at the time, and cannot be evidence of the fact itself before another tribunal whose duty it is to determine that question, not by the opinion of others, but as they themselves find the fact.

The next exception is to the exclusion of the deposition of Stephen Berry. In 1883 the pauper joined a Masonic lodge at Islesboro.

He testified that he called his home in Union during the five years after he became of age, and that up to his marriage in 1887 he called his home in Union after March 20, 1880, just the same as before. The defendants did not claim that he ever acquired any settlement in Islesboro, but offered the deposition to prove that the rules governing the residential jurisdiction of Masonic lodges in Maine in 1883 required that an applicant must have been a resident of that town for six months prior to his joining the lodge, and thereby to illustrate the sense in which the pauper used the word "home." The pauper testified that he was at Islesboro one summer, that he did not know how long he had to be a resident in order to join the lodge, that he was asked to join and joined the lodge, and that he did not know whether he complied with the rules of the order as to residence when he joined. The deposition was properly excluded. It had no tendency to show the length of his residence in Islesboro before joining the lodge there. The regulation testified to was not shown to have been brought to his notice or acted upon by him. All that the deposition tended to show was the opinion of the persons, who invited him to join the lodge and admitted him to membership, as to the length of his residence in Islesboro. Their opinion has no probative force as evidence.

Neither can the defendant's motion be sustained. There was but one simple issue which under an unexceptionable charge the jury could not have failed to understand. There was scarcely any controversy at the trial over the material facts of the case. The question was, what was the logical and correct inference from those facts. Undoubtedly other men might have reached a different conclusion. The pauper's intention as to retaining and returning to Union as his home during his many and long absences therefrom in the five years in controversy, was a question of fact which a jury was peculiarly qualified to settle correctly. We find no such manifest error as would warrant disturbing their decision.

Motion and exceptions overruled.

ALBERT E. MACE *vs.* EBEN M. RICHARDSON & TRUSTEES.

Hancock. Opinion March 11, 1905.

Trustee Process. Adverse Claimant. Assignment.

The defendant gave the claimant a written assignment of wages to be earned by him under an existing contract with the trustee, the consideration stated being "money, supplies and merchandise to me already paid and furnished and to be hereafter to me paid, advanced and furnished," and thereafter gave one P. an order for $35. on the claimant who before the service of the trustee process accepted the same in writing, with the understanding that the claimant should be holden upon it only to the extent that the amount due the defendant from the trustees exceeded the amount due from the defendant to the claimant. The excess so due was $34.46.

Held: that to that extent the condition of the acceptance had been fulfilled and the liability of the acceptor was absolute.

That; the liability thus incurred at the defendant's request is within the meaning of the consideration stated in the assignment.

That; the claimant has a just and equitable claim to reimbursement from the fund disclosed.

On report. Title of claimant sustained with costs. Trustees discharged.

Assumpsit upon account annexed against the principal defendant and Whitcomb Haynes & Co., trustees. The trustees duly appeared and filed a disclosure setting forth that there was due Richardson, the principal defendant, from them, at the time of the service of the writ upon them, for wages earned $97.85, and that this sum was claimed by one W. J. Johnston under a written assignment to him from said Richardson, and that under said assignment demand had been made upon said trustees by said Johnston for payment of the aforesaid sum to him.

Said W. J. Johnston filed a written request to be allowed to appear as claimant of the funds disclosed by the aforesaid trustees by virtue of the aforesaid assignment, and therefore he was admitted as a party to the suit for that purpose.

At the hearing upon the question of the liability of the alleged trustees, after the evidence was taken out, by agreement of parties,

the case was reported to the Law Court to decide all questions of law and fact involved.

Further facts appear in the opinion.

A. W. King, for plaintiff.

J. A. Peters, for claimant.

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

POWERS, J. This is a trustee process in which the claimant, W. J. Johnston, asserts title to the fund disclosed, by virtue of a written assignment to him from the defendant Richardson of the wages due and to become due for service performed under an existing contract with the trustees to July 1, 1903. The case comes here on report.

It appears that the defendant was owing the claimant a small store account and, having made arrangements with him to furnish the defendant and his family money and supplies while he was away at work upon the drive for the trustees, on March 13, 1903, gave him the assignment, the consideration therein stated being "money, supplies and merchandise to me already paid and furnished and to be hereafter to me paid, advanced and furnished" by the claimant. This assignment was duly recorded long before the service of the writ on June 16, 1903, on which date there was due from the trustees to the defendant $97.85 for driving, and from the defendant to Johnston, as he claims $98.39. Of the latter sum $63.39 was for cash and supplies furnished the defendant and his family, and the only controversy in the case is over an order on the claimant for $35.00 given by the defendant to Dr. Patten, and which we find as a fact was accepted in writing by the claimant the day before the service on the trustees. The acceptance was with the understanding between Dr. Patten and the claimant that the claimant should be holden upon it only to the extent that the amount, which was due Richardson for his driving wages, exceeded the amount then due from Richardson to the claimant.

It is urged that the amount of this order cannot be allowed to the claimant because at the time of service upon the trustees it had not

been paid and the acceptance was conditional. True it was conditional, but the condition had been fulfilled to the extent of $34.46, the amount by which the driving wages of Richardson exceeded the amount due from him to the claimant. To that extent it stands precisely the same as if no condition had been attached to the acceptance and constitutes an existing liability of the claimant, enforceable against him by Dr. Patten and incurred at the request of the defendant.

The plaintiff further claims that this sum cannot be allowed to the claimant because it was not money, "paid, advanced or furnished" to Richardson and therefore is not secured by the assignment. We think this too narrow a construction. The same objection might be made to the supplies furnished his family, to provide for and secure which the testimony and situation of the parties show was the chief object of giving the assignment. Money or supplies advanced or furnished to anyone at his request are as much furnished to Richardson, within the meaning of the assignment, as though placed in the debtor's own hand.

As between the claimant and the plaintiff equitable considerations are to prevail so far as the nature of the process will admit. It is evident that the claimant, being holden to pay the $34.46, has a just and equitable claim to reimbursement from the fund disclosed.

Title of claimant sustained with costs. Trustees discharged.

GEORGE H. CHAMBERLAIN *vs.* OTIS C. WOOD AND LUMBER.
S. ED. TRUE *vs.* SAME.
WILLIAM L. MERRILL *vs.* SAME.
SILAS F. HUFF *vs.* SAME.
SIMON R. GRIFFIN *vs.* SAME.
JOHN MCKAY *vs.* SAME.
EDWARD TUCKER *vs.* SAME.

Piscataquis. Opinion March 11, 1905.

Lien on Spool Timber. Place of Destination. R. S., c. 93, § 53.

Chapter 93, section 53, R. S., gives a lien for certain services upon spool timber and spool bars manufactured therefrom which continues for sixty days after such timber or spool bars arrive at the place of destination for sale or manufacture.

Held: that in the case of spool bars, the place of destination for sale or manufacture, is the place where such spool bars are actually intended to be sold or manufactured into spools.

On exceptions by defendant. Overruled.

The case is sufficiently stated in the opinion.

C. W. Hayes, for plaintiffs.

M. L. Durgin, for defendant.

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

POWERS, J. Actions of assumpsit brought by the several plaintiffs against Otis C. Wood, to enforce a lien for the several amounts due them for their personal services and the services of their teams, performed under contract with the defendant upon certain spool timber and spool bars manufactured therefrom and attached upon the writs. Wood was engaged in carrying out two contracts, entered into by him with the American Thread Company to furnish and deliver at the Company's mills in Lake View and Milo a certain quantity of spool bars, for which payment was to be made as follows:

three-fourths of the contract price as the wood was delivered at Lake View and Milo and the balance as soon as the wood was all delivered. At these places the American Thread Company operated mills for the manufacture of the spool bars into spools. Defendant hauled the timber to his mill in Elliotville where it was sawed into spool bars, which were in part hauled thence to the Canadian Pacific Railway, loaded on the cars and shipped to Milo and Lake View, and the remaining spool bars, intended for like shipment, were still at the defendant's mill in Elliotville when they were attached upon the writs in these actions. It is admitted that the attachments were more than sixty days after the timber was sawed and piled at the mill in Elliotville. Plaintiffs' personal services were performed in cutting the white birch from which the bars were sawed, in cooking for the persons who labored upon said white birch and in sawing said white birch into spool bars; and the personal services of the plaintiffs and the services of their teams were performed in hauling said white birch to the mill where it was sawed into spool bars and from the mill to the cars upon which said spool bars were loaded.

Plaintiffs claimed that the place of destination for sale or manufacture was at Milo and Lake View; the defendant contended that it was at his mill in Elliotville where the timber was sawed into spool bars. The cases were tried before the presiding Justice, with the right of exception, who found that the plaintiffs were entitled to a lien upon said spool bars, and ruled that the place of destination for sale and manufacture was Milo and Lake View; and gave judgment for the plaintiffs in each action. The only exception taken by the defendant is to the ruling as matter of law as to the place of destination for sale or manufacture.

The statute under which the lien is claimed is as follows: "Whoever labors at cutting, hauling or sawing of spool timber or in the manufacture of spool timber into spool bars and the piling of such bars or at cooking for persons engaged in such labor, has a lien thereon for the amount due for his personal services and the services performed by his team, which takes precedence of all other claims, continues for sixty days after such timber or spool bars arrive at the place of destination for sale or manufacture, and may be enforced by

attachment." R. S., chapter 93, section 53. There can be no question upon the foregoing facts that as a matter of fact the place of destination for sale of the spool bars was at Milo and Lake View. There the defendant's contract bound him to deliver the spool bars. Upon delivery there payment was to be made. Until delivery there the title and possession remained in the defendant; for where the vendor binds himself to deliver goods at a distant place delivery to a common carrier is not delivery to the vendee but the carrier remains the agent of the vendor. Milo and Lake View were likewise in fact the place of destination for manufacture of the spool bars; for there the American Thread Company operated mills for the purpose of manufacturing them into spools. The question of law therefore presented by the exceptions is, whether the "place of destination for sale or manufacture" named in the statute is the place at which the spool bars are in fact intended to be sold or manufactured into spools. We think it is. We think if the legislature had intended some other place than that in which the spool bars were in fact intended to be sold or manufactured it would have said so, and used some other language than that which in the statute so clearly describes such place of destination.

We do not overlook the fact that the statute speaks of labor "in the manufacture of spool timber into spool bars," and that the spool timber in this case was actually manufactured into spool bars at the defendant's mill in Elliotville. The laborer has "a lien thereon for the amount due him for his personal services and the services performed by his teams." A lien on what? Not on the timber alone, for then the laborer who manufactured the timber into spool bars would divest himself of his lien by performing the services for which the lien is given. Plainly the word "thereon" embraces both the spool timber and the spool bars before named in the section. It is unnecessary to consider whether in some cases the timber and the spool bars may have different places of destination for sale or manufacture. The lien is given upon both for all the different kinds of services enumerated, and continues for sixty days after either the timber or the bars arrive at the place of destination for either sale or manufacture. Wood's contract was for spool bars. Spool bars were

attached upon the writ and the place of destination for sale or for manufacture of such spool bars within the statute, was the place where they were actually intended to be sold or manufactured into spools in Milo and Lake View, not the defendant's mill in Elliotville where they were never manufactured or intended for manufacture into spools, where they never "arrived" in the form of spool bars but there first came into existence as such, and where the timber may have arrived more than sixty days before a single spool bar was sawed from it.

Exceptions overruled.

STATE OF MAINE, by Scire Facias, *vs.* HARRY B. RUSS et als.

Cumberland. Opinion March 13, 1905.

Recognizance in Criminal Cases. Scire Facias. Pleading. Stat. 1856, c. 204. Stat. 1895, c. 134. Stat. 1901, c. 57. R. S., c. 133, § 5; c. 134, §§ 13, 27.

1. It is not necessary for a recognizance in a criminal case to state that the warrant had a proper return signed by the officer serving it.
2. Neither is it necessary for the recognizance to recite the fact that the defendant pleaded.
3. A recognizance in a criminal case is not vitiated by requiring the defendant in the concluding words to "further do and receive that which the said court shall then consider." Such words are mere surplusage.

On exceptions by defendants. Overruled.

Scire facias brought in behalf of the state in the Superior Court for Cumberland County against the principal and sureties upon a recognizance taken by the Municipal Court for the city of Portland, in the penal sum of $1500 for the appearance of the principal at the May term, 1903, of said Superior Court. The defendants filed a general demurrer to the writ. The demurrer was overruled. Thereupon the defendants took exceptions.

The case is sufficiently stated in the opinion.

Robert Treat Whitehouse, County Attorney, for the State.

Harrison G. Sleeper and William H. Gulliver, for the defendants.

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

WHITEHOUSE, J. This is a writ of scire facias, brought in behalf of the state in the Superior Court for the County of Cumberland, against the principal, and sureties upon a recognizance taken by the Judge of the Municipal Court for the city of Portland in the penal sum of $1500 for the appearance of the principal Harry B. Russ at the May term of the Superior Court, 1903. The defendants filed a general demurrer to the writ and the case comes to this court upon exceptions to the overruling of the demurrer.

In support of the exceptions it is contended by the learned counsel for the defendants, that the writ is defective, first, because it fails to show that the warrant against the defendant had a proper return thereon signed by the officer serving it, 2nd, because it does not show that any plea was entered before the magistrate, 3d, that the magistrate had before him a complaint charging the defendant with two distinct offenses, and 4th, because the writ summons the sureties, not only to show cause why judgment should not be had for said sum, but also "further do and receive that which the said court shall then consider."

It is provided by section 27 of chapter 134, R. S., that, "No action on any recognizance shall be defeated, nor judgment thereon arrested, for an omission to record a default of the principal or surety at the proper term, nor for any defect in the form of the recognizance, if it can be sufficiently understood, from its tenor, at what court the party or witness was to appear, and from the description of the offense charged, that the magistrate was authorized to require and take the same."

In this case the writ appears to fulfil all the requirements of the general rules of pleading and to be sufficient without the aid of these statutory provisions, but the sufficiency of it is established beyond question by the statute above quoted. In the first place, it can be sufficiently understood from its tenor at what court the defendant was to appear and from the description of the offense charged that the magistrate was authorized to require and take the

same. With respect to the latter requirement, the description of the defense contained in the writ, fully, correctly and technically, charges the principal defendant with the offense of being accessory before the fact to the felonies of forgery and uttering.

Such an offense is not within the jurisdiction of the Judge of the Municipal Court of the city of Portland for trial, but it is an offense, with respect to which he is authorized to find probable cause against the accused and take his recognizance for his appearance at the Superior Court. See chapter 204 of the act of 1856 of the public laws of Maine, as amended by act of 1895, chapter 134 and act of 1901, chapter 57, defining the jurisdiction of the Municipal Court of the city of Portland. See also section 5, chapter 133, relating to the criminal jurisdiction of magistrates, and section 13, chapter 134, in relation to the examination of offenders.

It was not necessary for the recognizance to state that the warrant had a proper return signed by the officer serving it. The statute makes it entirely unneccessary to recite any preliminary acts such as the making of the return of the warrant. The requirement in regard to the return is not made a condition precedent to the taking of the recognizance, but it appears from the recognizance in this case that the principal defendant was actually brought before the court "by virtue of the warrant duly issued."

A recognizance containing the exact words of the recognizance in the case at bar in this respect, but making no mention of the return upon the warrant, was held sufficient in *State* v. *Hatch*, 59 Maine, 410, and *State* v. *Cobb*, 71 Maine, 198.

It is equally unnecessary for the recognizance to recite the fact that the defendant pleaded. This is a matter entirely outside of the description of the offense specified in the statute. See *State* v. *Hatch*, and *State* v. *Cobb*, supra.

It does not appear from the writ that the magistrate had before him a complaint charging the defendant with two distinct offenses. As already shown, the writ simply sets forth a full description of the offense of being accessory before the fact to the felonies of forgery and uttering. The offense intended by the words "said offense" is plain and unequivocal upon a careful reading of the writ. Finally

it is objected by the defense that the statute only requires that the lower court shall cause the respondent to "recognize with sufficient sureties to appear," whereas the recognizance in this case required the defendant to "further do and receive that which the said court shall then consider."

It has been held that the concluding words of a recognizance precisely like these, are mere surplusage and do not vitiate the recognizance. *State* v. *Hatch,* supra. "There can be no reason for disturbing what has now become an established practice under that decision." *State* v. *Cobb,* supra.

Exceptions overruled. Judgment for the State.

LIZZIE M. MAXFIELD *vs.* MAINE CENTRAL RAILROAD CO.

Cumberland. Opinion March 13, 1905.

Railroads. Negligence. Carriers of Passengers. Slippery Condition of Station Platform.

In the actual transportation of passengers, common carriers are required by public policy and safety to exercise the highest degree of care consistent with the business in which they are engaged. They are required to do all that human care, vigilance and foresight can do under the circumstances considering the character and mode of conveyance, to prevent accident to passengers. But the standard recognized by law is that of ordinary care with respect to the exigencies of the particular case; and the "standard by which to determine whether a person has been guilty of negligence is the conduct of a prudent, careful or diligent man."

In view of the great peril involved in the transportation of passengers by steam railways, a very high degree of vigilance, foresight and skill is required to fill the measure of ordinary care in order to prevent accident and injury. So with respect to the duty owed to the passenger on the platform of a railway station, the company is required to exercise ordinary care for the protection and safety of a passenger in that situation but it is obvious that different precautions and safeguards and a less degree of skill and foresight may be sufficient to meet the requirements of ordinary care under those circumstances. The correct principle obviously is that in all

cases the amount of care bestowed must be equal to the emergency, however the standard may be denominated.

It is the duty of a railroad company to exercise all ordinary care to maintain its platform in such a reasonably safe and suitable condition that the passengers who are themselves in the exercise of ordinary care can walk over it in safety.

On motion by defendant. Overruled.

Action on the case for personal injuries sustained by the plaintiff by slipping on the platform at Newhall Station, on the mountain division of the defendant's railroad, as she was walking from the station door for the purpose of taking a train. At the trial in the court of the first instance, the plaintiff recovered a verdict for $1158.35. Thereupon the defendant filed a general motion for a new trial.

The case is fully stated in the opinion.

Scott Wilson, and *E. L. Bodge*, for plaintiff.

Nathan and Henry B. Cleaves and Stephen C. Perry, and Wallace H. White and Seth M. Carter, for defendant.

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

WHITEHOUSE, J. This was an action to recover damages for a personal injury which the plaintiff sustained on the 22nd of December, 1902, by slipping on the platform at Newhall station in the town of Windham, on the mountain division of the defendant's railroad, as she was walking from the station door to the cars for the purpose of taking the morning train to Westbrook. It is alleged in her declaration that this platform had negligently been allowed to remain covered with ice in the line of travel from the door of the station to the cars, and had thereby been rendered slippery and dangerous for passengers having occasion to walk over it for the purpose of entering or leaving the car.

It was not in controversy that on the morning in question, the plaintiff entered the station, purchased a ticket for the eight o'clock train from Newhall to Westbrook, and attempted to walk across the platform for the purpose of entering the car, when she slipped upon the platform and fell, severely spraining her ankle. The jury

rendered a verdict in her favor for $1158.35, and the case comes to this court on the defendant's motion to set the verdict aside as against the evidence.

Upon the question of the defendant's liability, the principal controversy between the parties was one of fact, respecting the precise condition of the platform at the time and place of the accident on the morning of December 22d.

It appears from the testimony of the clerk of the weather bureau at Portland, that a light snow had fallen there in the afternoon of the day before, changing to rain at 3.16 p. m., and that the rain continued to fall more or less during the night, ceasing at 5.20 on the morning of the 22d. It also appears from this record that the temperature at Portland on Sunday the 21st was fifteen degrees below the freezing point in the morning, the average during the day, and when the rain began to fall in the afternoon, being substantially at the freezing point. On Saturday the 20th, it was ten degrees below the freezing point in the morning, the highest during the day being one degree above at two o'clock in the afternoon. It was six below at eight o'clock in the evening. At eight o'clock on the morning of the 22d, at the time of the accident, the temperature at Portland appears to have been eleven degrees above the freezing point.

It is contended, however, that this record of the temperature at Portland is by no means conclusive evidence of the temperature at Newhall, twelve miles farther inland, and even if it were, it is insisted that the temperature above shown is not necessarily inconsistent with the contention that on the platform of the Newhall station at the time of the accident there was in fact a thin coating of ice which had formed during the continued cold weather prevailing during the two preceding days. It is further said that the plaintiff's claim on this point is strengthened by uncontradicted testimony in her behalf, that prior to the freezing weather of Saturday and Sunday, the 20th and 21st, water had been dripping from a defective or obstructed gutter at the edge of the roof projecting over the platform and that the mixture of snow and water, colloquially termed "slush" found on the platform that morning and not wholly removed by the station agent's

shovel, tended to conceal the icy and slippery condition previously created and then existing.

On the other hand, the defendant as earnestly contended that there was no ice whatever on the platform at the time of the accident, that an hour before it happened, the station agent found about half an inch of "slush" there and scraped it off with a large shovel, leaving the platform wet, but with only such "slush" upon it as the shovel failed to reach by reason of the inequalities of the surface. The defendant also claimed that it sufficiently appeared from the plaintiff's own testimony and that of her son that the leaking of the gutter, if any, near the door of the station could not have caused any coating of ice at the edge of the platform where the plaintiff fell.

Upon this issue of fact the testimony was conflicting. The plaintiff's positive testimony that there was a coating of ice upon which she slipped and fell and that no sand or ashes had been sprinkled upon it is emphatically corroborated by her daughter-in-law, who states that she remembers the difficulty with which they picked their way along in passing from the station door to the cars, although they both wore rubbers over their shoes.

Four other witnesses apparently disinterested, give clear and unequivocal testimony that there was a coating of ice on the platform with a little slush or snow and water on top of it; two of them state that it was icy and slippery and that they experienced difficulty in walking safely over it.

In behalf of the defendant, four of its employees, the station agent, conductor, brakeman and carpenter, state postively that while the platform was wet and in some places partially covered with a little slush, there was no ice upon it. One other witness for the defendant testified that there was not a particle of ice on the platform, and two of them testify that they didn't see any ice, but admit that the platform was slippery. There is no claim on the part of the defendant that the precaution of sprinkling sand or ashes on the platform had been exercised by his agents to prevent passengers from slipping upon it in walking from the door of the station to the cars.

Whether this evidence warranted a finding that there had been a breach of duty on the part of the defendant towards its passengers,

was a question which was submitted to the jury under instructions to which no exceptions were taken.

It has been seen that at the time of the accident the plaintiff had purchased her ticket for Westbrook and that the relation of carrier and passenger had been fully established between her and the defendant company. *Rogers* v. *Steamboat Co.*, 86 Maine, 261. She was then entitled to the care and protection of its servants. But a great variety of terms have been employed by different courts and law writers to express the nature and extent of the obligation due from carriers to passengers under such circumstances. In the actual transportation of passengers, common carriers are required by public policy and safety to exercise the highest degree of care consistent with the business in which they are engaged. They are required to do all that human care, vigilance and foresight can do under the circumstances considering the character and mode of conveyance, to prevent accident to passengers. *Libby* v. *M. C. Railroad Co.*, 85 Maine, 34. But the standard recognized by law is that of ordinary care with respect to the exigencies of the particular case; and the "standard by which to determine whether a person has been guilty of negligence is the conduct of a prudent, careful or diligent man." Bigelow on Torts, p. 261.

In view of the great peril involved in the transportation of passengers by steam railways, a very high degree of vigilance, foresight and skill is required to fill the measure of ordinary care in order to prevent accident and injury. So with respect to the duty owed to the passenger on the platform of the railway station, the company is required to exercise ordinary care for the protection and safety of a passenger in that situation but it is obvious that different precautions and safeguards and a less degree of skill and foresight may be sufficient to meet the requirements of ordinary care under those circumstances. Many courts, however, have used the same phraseology to describe the duties of the carrier to the passenger whether on the platform or in the cars. In *Knight* v. *Railroad Co.*, 56 Maine, 234, a through passenger sustained an injury on the wharf while passing from the railway station to the steamboat and it was held that the defendant railroad company was "bound to exercise

the same degree of care in making the wharf safe and convenient for passengers to travel over, which is required of common carriers of passengers" and "that common carriers of passengers are required to exercise the strictest care which is consistent with the reasonable performance of their contract of transportation." See also *Tobin* v. *Railway Co.*, 59 Maine, 183.

In *Jordan* v. *N. Y., N. H. & H. Railroad Co.*, 165 Mass. 346, the plaintiff was injured by reason of a defect in the floor of the ladies' toilet room in the station and in the opinion, the court say: "The plaintiff was a passenger and the defendant owed her the highest degree of care consistent with the proper management of the business in which it was engaged."

But the correct principle appears to have been recognized in *Moreland* v. *B. & P. Railroad Co.*, 141 Mass. 31, in which it was held, that a railroad corporation is not bound to exercise the same care towards a passenger who is passing through the station grounds on his way from the train to the highway that it is under obligation to exercise while the passenger is on the train. In the opinion the court say: "The degree of care is not fixed solely by the relation of carriers and passengers; it is measured by the consequences which may follow the want of care. A railroad company is held to the highest degree of care in respect to the condition and management of its engines and cars because negligence in that respect involves extreme peril to passengers against which they cannot protect themselves. It would not act reasonably if it did not exercise greater care in equipping and running its trains, than in regard to the condition of its station grounds."

In 6 Cyc. of Law and Proc., 608, the rule deduced from the decisions is thus stated: "The care required of the carrier for the protection of the passenger on his premises involves reasonable care to provide and maintain safe and adequate station houses, platforms, walks, steps and landings for use in waiting for approaching and leaving trains." In 5 Am. & Eng. Encyc. of Law, 532, the carrier's duty is thus stated: "The rule seems to be that with respect to the stational appointments the carrier is bound to exercise ordinary care in view of the dangers to be apprehended."

This reasonable doctrine was also recognized and expounded in a luminous opinion of this court in the recent case of *Bacon* v. *Steamboat Co.*, 90 Maine, 46. In that case it was held, "that the degree of care which the defendant company was bound to exercise for the protection and safety of its passengers upon a wharf occupied by the company, was that of reasonable diligence or of common care and prudence." In the opinion the court say: "In all cases the amount of care bestowed must be equal to the emergency, however the standard be denominated. We do not mean to say that the distinction between ordinary and gross negligence, or between ordinary and extraordinary care does not still exist, but, in reply, to the suggestion made by the plaintiff's counsel that the same degree of care should be exercised by the defendants when wharfingers or tenants of a wharf used in conjunction with their boats, as is imposed on them while common carriers of passengers, we do mean to say that we perceive no reason for imposing so extreme an obligation upon the defendants when they have completed their trip and ceased to be longer performing the duties of common carriers; and the authorities do not support any such application of the rule of extraordinary care as is contended for." See also *Caven* v. *Granite Co.*, 99 Maine, 278.

It was the duty then of the defendant company to exercise all ordinary care to maintain the platform in question in such a reasonably safe and suitable condition that passengers who were themselves in the exercise of ordinary care could walk over it in safety. If the plaintiff's contention was correct that at the time and place of the accident, there was a coating of ice on the platform partially covered with slush, it would not be contended that such a condition was a reasonably safe one, for the accommodation of passengers. There was sufficient evidence in behalf of the plaintiff if accepted as true, to support this contention. That evidence was not in itself so unreasonable or improbable or so overborne by undisputed facts that this court would be warranted in rejecting it as incredible. The evidence being conflicting, it was the province of the jury to decide this controverted question of fact. They evidently accepted the plaintiff's version as correct. They drew their conclusion not simply from the words of the witnesses but from their manner and bearing as well, and we do

not feel justified in declaring that their conclusion was manifestly wrong. The conduct of the plaintiff appears to have been that of reasonably prudent people under like circumstances. There was no want of ordinary care on her part.

Nor are the damages disproportionate to the injury. The plaintiff is shown to have had an established business as a canvasser which yielded a net income of $350.00 per year. At the time of the trial, a year and four months had already elapsed, and she was still unable to walk without crutches. The testimony of the physician tended to show that six months or a year more would be required to complete the recovery, and a "joint injured to that extent almost never gets as well as new." For this loss, resulting from her incapacity to resume her vocation, for the expenses of medical attendance and nursing and a reasonable compensation for her suffering, the damages awarded cannot be deemed excessive.

Motion overruled.

JAMES C. ROGERS, Assignee,

vs.

PORTLAND AND BRUNSWICK STREET RAILWAY.

Cumberland. Opinion March 14, 1905.

Equitable Estoppel. Assignment of Claim. Trover.

The doctrine of equitable estoppel is founded upon the principles of equity and justice, and is applied so as to conclude a party, who by his acts and admissions intended to influence the conduct of another, when, in good conscience and honest dealings, he ought not to be permitted to gainsay them.

This doctrine of equitable estoppel should be applied with great care in each case, so that a person may not be debarred from the maintenance of a suit based upon his legal rights, unless the conduct relied upon as creating an estoppel has been of such a character, and has resulted in such injury to the person relying upon such conduct, that, in equity and good conscience, he should be thereby prohibited from enforcing the legal rights which he otherwise would have, nor unless in any given case all the elements exist

which have been universally held to be essential for the purpose of creating an estoppel.

The conduct, declarations or silence relied upon to create an estoppel, must be made to or in the presence of a person known to have an interest in the subject matter, and must be of such a character as would naturally have the effect of influencing the conduct of the person to whom it is addressed.

It is not necessary, in accordance with the prevailing rule, that the conduct creating an estoppel should be characterized by an actual intention to mislead and deceive. Neither would ignorance upon the part of the plaintiff of his legal rights, provided he had a full knowledge of the facts, be an answer to the estoppel relied upon.

In order to create an estoppel, the conduct, misrepresentations or silence of the person claimed to be estopped must be made to or in the presence of a person who had no knowledge of the true state of facts, and who did not have the same means of ascertaining the truth as did the other party.

A person will not be estopped merely by his silence and failure to disclose facts that may be ascertained by an examination of public records, when the situation is not such as to place upon him the duty of making known the truth. In such a case he may rely upon the notice given to all by the public records. But where the situation is such that it is his duty to speak, as where inquiries are made of him, or where, instead of merely remaining silent, he does some positive affirmative act, which would naturally have the effect of misleading and deceiving one, then the mere fact that the truth can be ascertained by an examination of the records, does not prevent the operation of the estoppel against him.

The law distinguishes between silence and encouragement. While silence may be innocent and lawful, to encourage and mislead another into expenditures on a bad and doubtful title would be a positive fraud that should bar and estop the party.

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

Trover for the alleged conversion of 1800 loads or cubic yards of earth and gravel of the alleged value of $180. The action was brought and tried in the Superior Court for Cumberland County. Verdict for plaintiff for $127.16. Defendant took exceptions to the refusal of the presiding Justice to give certain requested instructions, and also filed a general motion for a new trial. The motion alone was considered.

The case is fully stated in the opinion.

Robert Treat Whitehouse, for plaintiff.

Thompson & Wheeler, for defendant.

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

WISWELL, C. J. At the time of the transactions later referred to, the plaintiff was in the possession of a farm in the town of Freeport, situated between Freeport Village and the town of Brunswick, the title to which came to him by devise from his father, subject to a mortgage given by the latter to the Topsham and Brunswick Twenty-five Cent Savings Bank. On June 4, 1898, after the death of the plaintiff's father, the bank commenced foreclosure of this mortgage by publication, the first publication being on that day, and on June 4, 1899, the mortgage containing a one year foreclosure clause, it became fully foreclosed, and the right of redemption became barred. Subsequently, on March 29, 1900, the Savings Bank gave a lease of the premises to the plaintiff for a monthly rental. The lease contained a provision to the effect that after taxes, insurance, expenses and interest had been deducted from the rent paid, "the balance shall be used towards payment for said premises by said lessee, if he shall desire to purchase the premises from the lessor." Thereafter, the plaintiff continued in possession of the premises as tenant of the Savings Bank until the time hereafter referred to, and subsequently.

In the early summer of the year 1902, the defendant was building its railroad between Freeport and Brunswick; in May of that year a person connected with the construction of the road saw the plaintiff for the purpose of obtaining permission from him to take material from this farm for use in filling or in ballasting the road; this permission was finally given, but for a limited period of time only, and the plaintiff then objected to the taking of any more of this material from the premises; but on July 4, 1902, Mr. Amos F. Gerald, the general manager of the defendant, saw the plaintiff and sought to obtain from him further permission to take this material from the farm, and agreed to be responsible, either in his own behalf or on that of defendant, for all the earth and gravel that had been taken or that should be taken under the new permission desired; thereupon, in consideration of this promise on the part of Gerald, the plaintiff consented that the railroad company might take such earth and gravel

as was needed for their purposes, the price to be paid not being agreed upon; during the time that this material was being taken from the farm and hauled to the defendant's railroad, the plaintiff assisted, for a while, at least, in the employment of the railroad company.

At this time the plaintiff did not disclose to Gerald the fact that he was not the owner of the farm which he was occupying, or that it was owned by the Savings Bank, or that anybody else had any claim on or interest in it, and Gerald had no knowledge of the ownership of the farm, other than appeared from the plaintiff's possession and his conduct in assuming to contract in relation to taking and carrying away such material, upon Gerald's promise to be responsible for what the material was reasonably worth. On December 4, 1902, Gerald paid to the plaintiff the sum of $25., either in full payment for this gravel, as claimed by him, or in partial payment therefor, as claimed by the plaintiff, and as found by the jury. Later, the plaintiff brought in his own name an action of assumpsit upon an account annexed to the writ to recover the balance claimed to be due him for this same quantity of gravel and earth, but when the former case came on for trial, on November 6, 1903, these facts in regard to the title became known for the first time to the plaintiff's counsel, and the action was entered neither party.

Still later, on November 13th, 1903, the Savings Bank, the owner of the premises made an assignment to the plaintiff of "any and all rights, claims and demands it now has or may have against the Portland & Brunswick Street Railway, ... for the severance from the freehold and conversion by said Portland & Brunswick Street Railway, its agents or employees, ... of any earth or gravel, stone or stone wall from the premises of the farm situated in said Freeport, now occupied by the said Jas. C. Rogers, and owned by the said Topsham & Brunswick Twenty-five Cent Savings Bank; and also all the right, title and interest of said Bank in and to the earth, gravel, stone and stone wall so severed and converted as aforesaid." On the same day the plaintiff entered into an agreement with the Savings Bank, in which he agreed, in consideration of this assignment, that all sums which might be recovered by him in any suit

against the railroad company, should be paid over to the Savings Bank, less the expense of prosecuting such suit, and that the same should be applied to the reduction of the plaintiff's indebtedness to the bank.

Thereupon, on December 2, 1903, the plaintiff commenced in his own name, as assignee of the Savings Bank, this action of trover to recover for the conversion of the quantity of earth and gravel taken by the railroad company. The case was tried before a jury and resulted in a verdict for the plaintiff for $127.16, the defendant brings the case here both upon exceptions and a motion for a new trial. The defendant in its plea set up and relied upon an equitable estoppel based upon the facts already referred to, and presented to the presiding justice certain requested instructions based upon its claim that the plaintiff was estopped from the maintenance of this suit. It may be that the requested instructions were not as full and accurate in statement as they should have been, but the whole question is presented, and perhaps may be more satisfactorily considered, upon the motion for a new trial.

The doctrine of equitable estoppel is founded upon the principles of equity and justice, and is applied so as to conclude a party, who by his acts and admissions intended to influence the conduct of another, when, in good conscience and honest dealings, he ought not to be permitted to gainsay them. Formerly such estoppels were characterized by the decisions as odious and were not favored in law, "but, as said by Walton, J., in *Stubbs* v. *Pratt*, 85 Maine, 429, the doctrine of equitable estoppel has been very much extended within the last half century, and is now as freely applied in actions at law as in suits in equity, and it is a doctrine so well calculated to suppress fraud and oppression, that we do not wish to be understood as limiting its application in the slightest degree in proper cases." "Legal estoppels exclude evidence of the truth and the equity of the particular case to support a strict rule of law on grounds of public policy. Equitable estoppels are admitted on exactly the opposite ground of promoting the equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to

equity and good conscience for him to allege and prove the truth." *Martin* v. *Maine Central Railroad Company*, 83 Maine, 100, citing *Horn* v. *Cole*, 51 N. H. 287. But it is undoubtedly true that this doctrine of equitable estoppel should be applied with great care in each case, so that a person may not be debarred from the maintenance of a suit based upon his legal rights, unless the conduct relied upon as creating an estoppel has been of such a character, and has resulted in such injury to the person relying upon such conduct, that, in equity and good conscience, he should be thereby prohibited from enforcing the legal rights which he otherwise would have, nor unless in any given case all the elements exist which have been universally held to be essential for the purpose of creating an estoppel.

It is claimed upon the part of the plaintiff that this doctrine is not applicable to the present case, whatever may have been the conduct of the plaintiff, because the Savings Bank could not be estopped on account of any conduct upon its part, since it took no part whatever in, and had no knowledge of, the transaction, and that the plaintiff as assignee of the bank simply stood in its position. But the plaintiff is prosecuting this suit in his own name and for his own benefit; it had been expressly agreed between him and the bank that all sums received for this, and for other alleged conversions, should be paid to the bank and that it should be applied to the reduction of the plaintiff's indebtedness to the bank. It is undoubtedly true that the Savings Bank, as owner of the property, had a right of action for the severance and conversion of this gravel, and this right of action might be transferred by it, but not to a plaintiff, so that he could maintain an action for his own benefit, if his conduct had been such that the doctrine of equitable estoppel is applicable to him. It would hardly be contended that a person who had unlawfully and wrongfully sold a chattel which did not belong to him, and who had received the payment therefor, either in whole or in part, could afterwards purchase of the true owner the chattel, or the right of action for its conversion, and maintain trover against the one to whom he had wrongfully sold it, assuming to be the owner with the right to sell. The owner in such case would not of course be estopped, but the assignee should

be and would be upon the well established doctrine that a person will not be allowed to take advantage of his own wrong.

It is also strenuously claimed by the plaintiff that many, if not all, of the elements necessary to create an estoppel, even as to the plaintiff individually, are lacking in this case. We do not think so. Upon the contrary, in our opinion, all of the elements necessary to create an estoppel upon the part of the plaintiff do exist, and are so clearly shown by the uncontradicted facts and circumstances, that the action by this plaintiff is not maintainable, and that the verdict was unquestionably wrong.

At the time of the transaction between the plaintiff and Gerald, the plaintiff assumed to be the owner of the farm and to have a right to give the railroad company permission to remove material therefrom for the construction of its railroad. His affirmative acts and conduct were not only of such a character as to induce Gerald to believe that he was the owner and had the right to make this contract, but, by his silence, as well, he contributed to this belief. He in no way informed Gerald of his entire want of any right to make this contract or to give this permission. His conduct and silence were well calculated to give any reasonable person to believe, coupled with the fact that he was in possession of the farm, with all of the evidences of ownership, that he had such right. He had full knowledge of the fact that he had no right to make this contract. He must have known that the right of redemption had been fully foreclosed, because, not long before, in March, 1900, he had become a party to a lease from the bank to him of these very premises. But, it is urged, that the plaintiff in thus assuming the rights of an owner in making the contract with Gerald, and in failing to give him notice of the true state of facts, acted innocently or thoughtlessly with no fraudulent design to mislead and deceive Gerald, and that he was ignorant of his legal rights, or want of them, in the premises. Assuming that this is so, it is no answer to the estoppel. It is undoubtedly true that the conduct, declarations or silence relied upon to create an estoppel, must be made to or in the presence of a person known to have an interest in the subject matter. *Allum* v. *Perry*, 68 Maine, 232, and must be of such a character as would naturally have the effect of influencing

the conduct of the person to whom it is addressed. *Fountain* v. *Whelpley*, 77 Maine, 132. But it is not necessary, in accordance with the prevailing rule, that the conduct creating the estoppel should be characterized by an actual intention to mislead and deceive. 11 A. & E. Encyl. of L. 2d. Ed., 431, citing many cases. And this was expressly decided by this court in *Martin* v. *Maine Central Railroad Company*, supra, in this language; "But it is not necessary that the original conduct creating the estoppel should be characterized by an actual intention to mislead and deceive." Neither would ignorance upon the part of the plaintiff of his legal rights, provided he had a full knowledge of the facts, be an answer to the estoppel relied upon. We, again, quote from *Martin* v. *Maine Central Railroad Company*, supra, "the presumption is that every person is acquainted with his own rights, provided he has had reasonable opportunity to know them; and nothing can be more liable to abuse than to permit a person to reclaim property, in opposition to all the equitable circumstances cited, upon the mere pretense that he was at the time ignorant of his title." Citing Pom. Eq. Jur. Sec. 85; *Dixfield* v. *Newton*, 41 Maine, 221; *Cady* v. *Owen*, 34 Vt. 598.

It is also undoubtedly true that, in order to create an estoppel, the conduct, misrepresentations or silence of the person claimed to be estopped must be made to or in the presence of a person who had no knowledge of the true state of facts, and who did not have the same means of ascertaining the truth as did the other party. It is urged in this case that this essential requirement is lacking, because, while Gerald had no knowledge whatever of the ownership of the farm by the Savings Bank, he had the means of ascertaining the true state of the title by consulting the records of the Registry of Deeds in that county. It is true that a person will not be estopped merely by his silence and failure to disclose facts that may be ascertained by an examination of public records, when the situation is not such as to place upon him the duty of making known the truth. In such a case he may rely upon the notice given to all by the public records. *Mason* v. *Philbrook*, 69 Maine, 57. But where the situation is such that it is his duty to speak, as where inquiries are made of him, or where, instead of merely remaining silent, he does some positive

affirmative act, which would naturally have the effect of misleading or deceiving one, then the mere fact that the truth can be ascertained by an examination of the records, does not prevent the operation of the estoppel against him. *Hill* v. *Blackwelder*, 113 Ill. 283; *Robbins* v. *Moore*, 129 Ill. 30; *Morris* v. *Herndon*, 113 N. C. 237; *David* v. *Park*, 103 Mass. 501; Pom. Eq. Jur., Vol. 2, sec. 895; 11 A. & E. Encyl. of L., 2d Ed., 436, and cases cited. The law distinguishes between silence and encouragement. While silence may be innocent and lawful, to encourage and mislead another into expenditures on a bad and doubtful title would be a positive fraud that should bar and estop the party. *Knouff* v. *Thompson*, 16 Pa. St. 364. In this case, the defendant relies not merely upon the plaintiff's silence and failure to disclose the truth, but equally upon his acts of positive intervention whereby he assumed to act as owner of the farm with a right to sell this material, and later to receive the pay therefor, at least in part. Gerald did not have the same means of information that the plaintiff had. The plaintiff knew that he was not the owner and had no right to sell this material, while Gerald had no knowledge of the truth, and his only means of obtaining knowledge as to the truth was to consult the records of the Registry of Deeds, something more than would be expected of a person of reasonable care in making this comparatively small purchase of road building material.

Relying upon his belief that the plaintiff was the owner and had the right to contract with him for the removal of the gravel, which belief the conduct of the plaintiff was well calculated to induce, Gerald acted and was placed in the position where he would be substantially injured if this action of trover can be maintained by the plaintiff, in this respect at least, if in no other. On Dec. 4, 1902, he paid the plaintiff, as we have seen, the sum of $25., either in full or partial payment for this gravel. It is urged by the plaintiff that this payment cannot be relied upon for the purpose of showing that Gerald or the Railroad Company was injured by reason of these representations, because of the rule undoubtedly well established, that representations made or acts done subsequent to the change of position by the other party, which they do not invite or influence, will

not operate as an estoppel. This principle is not applicable. The payment was made as a part of the original transaction, although some months after the gravel was taken. It was made to the plaintiff as owner because of the belief that he was owner. Up to that time, and for almost a year afterwards, Gerald had no knowledge or notice to the contrary. The conduct of the plaintiff at that time, in receiving this money as owner, and in inducing Gerald to believe that he had a right to so take it, and his silence in not informing Gerald at that time of the true facts, are a part of the conduct relied upon to work an estoppel. This payment was made and received almost a year prior to the assignment to the plaintiff from the bank, and prior to the commencement of this action, while the plaintiff was still treating the premises, in his transactions with Gerald, as the owner with a right to sell materials therefrom as he saw fit.

In regard to the receipt by the plaintiff of this payment, it further appears that at the trial of this case the counsel for the plaintiff made an offer that this sum of $25. might be deducted by the jury from any amount that should be found by them to be due from the defendant to the plaintiff. But this offer cannot at all affect the result. When this action was commenced the plaintiff was estopped from the maintenance of it by reason of the facts which we have referred to. Being thus estopped, he cannot prevent the operation of the estoppel by an offer made during the course of the trial to give credit in this action of trover for the sum of money which he had previously accepted as owner.

In a word, then the plaintiff, with full knowledge of all of the facts, by his conduct and his silence, well calculated to have that effect, induced Gerald, who had no knowledge, and did not have equal means of information, to believe that he, the plaintiff, had the right to contract for the sale of this gravel; he knew that Gerald was relying upon his conduct and would act upon the belief thereby induced; Gerald, relying upon this belief, did act and has been placed in a position of substantial injury, if this action of trover can be maintained.

Because of the facts stated, and for the reasons given, we are

satisfied that the verdict was wrong and should not be allowed to stand.

Motion for new trial granted. New trial ordered.

JOSEPH H. LITTLEFIELD *vs.* FLORENCE L. PERKINS.

Kennebec. Opinion March 15, 1905.

Gift Inter Vivos. Life Insurance Policy. Promissory Note. Consideration.

1. To constitute a valid gift inter vivos of an insurance policy from a wife to her husband the necessary change of beneficiary must be made during her lifetime.
2. When the only evidence of such a gift was that the wife expressed a wish that the husband should have the whole of the insurance money, and one of the beneficiaries verbally agreed to that, but it did not appear that the husband or wife did or omitted to do anything in consequence of the promise, or in any way suffered thereby, such contract is nudum pactum, and the essential elements of a gift inter vivos or donatio causa mortis are wanting.
3. When a note is given for a certain sum, a part of which is for a good consideration, and the balance is without consideration, and afterwards the amount that is for a legal consideration is paid and endorsed on the note, the note then being without consideration as to the unpaid balance, no recovery can be had upon it.

On report. Judgment for plaintiff.

Assumpsit on account annexed and promissory note, brought in the Superior Court for Kennebec County.

The case is stated in the opinion.

Brown & Brown, for plaintiff.

F. W. Clair, for defendant.

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

STROUT, J. Plaintiff's wife had a policy on her life for one thousand dollars, payable to her legal representatives. The premiums were all paid by plaintiff. During Mrs. Littlefield's last

sickness she and her husband learned that upon her death one-half of the amount would go to her father and mother as her heirs, and the other half to her husband, as she had no children. Some correspondence was had with the insurance company in regard to a change of beneficiary to the end that the husband should take it all, and a blank for that purpose was furnished by the company, but the blank was not signed by the wife and the change was not made. Plaintiff says that before her death, his wife told him she wanted him to have it all, and that her mother, the defendant, was present and agreed to it. This is denied by the mother. After the death of the wife, her father was appointed her administrator, and received the one thousand dollars from the insurance company, and at the same time gave the plaintiff five hundred dollars and retained the other five hundred for himself and his wife. Shortly afterwards the defendant, at plaintiff's request, gave him the note in suit for three hundred and thirty dollars, being for the two hundred and fifty dollars insurance money she received as heir of her daughter and eighty dollars which plaintiff let her have to go towards purchase of a place. The eighty dollars has been paid and endorsed on the note. As to the balance the defense is a want of consideration.

Plaintiff claims as a gift from his wife, but the essential elements of a gift inter vivos or donatio causa mortis are wanting.

The eighty dollars loaned was a valid consideration for the note, but if there was no consideration for the balance of two hundred and fifty dollars, the eighty dollars having been paid, the action upon the note by the original payee must fail. *Parish* v. *Stone*, 14 Pick. 198.

Assuming the plaintiff's statement to be true that his wife expressed a wish that he should have the whole of the insurance money, and that the defendant agreed to this, it does not appear that the plaintiff or his wife did or omitted to do anything in consequence of the promise, or in any way have suffered thereby. The defendant by statute was entitled to one-fourth of the money, as heir at law. She received nothing for her promise to release it, if she made any. True, she subsequently gave the note, thus, perhaps, admitting a moral obligation, but this is not a sufficient legal consideration to render her liable. The contract was nudum pactum. See *Parish* v. *Stone*, supra;

Ware v. *Adams*, 24 Maine, 179; *Phelps* v. *Dennett*, 57 Maine, 491; *Fuller* v. *Lumbert*, 78 Maine, 325; *Lambert* v. *McClewley*, 80 Maine, 481.

The note being without consideration as to the unpaid balance, no recovery can be had upon it.

In the writ there is a count for seventeen dollars for costs of a prior suit against this defendant, which was discontinued by plaintiff. He testifies that the suit was discontinued by agreement of the parties and that in consideration thereof the defendant agreed to pay three dollars, as part of the costs. The defendant does not deny this. If such was the agreement, and the suit was discontinued upon defendant's promise, there was a sufficient consideration for her undertaking. It follows that there must be

Judgment for plaintiff for three dollars and interest from date of the writ.

CHARLES W. FALL *vs.* OSCAR E. FALL.

York. Opinion March 18, 1905.

Adverse Possession. Evidence. Declarations in Disparagement of Title.

The declarations of a person under whom title is claimed are receivable against the successor, if at all, on the theory that there is sufficient identity of interest to render the statements of the former equally receivable with the admissions of the latter.

The most common instances in which such declarations have been admitted in evidence are those in which the declarants were in possession, being explanatory of their possession.

Titles of real estate being matters of record, sound policy requires that they should not be affected by mere declarations of the parties, and that declarations in disparagement of titles should be shown to have been made in good faith.

It is indispensable to the admissibility of declarations against a tenant that he should be the declarant's successor in title; also that they be in reference to facts provable by parol, and that they tend to establish such facts.

Declarations which do not bear upon the quality of any possession of the declarant, and have no reference to the identity or location of boundaries or monuments, or to any matter concerning physical conditions or use, are properly excluded; and where their sole purpose is to show that the title which the record showed to exist did not in fact exist, they are not admissible, whether the declarant was in or out of possession, or is living or dead.

On exceptions by plaintiff. Overruled.

Real action.

The case is stated in the opinion.

William S. Pierce and George F. and Leroy Haley, for plaintiff.

James A. Edgerly and William S. Matthews, for defendant.

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

PEABODY, J. This is a real action brought to recover possession of a lot of woodland situated in Berwick, York County, Maine.

The plea is the general issue.

The demandant offered evidence of the declarations of Mary Fall, made while she held the record title to the demanded premises, that she was not the owner of the lot described in the writ and that the demandant was the owner. This evidence was excluded and exceptions taken by the plaintiff; and the court ordered a nonsuit, to which the plaintiff also excepted. The case is before the law court on these exceptions with agreement on the part of the plaintiff's counsel that if the rulings of the presiding justice in excluding the evidence offered are correct, there is no evidence to support the plaintiff's case and the nonsuit is to be confirmed.

The land in question formerly belonged to Tristram Fall, the father of the plaintiff and defendant, who died in 1871. In 1866 he conveyed the premises to his wife, Mary Fall, the mother of the parties, by deed, which appears to have been recorded.

The demandant was a minor at the date of the conveyance to his mother. It was made to her at his request, and upon receiving the title, she mortgaged the land for the purpose of raising money for

the payment of the grantor's debts, and the demandant on becoming of age signed the mortgage note and subsequently paid the same. The record title remained in Mary Fall until her death in 1898.

The demandant alleges in his writ that the defendant is in possession, and this the defendant by his plea admits. This possession is good against the plaintiff until he establishes a better title by affirmative evidence. He offers no deed of conveyance but relies, according to his informal statement of title, upon the fact that he has occupied the demanded premises by "peaceable, continuous, adverse, uninterrupted possession of and dominion over said land; said possession being begun under color of title and continuing for more than twenty years prior to the date of the plaintiff's writ." He testifies that he entered into possession in 1866, in the lifetime of his father while he held the record title, and continued in possession until his mother's death in 1898. He offered in evidence the declarations of his father, Tristram Fall, in disparagement of his title before he conveyed the real estate to his wife, Mary Fall. This evidence was excluded by the court and forms no part of the exceptions.

The demandant's alleged adverse possession to be available in acquiring title against the record title of Mary Fall must have continued for twenty years. It is claimed that the declarations of Mary Fall, although made when she was not in possession of the premises, are admissible against her and those in privity with her in respect to the demanded premises because in disparagement of her record title.

It is an established rule of evidence that the declarations of a person under whom title is claimed are receivable against the successor so claiming, if admissible at all, on the theory that there is sufficient identity of interest to render the statements of the former equally receivable with the admissions of the latter himself.

The most common instances in which declarations in disparagement of title have been held admissible in evidence are those in which the declarants are in possession, being explanatory of the nature of their possession. Possession being prima facie evidence of seizin in fee simple, a declaration qualifying it is admissible. 1 Greenleaf on Evidence, sec. 109; *Peaceable* v. *Watson*, 4 Taunton, 16; *Marcy* v. *Stone*, 8 Cush. 4; *Osgood* v. *Coates*, 1 Allen, 77; *Morton* v.

Pettibone, 7 Conn. 319; *Pickering* v. *Reynolds*, 119 Mass. 111; *Ware* v. *Brookhouse*, 7 Gray, 454.

In the last case cited it was sought to introduce declarations of a deceased prior owner that he had title to the right of way in dispute. They were held inadmissible as self-serving declarations. The court say: "But there are, we think, the soundest reasons why such declarations should not be admitted. The first is, that titles to real estate are matters of record, and wisely so; and that sound policy obviously requires that we should carefully guard against their being affected and impaired by mere acts in pais, and, a fortiori, by mere declarations of parties. Secondly, that as to declarations made in disparagement of title and against the interest of the party, we have the evidence of their being made in good faith."

In *Sullivan Granite Company* v. *Gordon*, 57 Maine, 522, Appleton, C. J., says: "In all the cases in this state and in Massachusetts, in which declarations have been received, they related to the land in controversy, were made by the declarant while in possession, and were offered in evidence against him or those deriving title under him."

But the cases in which a party and his privies may be affected by his admissions are limited to those where the subject matter of admission is subject to parol proof. The rule does not apply to matters which can only be proved by written evidence. 3 Phillips on Evidence, C. & H. notes, 266; *Keener* v. *Kauffman*, 16 Md. 296; *Dorsey* v. *Dorsey*, 3 Har. & J. 426. In *Jackson* v. *Cary*, 16 Johnson, (N. Y.) 302, Spencer, C. J., says: "Parol proof has never yet been admitted to destroy or take away a title." Wharton on Evidence, sec. 1156; *Phillips* v. *Laughlin*, 99 Maine, 26.

It is indispensable to to the admissibility of declarations against the tenant on the ground of privity in estate that he should be the successor in title to the demanded premises. It is claimed by the defendant that such privity of estate has not been shown in this case; but the exceptions expressly state that, "The defendant attempted to prove the declarations of Mary Fall, under whom the tenant claimed by will, while the record title was in her." Although the evidence reported does not show the source of the tenant's title, it is not in

conflict with the statement in the exceptions. It is indispensable also that the declarations be in reference to facts provable by parol, and that they tend to establish such facts. In *Phillips* v. *Laughlin*, 99 Maine, 26, supra, Wiswell, C. J., after a review and an analysis of a wide range of authorities cited, makes a carefully limited generalization, namely, "that such declarations against interest, (namely, of a person while in possession of land) 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 the 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 in the same case, it was also held that "it is not competent to prove declarations made out of court by the predecessor in title of a 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."

In the case at bar the excluded declaration bore not upon the quality of any possession of the declarant, and it had no reference to identity or location of boundaries or monuments, or to any matter concerning physical condition or use. Its sole purpose was to destroy what was apparently an invulnerable muniment of title by deed and record, and to show that the title which the record declared did exist, did not, in fact, exist. We think such declarations limited to such a purpose are not admissible, whether the declarant was in or out of possession, at the time, or whether she is now dead, or alive. The case comes within the doctrine of *Phillips* v. *Laughlin*, supra, for we conceive that there can be no real distinction, in principle, between the case of a tenant holding by inheritance, and one holding by deed. In either case such declarations as the one in question, are open to the same objection, namely, that they do not tend to prove any fact in disparagement or destruction of a record title, which is provable by parol.

Exceptions overruled.

CHARLES K. MILLER, Judge of Probate,

vs.

WILLIAM J. KELSEY AND T. R. PILLSBURY.

Knox. Opinion March 18, 1905.

Guardian's Bonds. Discharge of Surety. Action. R. S., c. 74, § 3.

A second bond, for twice the amount of the ward's estate, given by a guardian to meet requirements to entitle him to receive funds in another state, will not, when filed and accepted by the Judge of Probate, supersede the original bond in the absence of statutory proceedings for the discharge of the sureties from liability; and both bonds are valid, constituting cumulative, concurrent security for the entire management of the estate.

A citation to the guardian to settle an account of his guardianship, is generally a necessary preliminary to a right of action against the sureties on a guardian's bond, because it is the proper mode of instituting judicial inquiry to ascertain their liability; but it is not indispensable when special circumstances make the citation impossible or unnecessary.

Where the guardian has absconded to parts unknown, and has converted to his own use the entire property of the ward, consisting of a single item of money, and an accounting could not change the liability of the sureties, a suit may be brought and maintained against them without citing the principal.

Failure to faithfully discharge the trust, and neglect to return an inventory as required by law, are breaches of the condition of the bond, and give a right of action thereon to the Judge of Probate, and upon judgment, the right to have execution issued in his name, for so much of the penalty as may be adjudged on trial to be just.

On report. Judgment for the plaintiff.

The case is stated in the opinion.

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

C. M. Walker and L. R. Campbell, for defendants.

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

PEABODY, J. This is an action on a probate bond authorized by Charles K. Miller, Judge of Probate for Knox County, and brought in his name against the sureties, William J. Kelsey and T. R. Pillsbury, the principal, Frank A. Grant having absconded. The case comes before the law court on report. The principal on the bond then of Rockland, Maine, was appointed guardian of a minor, Lero F. Fairfield, July 15, 1902, by the Probate Court of Knox County, and on that date filed the bond in suit in the sum of $2,000.

There being funds belonging to the minor in Massachusetts in the hands of an administrator amounting to $1100, it was necessary for the guardian, to entitle him to receive the same, to file a bond for double the amount in accordance with the requirements of the statute of Massachusetts. The bond in suit not being for the required amount, it was intended to file an additional bond for $500, but as it was supposed that the new bond would be signed by the same sureties it was made for $2500. T. R. Pillsbury declining to become a surety on the second bond, it was signed by William J. Kelsey and Fuller C. Blackington as sureties and was filed in the Probate Court August 19, 1902; and thereupon the guardian received the funds from the foreign administrator. It appears from the statement of facts that Mr. Pillsbury requested the guardian's attorney to have the first bond withdrawn. He communicated this request to the Judge of Probate, who expressed doubt as to whether it could be withdrawn; and it further appears that the Judge of Probate considered that thereafter the responsibility would be under the new bond. The attorney did not understand that he was authorized by Mr. Pillsbury to petition for his discharge as surety on the bond and no petition was filed nor any decree made by the Judge of Probate. R. S., chapter 74, section 3, prescribes the method by which the surety or sureties on a probate bond may be discharged from liability and the scope of such discharge. The statute is as follows:—"On application of any surety or principal on such bond, the Judge, on due notice to all parties interested may, in his discretion, discharge

the surety or sureties from all liability for any subsequent, but not for any prior breaches thereof, and may require a new bond of the principal, with sureties approved by him." It is claimed that the second bond was given and accepted by the Judge of Probate in substitution for the bond in suit, and that the defendants were thereby discharged from liability for any subsequent default of the principal. In the absence of statutory proceedings for discharging the sureties, in view of the existence of the statute quoted, the filing of the new bond and its acceptance and approval by the Judge of Probate cannot have the effect by implication to supersede the original bond. Both bonds were valid and constituted cumulative and concurrent security for the entire management of the estate. *Governor* v. *Gowan*, 25 N. C. 342; *Hutchcraft* v. *Shrout's Heirs*, 1 T. B. Munroe, (Ky.) 206, 15 American Decisions, 101; *Loring* v. *Bacon*, 3 Cushing, 465; *State* v. *Mitchell*, 132 Ind. 461.

The conditions of a guardian's bond as prescribed by statute are as follows:—

"I. For the faithful discharge of his trust.

II. To render a true and perfect inventory of the estate, property, and effects of his ward, within the time limited by law.

III. To render a just and true account of his guardianship when by law required.

IV. At the expiration of his trust, to deliver all monies and property, which, on a final and just settlement of his account, appear to remain in his hands."

It is contended by the defendants that the action was prematurely brought because the principal was not cited to settle the account of his guardianship. This in the absence of special circumstances making a citation impossible or useless, is the legal prerequisite of a right of action against sureties on a guardian's bond. It is the proper mode of instituting a judicial inquiry in order to ascertain the liability of the sureties. It has been so decided in this state. *Bailey* v. *Rogers, et al.*, 1 Maine, 186; *Nelson* v. *Jaques*, 1 Maine, 139, following Massachusetts decisions, *Dawes* v. *Bell*, 4 Mass. 106. But it is admitted by the agreed statement of facts, that the principal on this bond resides, "Beyond the limits of the state being now without the

state, in parts unknown" and that he has "embezzled and converted to his own use all the property belonging to his ward." There can be no legal requirement of a citation which is impossible, and by reason of the circumstances of this case it is wholly unnecessary. The whole sum of $1100 which came into the hands of the guardian as a single item, has been converted to his own use, and an accounting could not possibly change the facts upon which the liability of the sureties depends; and the party in interest will not be compelled to resort to this preliminary, before bringing suit upon the bond, *Long* v. *Long*, 142 N. Y. 545; *Sage* v. *Hammonds*, 27 Gratt, (Va.) 651.

It is shown by the agreed statement of facts that there are also breaches of the first and third conditions of the bond. The principal "has used up and converted to his own use all the money and property of said estate, he has not rendered a true and perfect inventory of the estate, property and effects of his said ward within the time limited by law nor any inventory thereof." This gives the plaintiff in his official capacity a right of action, and upon judgment the right to have execution issue in his name for so much of the penalty of the bond as may be adjudged on trial to be just, and due to the person for whose use the action is brought. *Fuller* v. *Wing*, 17 Maine, 222; *Gilbert* v. *Duncan*, 65 Maine, 469. There is clearly due to the ward, Lero F. Fairfield, the sum of $1100 and interest.

Judgment in favor of the Judge of Probate for the penal sum of the bond. Execution to issue in his name for $1100 and interest from the date of the writ December 22, 1903, for the use of Lero F. Fairfield.

JOHN C. ERICKSON

vs.

MONSON CONSOLIDATED SLATE COMPANY.

Penobscot. Opinion March 20, 1905.

Master and Servant. Contributory Negligence. Assumption of Risk. Dynamite.

The relation of master and servant is contractual, and the law by presumption incorporates into the contract reciprocal duties.

The master is obliged to provide the servant with a reasonably safe place in which to perform his labor having reference to the nature of the work, and if he is inexperienced to instruct him and warn him of the existence of particular dangers, so that he may be able to decide with discretion whether he will assume the hazards of the employment.

The servant is bound to use reasonable care, and to assume ordinary risks incident to the business, those which are obvious or which he ought to know and appreciate, and those pointed out by the master.

It is not negligence to use dynamite in slate quarrying, but on account of its great explosive power it is a recognized element of danger in such work, and proportionate care is required of both master and servant in its use.

It would not be negligence in law to leave unexploded cartridges of dynamite in old holes in the pit of the quarry when new holes are being drilled, but it would be the duty of the master to warn a servant of this particular danger, unless he knew or ought to know that they were frequently left from imperfect explosions. Instructions of the foreman to the plaintiff, when drilling "to set his drill as far as he could from the old holes and not to bother them," were not only words of direction but of warning, and would ordinarily fulfil the defendant's duty as indicating a condition of danger.

Where, in an action to recover damages sustained from an accidental explosion of dynamite, the plaintiff was an adult of good intelligence, familiar with slate quarries, and of the particular quarry by working for two years on the dump, and running the hoister within two rods of the pit, and knew that the men were constantly using dynamite, knew it to be a dangerous explosive and that unexploded cartridges frequently remained in the place where he was operating the drill, and was directed to avoid proximity to the old holes, and he set his drill within four or five inches from one containing dynamite, without ascertaining its location by

clearing the surface of the ledge, and the explosion was caused by the action of the drill, *held*, that he was guilty of contributory negligence.

Where a servant receives positive orders from the master as to the manner in which he is to do his work, this imposes upon him a duty, and failure to perform it is prima facie evidence of his negligence.

On motion by defendant. Sustained.

Action on the case to recover damages for personal injuries sustained by the plaintiff from an accidental explosion of dynamite in the slate quarry of the defendant where the plaintiff was engaged in operating a steam drill in drilling holes for the purpose of blasting out slate. The plaintiff recovered a verdict for $4000. Thereupon the defendant filed a general motion for a new trial.

The case is stated in the opinion.

A. L. Blanchard and Louis C. Stearns, for plaintiff.

Frank E. Southard, for defendant.

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

PEABODY, J. This action was brought to recover damages sustained by the plaintiff from an accidental explosion of dynamite in the slate quarry of the defendant at Monson, Maine. The plaintiff was employed by the defendant company and at the time of the accident was engaged in operating a steam drill in drilling holes for the purpose of blasting out slate. The charge of dynamite which caused the accident had been left unexploded in a hole previously drilled by the defendant. This fact was not known to the defendant or to the plaintiff.

The plaintiff was under the supervision of his brother who had employed him ten days before and had instructed him how to operate the drill. The steam drill and boiler were connected by a rubber hose six or seven feet long so that holes might be drilled for a distance of the length of the hose and when drilling at such a distance the operator must leave the drill and go to the valve to turn on steam.

At the time of the accident the plaintiff had drilled six or seven holes and set his drill for another at about the full length of the hose

and had requested a co-servant to turn on steam. He then put one foot on the weight to hold the drill down on the ledge. He had previously prepared the place to set the drill by the use of a steel wedge called a gouge, and with it had cut holes in the ledge for the three feet of the drill. There were snow and ice at the bottom of the pit and with a pick-axe and shovel he had cleared them away. The place cleared was about six inches wide and eighteen inches long. While he was holding the drill set in motion by the steam turned on at his request, the explosion occurred. No other cause for it is assigned than the percussion of the drill directly upon the dynamite or the concussion from its action upon the ledge rock.

The relation of master and servant is contractual, and the law by presumption incorporates into the contract reciprocal duties. The master assumes the obligation to provide the servant with a reasonably suitable and safe place in which to perform his labor, having reference to the work in which he is engaged. *Hopkins* v. *O'Leary*, 176 Mass. 258; *Buzzell* v. *Laconia Mfg. Co.*, 48 Maine, 113; *Shanney* v. *Androscoggin Mills*, 66 Maine, 420; *Cunningham* v. *Bath Iron Works*, 92 Maine, 501; he is also bound to warn an inexperienced servant of any particular danger incident to the occupation and to give him such instruction as shall enable him to decide with discretion whether he will assume the hazards of the employment. *Welch* v. *Bath Iron Works*, 98 Maine, 361; *McMahon* v. *Ida Mining Co.*, 95 Wis. 308; *McEllingott* v. *Randolph*, 61 Conn. 157; *Smith* v. *Peninsula Car Works*, 60 Mich. 501. The law of master and servant requires of the servant the duty of using reasonable care, and of assuming ordinary risks incident to his employment including the negligence of a fellow servant, those which are obvious or which with reasonable care he ought to know and appreciate, and those pointed out by the master. This rule is consistent with justice and public policy. The master is in no sense an insurer of the safety of his servant and the law gives no indemnity against the consequences of recklessness. *Mundle* v. *Hill Mfg. Co.*, 86 Maine, 400.

A corporation acts through its agents and the special duties under consideration devolve upon a vice principal. At the time of the accident the brother of the plaintiff who was in charge of the outside

crew of the quarry, consisting of men on the dump, the hoisters, and the drill-men, must be considered as acting in this representative capacity; and if any safeguards were required or any information necessary to enable the plaintiff to understand and appreciate the dangers of working the drill in the pit, under the existing conditions it was the duty of this foreman to furnish them. The evidence as to what instructions he gave the plaintiff is vague. His testimony on this subject tended to negative any definite instructions or cautions in regard to unexploded cartridges, but it did show that he told the plaintiff to set his drill as far as possible from the old holes.

The facility with which quarrying is done by the use of dynamite, makes it recognized as indispensable in carrying on the business. Its dangerous character requires a proportionate degree of care, but the legal standard is reasonable care. The alleged negligence of the defendant consisted not in using dynamite, but in allowing unexploded cartridges or portions of them to remain in holes in the pit of the quarry where the plaintiff was working. The holes left after the explosion could be seen when the debris was removed and it might be possible to explode them before other holes were drilled, or to indicate them by cautionary signals; but the omission of such precautions would not be negligence in law. The presence of these holes was an element of danger in the work. The defendant's negligence must therefore depend upon the question of his duty to notify the plaintiff of the particular danger and of his fulfilment of this duty. If the plaintiff, from his experience gained in working about the quarry, ought to have known and appreciated the danger, no duty rested upon the master to give him special warning. The instruction given him by the foreman "to set his drill as far as he could from the old holes and not to bother them," were words not only of direction but of warning, but if they may be considered as in themselves not sufficiently definite to cause an inexperienced man to appreciate them as indicating a condition of danger, we think that the plaintiff in view of his general familiarity with the methods of blasting in this quarry, and the directions he had received, cannot recover in this action by reason of his contributory negligence. He was thirty years of age; he had been familiar with slate quarries part of the time for

ten years and for two years prior to the accident, had worked on the top of the dump in this quarry, and for a year and a half had run the hoister about ten rods from the pit in which the accident occurred. He knew that the men in the pit were using dynamite constantly, and received signals from them when explosions were made, he knew the nature of the explosive and that it was dangerous, and he knew, what was common knowledge among the quarry-men, that unexploded cartridges remained in the old holes. He was instructed by his brother how to run the drill and was directed in drilling to avoid proximity to these old holes. After the accident an examination showed that the hole was being drilled into the ledge but four or five inches distant from the old hole which must have contained dynamite. The positive direction which he received required him to ascertain the location of the holes before setting his drill. To do this it was necessary for him to clear a wider area than the evidence shows he did. He had sufficient tools at hand and a supply of steam and hot water, for the removal of the snow and ice from the surface of the ledge. He failed to do this sufficiently to expose to view the hole containing the unexploded dynamite. *Welch* v. *Bath Iron Works*, 98 Maine, 361, supra. The direction as to the manner of doing his work imposed upon him a duty and his failure to perform it is prima facie evidence of his negligence. Shearman & Redfield on Negligence, sec. 13 a; Deering on Negligence, sec. 211.

Motion granted.

JOSEPH ROVINSKY *vs.* NORTHERN ASSURANCE COMPANY.

SAME

vs.

FIRE INSURANCE COMPANY OF THE COUNTY OF PHILADELPHIA.

Oxford. Opinion March 29, 1905.

Fire Insurance. Fraud. False Swearing. False and Excessive Valuation. Forfeiture. Incredible Evidence.

If a plaintiff falsely and knowingly inserts in his sworn schedule of loss, as burned, any single article which in fact was not in the house or was not burned, this would constitute a fraud on the company, and such plaintiff cannot recover anything on his policy.

If a plaintiff knowingly puts a false and excessive valuation on any single article, or puts such false and excessive valuation on the whole as displays a reckless and dishonest disregard of the truth in regard to the extent of the loss, such knowing over-valuation is itself fraudulent and such plaintiff cannot recover at all.

It is true that in the case at bar, the plaintiff and his wife gave positive evidence in support of their claim but it is in itself so unreasonable and incredible and so overborne by established facts and circumstances that the court would not be justified in accepting it as the basis of a decision. Mere words are not necessarily proof, and courts are not compelled to allow justice to be perverted because incredible evidence is not contradicted by direct and positive testimony. Such cases call for the supervisory power of the court.

On motion and exceptions by defendants.

Motion sustained. Exceptions not considered.

Assumpsit upon fire insurance policies. The two actions were tried together. Plaintiff recovered a verdict for $526.50 in the first action, and for $1,053.00 in the second action. Defendants filed general motions for a new trial and also filed certain exceptions. The exceptions were not considered.

The material facts are sufficiently stated in the opinon.

John P. Swasey, for plaintiff.

Leslie C. Cornish and Norman L Bassett, for defendants.

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

WHITEHOUSE, J. The plaintiff had $1500 insurance on his household goods, furniture and wearing apparel, in a small house at Rumford Falls, owned by J. W. Withee. The house was not greatly damaged by the fire, but the plaintiff's schedule of loss on his personal property, amounted in the aggregate to $2076.00.

The defendants contended in the first place that the fire was set either by the direct act of the plaintiff or by his procurement. Secondly, it was contended, that the plaintiff attempted a fraud upon the companies in his "proof of loss," first, by knowingly including in his schedule numerous valuable articles not in the house at the time of the fire and not destroyed, and secondly, by knowingly placing an excessive and fraudulent valuation on numerous other articles in his schedule.

It may be conceded that the suspicious facts and circumstances tending to show an apparent preparation for a fire and to establish the fact of its incendiary origin, are not sufficiently conclusive to warrant a judicial finding that the fire was intentionally set for the purpose of defrauding the companies; but in the light of these facts and circumstances, the true color of much of the evidence relating to the proof of loss may be more clearly seen.

The fire occurred Oct. 10, 1902, at 4 o'clock in the morning. There was no person in the house at the time. The plaintiff's wife, to whom he had been married about a year left two weeks before for a visit to her parents in Montreal. The two roomers who occupied a chamber in the house some part of the time had left, one before the departure of the wife, and one a few days after. The plaintiff was stopping that night at his father's house on another street.

The plaintiff's house consisted of three small rooms below, parlor, dining room and kitchen, and three chambers above. The single chimney in the house was so located as to receive funnels from each lower room and also from the hallway above; but for several months before the fire only the kitchen stove had been set up for use. Next to the chimney there was a dining room closet 36 inches wide and

17 inches deep. The plaintiff says he built or attempted to build a coal fire in the kitchen stove about 8 o'clock in the evening before the fire broke out at 4 o'clock in the morning, although he did not intend to sleep there that night. He says he built it in the ordinary way, closed the drafts and left everything all right when he went home between 9 and 10 o'clock. But this attempt to build a coal fire was manifestly unsuccessful and the unburned coal found the next day in the kitchen stove and the absence of any defect in the chimney before the fire afforded an apparent refutation of the theory that the fire was caused by an overheated stove.

The fire was promptly extinguished, and it appears to have been confined to the central part of the house near the chimney and to this dining room closet. The paper and excelsior raked out of the debris at the bottom of this closet with the odor of kerosene upon them had great significance respecting the probable origin of the fire. The plaintiff's evidence relating to contents of a small sheet iron stove which fell from a closet above and a can of kerosene carried up stairs to fill lamps in a house lighted by electricity does not satisfactorily explain the conditions existing at the bottom of this closet. The extent and character of the house furnishings existing outside of this small closet could be for the most part readily discovered after the fire; and the evidence shows that the house alleged to have contained more than $2000 worth of goods and apparel had been stripped of all its most valuable furnishings and ornaments and was in no condition for Mrs. Rovinsky to resume housekeeping after her two weeks visit with her parents in Montreal.

(1) All the evidence tending more directly to show fraud in the plaintiff's proof of loss considered in connection with these facts and circumstances and with the plaintiff's improbable explanation is utterly irreconcilable, with the plaintiff's theory.

In the first place, the conclusion is irresistible that the plaintiff's schedule of loss embraced articles not in the house at the time of the fire. It includes at least 26 articles of clothing of the alleged value of $973.00 claimed to have been hung in this dining room closet 36 inches by 17 inches in size. Among these are a Persian lamb coat, valued at $250, a gray lamb coat at $90.00, a satin dress valued at

$125.00, a black silk dress at $75.00, a reception dress at $40.00, one silk tea gown at $17.00, one silk waist at $15.00, one silk waist $12.00, one overcoat $35.00, a wedding suit $30.00, one I. O. O. F. uniform, $35.00, and a silk umbrella $4.00. It is unreasonable that these furs should have been taken out of their summer packing in September. It is utterly improbable that if taken out, they should have been hung in this little dining room closet intended for dishes and not for clothes and unprovided with hooks, in preference to the spacious closet 5 feet by $3\frac{1}{2}$ feet opening out of Mrs. Rovinsky's own chamber which was found to contain only one old skirt and an old coat. It is incredible that she should have made this first visit to her old home after her marriage without taking with her at least such part of this fine apparel as was appropriate to the season. It is claimed on part of the plaintiff that she took with her only a dress suit case, but the weight of reliable evidence discloses the fact that two trunks left this house the day of her departure and that these were not the trunks of the roomers. If it were possible that all of those articles could have been packed in such a closet, it is utterly improbable that they should have been wholly consumed by a fire so promptly extinguished. The floor of the closet was not burned and the wooden door on which some of the clothes were said to have been hung was only burned at the top and still turned on its hinges. No identifying relics, either buttons, hooks, umbrella wires or other metallic attachments could be found in the debris.

Again in addition to the pictures valued at $123.00, and the mirror at $48.00, the schedule comprises items of silverware, and fancy articles of the alleged value of $239.00, in regard to which, the plaintiff's evidence is equally contrary to reason and probability. The inference is that if all these articles were ever in the house, the most of them had been removed and were not there at the time of the fire.

(2) The evidence showing a fraudulent over-valuation is still more positive and convincing. The law governing both of these propositions is settled in this state in *Dolloff* v. *Insurance Co.*, 82 Maine, 267. " If the plaintiff falsely and knowingly inserted in his sworn schedule of loss, as burned, any single article which in fact was not

in the house, or was not burned, this would constitute a fraud on the company and the plaintiff cannot recover anything on his policy. If the plaintiff knowingly put a false and excessive valuation on any single article, or put such false and excessive valuation on the whole as displays a reckless and dishonest disregard of the truth in regard to the extent of the loss, such knowing over-valuation is itself fraudulent and the plaintiff cannot recover at all." The charitable considerations applied in *Hanscom* v. *Ins. Co.*, 90 Maine, 335, utterly fail to explain or excuse the remarkable schedule presented in this case. The whole amount of the goods purchased of the Atherton Co., the year before, to furnish the entire house, was $325.00, at the prices then charged for goods sold on the installment plan, the plaintiff paying $60.00 at the time of the purchase. These were put into the schedule at $484.00 an increase of $159.00. The plaintiff's lease of these goods specifying the value of each item was doubtless in his possession after the fire. The evidence to the contrary is improbable and unreliable. The order in which he stated the items in his schedule of loss corresponds to that in the lease too closely to be the result of chance. He must have had access either to the original lease or to the town record in which the lease was recorded. The price of the velvet carpet appears to have been raised from $31.50 to $70.00. This appeared to be such a glaring instance of over-valuation that the plaintiff deemed it specially necessary to explain that this particular velvet carpet, precisely 28 yards, was a gift from his father and that he had turned the Atherton carpet over to his father in exchange. But it would seem from the evidence that he must have had notice of the gift from his father before the receipt of the Atherton goods and that he had abundant opportunity to countermand the Atherton order.

But the plaintiff proffers the further excuse for his over-valuations that the prices had been practically fixed by Mr. Forbush, the special agent of the company. The facts show, however, that this excuse is equally devoid of merit. It appears from the plaintiff's own testimony that the proof of loss was explained to him by the defendants special agent; that he was informed that if he was doubtful about the value of anything he should state it as nearly as he could; and that he

understood when he made oath to it that he was swearing that he had all of those articles in the house and that they were of the value which he gave them.

Thus it clearly appears that the plaintiff did not prepare this schedule and give this testimony under the embarassment which the ordinary householder would experience in attempting to recall specifically a multitude of articles purchased separately, many years before, or to give his judgment or opinion in regard to the exact value of those not purchased by him. The exact prices were here readily accessible, if not actually before his eyes; and the conclusion is irresistible that he wilfully refused to avail himself of the information and knowingly made false statements in regard to the values.

It is true that the plaintiff and his wife gave positive evidence in support of their claim but it is in itself so unreasonable and incredible and so overborne by established facts and circumstances that the court would not be justified in accepting it as the basis of a decision. Mere words are not necessarily proof, and courts are not compelled to allow justice to be perverted because incredible evidence is not contradicted by direct and positive testimony. These cases call for the exercise of the supervisory power of the court.

Verdicts set aside. New trial granted.

FRED A. BENNETT

vs.

DANIEL F. SULLIVAN, et als.

Androscoggin. Opinion March 29, 1905.

Landlord and Tenant. Repairs. Caveat Emptor.

When a landlord leases a dwelling house to a tenant there is no implied warranty that such dwelling house is reasonably fit for habitation, and no obligation on the part of the landlord to make repairs on the leased premises unless he has made an express valid agreement to do so.

The common law rule of caveat emptor is still in force in this state and applies to a lease as well as a sale of property.

The owner of private property owes to a prospective lessee no duty to exercise ordinary care to ascertain and apprise him of unknown defects in the property to be leased where such prospective lessee has equal opportunity to ascertain the defects.

The plaintiff by an oral contract hired from the defendants the middle tenement of the defendants' three story house, coupled with an agreement on the part of the defendants, as the plaintiff alleged, that the defendants would repair said tenement. The plaintiff then entered into the possession and occupation of said tenement. Afterwards the defendants gave the plaintiff permission to use a certain platform, which was not a part of the plaintiff's tenement but was on a level with and assigned to the use of the tenement below, provided the tenant below consented. At the time the plaintiff hired the tenement occupied by him, the use of this platform by the plaintiff was not in contemplation of the plaintiff and the defendants as one of the privileges pertaining to the tenement hired by the plaintiff. By reason of the defective condition of this platform the plaintiff was injured. *Held:* that the agreement of the defendants to repair the middle tenement, if any such were made, cannot be construed to include repairs on the platform.

Also *held*, that even if the defendants did subsequently promise to repair the platform that such promise was no part of the original contract of hiring and did not operate as an inducement for the plaintiff to take the tenement, and as the plaintiff did not threaten to quit the premises if such repairs were not made, such promise, if any were made, was without consideration.

On report. Judgment for defendants.

Action to recover damages for an injury sustained by the plaintiff by reason of the defective condition of a platform on the defendants' premises, one tenement of which was occupied by the plaintiff as a tenant at will.

The case is stated in the opinion.

George C. Wing, for plaintiff.

Newell & Skelton, for defendants.

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

WHITEHOUSE, J. This is an action to recover damages for an injury sustained by the plaintiff Oct. 13, 1903, by reason of the defective condition of a platform on the defendants' premises, one tenement of which was occupied by the plaintiff as a tenant at will. The testimony is reported to this court for a final determination of the rights of the parties.

It is alleged in the plaintiff's declaration that the "plaintiff, at the time of becoming a tenant, was promised by the agent of defendants, that if he would enter into the use and occupation of said premises, or a portion of the same, to be assigned to him, that the same should be put in good repair and in safe condition; that only upon this agreement did he become the tenant of the defendants, and began his occupancy of said premises as such; that the premises were allowed to fall into decay, and by exposure to the weather become rotten and unsafe, all of which the defendants well knew, and which condition of affairs they neglected to correct. And among other appurtenances in connection with said premises was a platform, erected for the purpose of hanging clothes to dry, and for general uses in connection with the occupancy of said premises."

In support of this averment, the plaintiff introduces evidence showing that at the time of the accident he was in the occupancy of the middle tenement of the defendants' three story dwelling house in Auburn at a rental of eleven dollars per month, payable monthly; that at the time he engaged the tenement, about four years prior to the accident, the defendants' agent told him if he would move in he

would "fix it up;" and "see that it is all put in proper shape in the spring." It is not claimed that this agreement was in writing.

The defendant's agent, Mr. Allen, denies that he gave any assurance whatever that he would make repairs on the tenement at any time and testifies that the platform in question at the rear end of the stable was not an appurtenance of the middle tenement engaged by the plaintiff, but of the basement occupied by one Pusy. It also appears from the testimony of the plaintiff's wife that the use of this platform was not expressly included as one of the privileges connected with the plaintiff's tenement at the time of the original hiring but that she obtained permission from Mr. Allen, a few days after they moved in, to use this platform for the purpose of hanging out clothes; and she admits that Mr. Allen then informed her in substance that it could only be used by her with the consent of Mr. Pusy, who occupied the basement. The plaintiff's wife further testifies that some two years afterward her foot went through the floor of this platform on account of its defective condition, and upon her complaint, Mr. Allen said he would "see to it at once." This is also denied by Mr. Allen, it is agreed, however, that no repairs were ever made on this platform during the plaintiff's occupancy of his tenement, prior to the time of the accident, and that he was injured by falling from it on account of the defective condition of the railing.

The law governing the rights of parties in the situation disclosed by this evidence is well settled in this state. It is a familiar rule, in the first place, that in the case of a dwelling house there is no implied warranty that it is reasonably fit for habitation, and no obligation on the part of the landlord to make repairs on the leased premises unless he has made an express valid agreement so to do. *Libby* v. *Tolford*, 48 Maine, 316; *O'Leary* v. *Delaney*, 63 Maine, 584.

In the case at bar, however, it is contended in behalf of the defendants in the first place that upon the plaintiff's own testimony, considered in connection with the undisputed facts in the case, the agreement to repair alleged to have been made by defendants' agent, was within the statute of frauds and could only be proved by some memorandum in writing; and *O'Leary* v. *Delaney*, 63 Maine, 584, is cited by counsel in support of this proposition. In that case the

plaintiff hired a certain tenement of the defendant at a rental of eight dollars per month and the landlord agreed as a part of the contract to repair a certain elevated walk connected with the premises. The presiding judge ruled that the agreement was within the statute of frauds and could only be proved by a memorandum in writing. In the opinion *McMullen* v. *Riley,* 6 Gray, 500, is cited as an authority directly in point to sustain that ruling. In the latter case it distinctly appears that the oral agreement in question was to hire a shop for one year at a rental of $125.00 a year, and this agreement was declared to be within the statute of frauds. But it is not apparent from the statement of facts in *O'Leary* v. *Delaney,* that the oral agreement there in question might not have been performed within one year from the time it was alleged to have been made. Furthermore there were two other grounds more fully considered in that case upon which the decision appears to have been based.

It is unnecessary to determine, however, whether or not, this dictum in *O'Leary* v. *Delaney,* with respect to the statute of frauds was warranted by the law and the facts of that case, for it has been seen that in the case at bar it distinctly appears from the evidence that the oral agreement set up by the plaintiff was one to be performed in the spring, within six months from the time it was alleged to have been made.

But assuming that the alleged agreement of the defendant's agent to "see that it is all put in proper shape in the spring" was not within the statute of frauds and was capable of being proved by parol, there are still insuperable obstacles to the maintenance of the plaintiff's action for damages.

It satisfactorily appears from the evidence that the platform in question was not a part of the plaintiff's tenement but was on a level with and assigned to the use of the tenement below. It was provided with facilites for hanging out clothes, superior to those found on the piazza connected with the plaintiff's tenement. For the accommodation of the plaintiff's wife the defendant's agent gave her permission to use the platform, a few days after they took possession, provided the tenant below consented. According to the allegations in the writ and the testimony introduced by the plaintiff, the defendants'

general agreement "to fix up" the tenement was made as a part of the original contract and before the plaintiff entered into the occupation of the premises. The use of this platform was not then in contemplation of the parties as one of the privileges pertaining to the tenement hired by the plaintiff. The agreement of the defendants' agent to repair the middle tenement, if any was made by him cannot be construed to include repairs on the platform for it was not a part of the plaintiff's tenement; nor can it be presumed that the plaintiff was induced to hire it by considerations not present to the mind of either party.

It is further claimed on the part of the plaintiff, it is true, that at the time his wife met with a slight accident through a defect in the floor of the platform, the defendants agreed specifically, to make repairs upon it; but this promise, if made, as claimed by the plaintiff, was no part of the original contract of hiring and did not operate as an inducement for the plaintiff to take the tenement. It is not claimed that the plaintiff threatened to quit if no repairs were made. The defendants were then under no legal obligation to make repairs upon this platform, and any promise to do so, if made, was without consideration.

Furthermore, as before stated the common law rule of caveat emptor is still in force in this state and applies to a lease as well as the sale of property. The owner of private property owes to the prospective lessee no duty to exercise ordinary care to ascertain and apprise him of unknown defects in the property to be leased where a prospective lessee has equal opportunity to ascertain the defects. *Whitmore* v. *Orono Pulp Co.*, 91 Maine, 297. In the case at bar, neither the defendant nor his agent had any special knowlege of the defective condition of the railing around the platform. The plaintiff and his wife had frequent occasion to use it and a better opportunity than the defendants or their agents to discover the actual condition of the platform and the railing. The plaintiff admits that he "must have known" it. No repairs were made on this platform prior to the accident. Yet the plaintiff continued in the occupation of the tenement and in the use of this platform. It is the opinion of the

court upon this state of the law and the facts, that the defendants are not liable to the plaintiff. *Shackford* v. *Coffin*, 95 Maine, 69; *Gregor* v. *Cady*, 82 Maine, 131.

Judgment for the defendants.

WARREN TUTTLE, Petitioner for Habeas Corpus,

vs.

ALFRED H. LANG, Sheriff.

Somerset. Opinion March 31, 1905.

Skowhegan Municipal Court. Suspension of Mittimus. Jurisdiction. Habeas Corpus. Special Laws, 1901, c. 485. Stat. 1903, c. 171, R. S., c. 133, § 17.

A discharge on a petition for habeas corpus will not be granted for technical or unimportant errors in a criminal process or proceedings; but it will be granted where the detention is under process issued by a court or magistrate without authority or in excess of its jurisdiction.

The issuance of a mittimus is a ministerial and not judicial act, a sequence of the sentence necessarily following it, and not subject to control by a magistrate, except in case of appeal. In courts of general jurisdiction it is issued by the clerk, without action or direction by the court, but a magistrate having no clerk must do it personally.

The statute allows an appeal from a judgment of a magistrate or Municipal Court, to be taken within twenty-four hours thereafter. If not taken before the close of the session, the mittimus should issue, and the convict be placed in jail; but in such case, if an appeal is duly taken within twenty-four hours, the magistrate must necessarily recall the mittimus to allow the appeal to be perfected.

The ordinary mittimus directs the officer to commit the convict then in custody, to the jail or prison according to the sentence. It contains no order to arrest, and does not authorize an arrest of one at large, and not an escaped prisoner. The sentence takes effect and is in force the day it is pronounced, and if the magistrate voluntarily discharges the convict from that custody without day, he cannot be afterwards taken in execution; certainly not after the time named for his imprisonment has elapsed.

A permanent court of general jurisdiction, having stated terms for the trial of criminal cases, may, for good cause, place an indictment on file, or continue the case to a subsequent term for sentence. In such case jurisdiction

of the person and cause is retained. But after sentence and adjournment of the term, or the end of the session, if before a magistrate, all jurisdiction of the cause and the person has ceased.

If after conviction and sentence any court, whether of general or limited jurisdiction, permits the convict to go at large without day, it can never thereafter issue a mittimus for his commitment. In such case, having completed its judicial functions, it has voluntarily surrendered all further control over the case and person.

The Municipal Court of Skowhegan has regular terms for civil business, but none for criminal. In the class of offenses charged against the petitioner that court has the same jurisdiction as trial justices, and no more. In criminal cases it is always open. Upon a criminal charge within its jurisdiction, if upon trial the respondent is found guilty, or if he plead guilty, it becomes the duty of the Judge at that session to impose sentence. When that is done, the cause is determined, the Judge's duty is at an end, and nothing remains but to carry the judgment into effect. If to do this, a commitment is necessary, he should issue a mittimus at or before the end of the session at which the conviction was had, to convey the prisoner then present in custody to jail.

The fact that the petitioner assented to the suspension of the mittimus is immaterial. He could not thereby change or enlarge the jurisdiction or power of the Municipal Court.

Habeas Corpus is the proper remedy, when the process upon which a convict is held, was issued by a court having no jurisdiction of the case or person at the time of its issue.

On exceptions by petitioner. Sustained. Petitioner discharged.

Petition for habeas corpus. The material facts, as found by the Justice of the first instance, are stated in the opinion.

E. N. Merrill, for petitioner.

Geo. W. Gower, County Attorney, for defendant.

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

STROUT, J. The Justice who heard the cause in the first instance, found the following facts:

November 20, 1902, the petitioner was arrested and brought before the Skowhegan Municipal Court, charged with the offense of the unlawful sale of intoxicating liquors. Before pleading to the complaint the petitioner, the prosecuting complainant and the Judge came to an agreement by which the petitioner should plead guilty and be

sentenced to fine, costs and imprisonment, but that no mittimus in execution of the sentence should issue until the petitioner should again be guilty of unlawfully selling intoxicating liquors. The petitioner thereupon pleaded guilty, sentence of fine, costs and imprisonment was imposed, a memorandum of the agreement was noted on the Judge's docket, and the petitioner was released from arrest and allowed to go without day, without payment of fine and costs, and without imprisonment. No mittimus or other precept in execution of the sentence was issued, or even prepared.

In October, 1904, nearly two years afterward, the Judge, being of the opinion that the petitioner was again unlawfully selling intoxicating liquors, but without giving him any hearing on the question, made out a mittimus on the old sentence of November 20, 1902, and delivered it to the Sheriff who took the petitioner into custody and committed him to jail in execution of that sentence. The petitioner thereupon sued out this writ of habeas corpus and asks for his discharge from that imprisonment.

For the purpose of bringing the cause before the Law Court, the sitting Justice ruled, as matter of law, that the petitioner was not entitled to be discharged. The case is here upon exception to that ruling.

A discharge will not be granted for technical or unimportant errors in the process or proceedings; but it will be granted where the detention is under process issued by a court or magistrate, without authority or in excess of its jurisdiction. *Fisher* v. *McGirr*, 1 Gray, 45.

The Municipal Court of Skowhegan has regular terms for civil business, but none for criminal, c. 485, special laws of 1901. In the class of offenses charged against the petitioner that court has the same jurisdiction as trial justices, and no more. In criminal cases it is always open. Upon a criminal charge within its jurisdiction, if upon trial the respondent is found guilty, or if he plead guilty, it becomes the duty of the Judge at that session to impose sentence. When that is done, the cause is determined, the Judge's judicial duty is at an end, and nothing remains but to carry the judgment into effect. If to do this, a commitment is necessary, he should issue a mittimus at or before the end of the session at which the conviction was had, to

convey the prisoner then present in custody to jail. The issuance of a mittimus is a ministerial and not judicial act, a sequence of the sentence necessarily following it, and not subject to control by a magistrate, except in case of appeal as hereinafter stated. In courts of general jurisdiction it is issued by the Clerk, without action or direction by the Court, but a magistrate having no clerk must do it personally. *Fisher* v. *Deans*, 107 Mass. 118. *Doggett* v. *Cook*, 11 Cush. 262.

There is no doubt that a permanent court of general jurisdiction, having stated terms for the trial of criminal cases, may, for good cause, place an indictment on file, or continue the case to a subsequent term for sentence. In such case jurisdiction of the person and cause is retained. But after sentence and the adjournment of the term, or the end of the session, if before a magistrate, all jurisdiction of the cause and the person has ceased. *Com.* v. *Dowdican's Bail*, 115 Mass. 136. *People* v. *Court of Sessions*, 141 N. Y. 288.

We are not called upon to decide whether the Skowhegan Municipal Court or a trial justice has authority after conviction, to continue for sentence. It is very doubtful if such authority exists. The statute in force when Tuttle was convicted, provided that "if the offense is within the jurisdiction of the magistrate, he shall try it and award sentence thereon." A continuance for sentence cannot be for an indefinite time, but should be to a subsequent term. This municipal court has no stated terms for criminal causes. As to these it is a temporary court for each case, exercising limited jurisdiction by prescribed methods. It has no jurisdiction to suspend and revive at its will a case before it. *Com.* v. *Maloney*, 145 Mass. 211.

The statute allows an appeal from a judgment of a magistrate or municipal court, to be taken within twenty-four hours thereafter. If not taken before the close of the session, the mittimus should issue, and the convict be placed in jail; but in such case, if an appeal is duly taken within the twenty-four hours, the magistrate must necessarily recall the mittimus to allow the appeal to be perfected. To put this beyond question, and resolve all doubts, the Legislature, c. 171, of the laws of 1903, now R. S., c. 133, § 17, provided that in all criminal cases before a magistrate, upon conviction and sentence,

if an "appeal is not taken before the adjournment of the session of court at which such sentence is imposed, mittimus shall issue and the respondent shall be committed thereon, under such sentence." Then follows a provision that if after conviction an appeal is duly claimed, the mittimus may be superseded, and the appeal allowed and perfected. This enactment crystalized into a statute the already existing law.

If after conviction and sentence any court, whether of general or limited jurisdiction, permits the convict to go at large without day, it can never thereafter issue a mittimus for his commitment. In such case, having completed its judicial functions, it has voluntarily surrendered all further control over the case and person. Ex parte Gordon, 1 Black, 303; In re Webb, 89 Wis. 354; *People* v. *Brown*, 54 Mich. 15; *State* v. *Vose*, 80 Iowa, 467; *People* v. *Barrett*, 202 Ill. 287.

We are not furnished with a copy of the mittimus in this case; but the ordinary mittimus directs the officer to commit the convict then in custody, to the jail or prison according to the sentence. It contains no order to arrest, and does not authorize an arrest of one at large, and not an escaped prisoner. The sentence takes effect and is in force the day it is pronounced, and if the magistrate voluntarily discharges the convict from that custody without day, as was done in this case, he cannot afterward be taken in execution; certainly not after the time named for his imprisonment has elapsed, cases previously cited, *U. S.* v. *Wilson*, 46 Fed. Rep. 748. In re Bloom, 53 Mich. 597. In re Breton, 93 Maine, 39. *Spencer* v. *Perry*, 17 Maine, 413.

The fact that the petitioner assented to the suspension of the mittimus is immaterial. He could not thereby change or enlarge the jurisdiction or power of the Municipal Court.

We are cited, in opposition, to *Sylvester* v. *State*, 65 N. H. 193; *O'Malia* v. *Wentworth*, 65 Maine, 129; *State* v. *Quinn*, 96 Maine, 496. Neither of the cases hold that the delay in issuing the mittimus was lawful.

Habeas corpus is the proper remedy, when the process upon which the convict is held, was issued by a court having no jurisdiction of

the case or person at the time of its issue. In re Hans Nielsen, 131 U. S. 176.

The result is, that the Municipal Court had no legal right to issue the mittimus when it did, and that the arrest and commitment under it was illegal, and the petitioner is unlawfully restrained of his liberty.

Exceptions sustained. Petitioner discharged.

FRANKLIN M. DREW, Judge of Probate, by Magloire Cote,

vs.

REGIS PROVOST, et als.

Androscoggin. Opinion April 1, 1905.

Descent and Distribution. Assignment of Interest. Evidence. Fraud. Res Judicata.

1. If made for a legal consideration and without fraud, an assignment of one's interest in the estate of a decedent before the estate is settled and his right to a distributive share is established, is valid and is a defense to action by the assignor to recover for his own use the share adjudged by the probate court to be due him as distributee.
2. In such action the adjudication of the probate court is conclusive upon the defendant, but nevertheless, to meet the charge of fraud in obtaining the assignment, he may introduce evidence of circumstances tending to show that at the time of the assignment the assignor must have doubted his right to a distributive share.
3. In this action, though the probate court has adjudicated that the assignor, the plaintiff, was the husband of the decedent at her death, a record of his divorce from another woman, since his marriage to the decedent and before the assignment, is admissible as tending to show his belief that he was rightfully married to the other woman and so had ceased to be the husband of the decedent.

See *Bergeron* v. *Cote*, 98 Maine, 415.

On motion and exceptions by plaintiff. Overruled.

Debt on a probate bond, brought in the interest of Magloire Cote who as plaintiff in interest sought to recover the amount of the

distributive share of the estate of Caroline Cote, deceased, decreed to him as the husband of said deceased.

Regis Provost, one of the defendants, was the administrator of the estate of said deceased, and in this action Carice Bergeron, as defendant in interest, intervened, claiming the aforesaid distributive share under an assignment thereof from the aforesaid Magloire Cote which said assignment the said Cote claimed to avoid for fraud.

The action was tried at the September term, 1904, of the Supreme Judicial Court, Androscoggin County, and the verdict was for the defendants. Thereupon the plaintiff filed a general motion for a new trial, and also took exceptions to certain rulings of the presiding Justice made during the progress of the trial.

The case is sufficiently stated in the opinion.

Oakes, Pulsifer & Ludden, for plaintiff.

McGillicuddy & Morey, for defendants.

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

EMERY, J. When the estate of Caroline Cote, deceased, was ready for distribution a question arose whether one Magloire Cote was entitled to a distributive share as husband of the deceased. His claim as such was sustained by the Supreme Court of Probate, *Bergeron* v. *Cote,* 98 Maine, 415. The administrator still declining to pay over to him the husband's distributive share, he brought this action in the name of the Judge of Probate on the administrator's official bond to recover such share.

At the trial it appeared that, before the commencement of the action and before the settlement of the estate in the Probate Court and before his right as husband had been adjudicated, the plaintiff in interest, for a consideration and by sufficient instrument of assignment, had assigned all his interest in the estate of Caroline Cote to Carice Bergeron one of her brothers. Whether this instrument of assignment was invalid as obtained by misrepresentation or other fraud upon the part of Bergeron, was the only question at issue before the jury.

I. Exceptions. The defendant offered in evidence a certified copy of a record of divorce obtained by Magloire Cote from a woman other than Caroline Cote (the deceased) subsequent to the time of Magloire Cotes' marriage to the deceased. To this the plaintiff objected on the ground that the fact that Magloire Cote was the legal husband of Caroline at the time of her death had been adjudicated and could not be questioned in this action, and hence the only effect of the offered evidence would be to prejudice the jury against him. The assignment, however, was made before Magloire's right as husband was established, and even before he made any claim as husband. In rebutting the plaintiff's contention that the assignment was obtained by misrepresentation, the defendant was entitled to show how the situation appeared at the time of the assignment, even though afterward it was found to be different in fact. At that time it was undetermined whether Magloire Cote was Caroline's husband at the time of her death. It may have been that, without suggestion from Bergeron or any one, he believed he was not her husband, that he believed a subsequent marriage by him to another woman had lost him all rights as the husband of Caroline. With such a belief, with circumstances thus appearing to him, he might well have been willing to relinquish to her relatives for a mere nominal sum, or for nothing, all claim on her estate. Indeed, he might have thought it his duty to do so. The record of a divorce he had obtained from another woman was certainly evidence that he believed he had legally married such other woman, and that circumstance was certainly admissible as showing Magloire's view of his rights when he executed the assignment.

In his charge the presiding justice carefully explained to the jury that they must assume Magloire Cote to have been in fact the husband of Caroline at her death, that the record of the divorce from the other woman and all the other circumstances were not admissible and could have no weight against that adjudication of the probate court, but that the divorce record and other circumstances were admissible and could be considered as indicating the plaintiff's opinions and situation at the time he made the assignment, and as indicating what may have influenced him to make the assignment.

It should need no argument to show that the evidence was properly admitted, the issue clearly stated, and the rights of the plaintiff carefully guarded.

II. The Motion. The evidence to establish misrepresentation by Bergeron was stoutly contradicted by him and by others. Many witnesses called by the plaintiff were shown to have made contradictory statements at different times. If the witnesses for the defense told the truth there were no misrepresentations sufficient to avoid the assignment. Under these circumstances the verdict for the defendant must stand.

Motion and exceptions overruled.

In Equity.

GEORGE B. BOYNTON, et al.,

vs.

AUSTIN HALL, et als.

Washington. Opinion April 3, 1905.

Equity. Obstructing a Stream. When an alleged Nuisance will not be Enjoined.

A bill in equity by the owners of a mill against the owners of another mill higher up upon the same stream, alleging that the defendants by the use of planks and gates in their dam were obstructing the natural flow of the stream, to the injury of the plaintiffs, and praying that the obstruction be adjudged a nuisance, and that it be abated, cannot be sustained, when the rights of the parties have never been determined by an action at law, and where there is neither allegation in the bill, nor proof in the record, that irreparable injury will result to the plaintiffs, unless an injunction be granted, nor that their rights are in danger, nor that adequate compensation for their wrongs may not be obtained in an action at law.

In equity. On report. Bill dismissed with costs.

Bill in equity praying that a certain dam on Orange Stream in Whiting, Washington County, be adjudged a nuisance, and that the defendants, the owners thereof, be enjoined from further obstructing

the natural flow of said stream to the injury of the plaintiffs who are the owners of a mill and dam on the same stream, below the defendants' dam.

The case is sufficiently stated in the opinion.

A. D. McFaul and W. R Pattangall, for plaintiffs.

J. H. Gray and John F. Lynch, for defendants.

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

SAVAGE, J. The complainants are owners of a mill on Orange Stream in Whiting. The defendants are the owners of another mill and dam on the same stream above the complainant's mill. The gist of the complaint is that the defendants by the use of planks and gates in their dam were obstructing the natural flow of the stream to the injury of the complainants. The prayer is that the obstruction be adjudged a nuisance and that it be abated. The rights of the parties have never been determined by an action at law. There is neither allegation in the bill, nor proof in the record, that irreparable injury will result to the complainants, unless an injunction be granted, nor that their right is in danger, nor that adequate compensation for their wrongs may not be obtained in an action at law. Under such conditions we think the bill cannot be sustained. The granting of an injunction is an exercise of an extraordinary power by the court, and the power should be exercised only when the case clearly demands it. It has always been the rule in this state that the court may interfere to prevent a nuisance from being brought into existence, but it will not enjoin an alleged existing nuisance, unless it appears that there is a strong and imperious necessity for so doing, in order to prevent irreparable loss or injury, and when the remedy at law would be inadequate; or that the right has been previously established at law, or has been long enjoyed without interruption. *Porter* v. *Witham,* 17 Maine, 292; *Jordan* v. *Woodward,* 38 Maine, 423; *Varney* v. *Pope,* 60 Maine, 192; *Denison Mfg. Co.* v. *Robinson Mfg. Co.,* 74 Maine, 116; *Lockwood Co.* v. *Lawrence,* 77 Maine, 297; *Haskell* v. *Thurston,* 80 Maine, 129; *Tracy* v. *LeBlanc,* 89 Maine, 304;

Sterling v. *Littlefield*, 97 Maine, 479. In several of those cases the conditions were like those in the present case. Here none of the conditions essential to the exercise of equitable jurisdiction appear to exist.

Bill dismissed with costs.

ALFRED E. POLAND, et al.,

vs.

THOMASTON FACE AND ORNAMENTAL BRICK COMPANY.

Knox. Opinion April 5, 1905.

Contract. Drilling a Well. Construction. Non-performance Excused. Form of Action. Indebitatus Assumpsit.

In a verbal contract where there is no guaranty that the work to be done under it shall secure a particular result desired, and from the nature of things this may be impossible, the law implies a condition that both parties shall be excused from their obligations where it becomes reasonably certain that a continuance would be useless.

When a contract, before it has been completed, has been terminated without the fault of the plaintiff, or he has been prevented by the fault of the defendant from fully performing such contract, or by reason of the conduct or statements of the defendant, the plaintiff is justified in abandoning such contract then the plaintiff may recover the reasonable value of his services; and a proper form of action therefor is indebitatus assumpsit.

On motion by defendant. Overruled.

Assumpsit on account annexed. The action was tried at the April term, 1904, of the Supreme Judicial Court, Knox County, where the plaintiffs recovered a verdict for $1,333.42. Thereupon the defendant filed a general motion for a new trial.

The case is sufficiently stated in the opinion.

L. M. Staples, for plaintiffs.

Joseph E. Moore, for defendant.

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

PEABODY, J. This case comes up on motion for a new trial.

It is an action of assumpsit on account annexed. The plaintiffs were verbally engaged to sink an artesian well at $3.50 a foot. No limit was set to the depth of the well beyond a general statement of the amount of water required by the defendant, and the time of payment was not referred to in the contract. After drilling 386 feet, a depth much greater than at first anticipated, and not obtaining the requisite supply of water, the financial condition of the plaintiffs made it difficult for them to continue the work without some payment on account. They made several requests for such payment which met either with no response or replies which tended to show that the defendant not only refused to admit that any payment was then due but that it denied any liability under the contract unless the water supply was secured. Thereupon the plaintiffs discontinued the work and brought this action setting out in their account annexed the number of feet drilled and charging for the work at the price per foot which had been agreed upon. The verdict was for this amount.

There is not sufficient evidence to sustain the claim of the defendant, that the plaintiffs guaranteed a certain quantity of water, and that the meaning of the contract was that unless this was obtained they were entitled to no pay. Such a guaranty was expressly negatived by them, and would not be reasonable without some further inducement than appears from the mere contract price per foot. On the other hand it is not necessary to adopt the plaintiffs' contention that under the contract they were entitled to recover for each foot as it was drilled.

A fair construction of the contract is that a well was to be drilled such as would be adapted to the needs of the defendant, and the exact depth was left to be determined by the agreement of the parties in the future according to the success of the enterprise. It could not have been intended that the plaintiffs were to go on indefinitely until water was obtained or forfeit their pay. The contract was subject to an implied condition that both parties should be excused

from their obligations in case its actual completion became impossible; and it would have been fulfilled when a sufficient amount of water had been obtained, or when it became reasonably certain that further drilling would be useless. Upon completing the work within this construction of the contract they would have been entitled to payment. 1 Beach on Contracts, sec. 230; *Walker* v. *Tucker*, 70 Ill. 527; *Ward* v. *Vance*, 93 Pa. St. 499; *Cleary* v. *Sohier*, 120 Mass. 210. There is no time fixed for the payment and the law therefore fixes the time, and that is in a case like this when the service is performed. *Davis* v. *Maxwell*, 12 Met. 286. There is no claim in this case that the contract had been fulfilled, and therefore an action upon a special contract would not lie.

This action of general assumpsit on account annexed brought before the work had been completed is a proper form of action where the contract has been terminated without the fault of the plaintiffs. The value of the services rendered may be recovered where the performance has been prevented by the act or default of the defendant. *Wright* v. *Haskell*, 45 Maine, 489; *Holden Steam Mill* v. *Westervelt*, 67 Maine, 446; *Moulton* v. *Trask*, 9 Met. 577; *Canada* v. *Canada*, 6 Cush. 15; *Bassett* v. *Sanborn, et al.*, 9 Cush. 58; *Johnson* v. *Trinity Church Society*, 11 Allen, 123. In *Moulton* v. *Trask*, supra, Shaw, C. J., says: "when a contract is at an end, either by its own original terms, or by the subsequent consent of the parties, or by the unjustifiable act of the defendant, and nothing remains but to pay money, indebitatus assumpsit will lie, although the debt accrued under a special contract; and such special contract may be proper and necessary evidence in support of the action."

Under proper instructions from the presiding justice, which must be assumed to have been given, it was competent for the jury to find from the evidence that the defendant's conduct and statements made at the time of the request for payment on account was a denial of the right of the plaintiffs to any remuneration unless water was obtained, and amounted to a repudiation of the contract on its part. This might have been sufficient justification for the plaintiffs to consider the contract at an end. In the case of *Moulton* v. *Trask*, cited above it was held that if the defendant had without justifiable cause

prevented further performance of the contract, the plaintiff, by bringing his action for the part of the year during which the son had served, thereby consented to the act of the defendant and the contract was thereby determined.

Taking this view of the case the plaintiffs may recover in indebitatus assumpsit the value of their services, the contract price being a reasonable measure of value in the absence of evidence showing any loss or damage to the defendant by reason of failure to complete the work.

Motion overruled.

AMI L. DENNISON *vs.* INHABITANTS OF VINALHAVEN.

Franklin. Opinion April 5, 1905.

Hiring School Teachers. Contract. Ratification. Interpretation. Construction. R. S., (1883), c. 11, § 87.

While by sec. 87, chap. 11, R. S. 1883, the authority to hire teachers was conferred upon the superintending school committee, unless the town otherwise vote, yet a contract with a teacher made, at their request, by the superintendent of schools is valid; the maxim delegata potestas non potest delegari does not apply.

A contract made with a school teacher by a person not authorized to make it may be ratified by those having authority either expressly or by acts recognizing the employment.

When a contract is indefinite as to time, it is to be interpreted by the intention and understanding of the parties as indicated by their acts and the attendant circumstances.

Where the plaintiff was engaged as a school teacher at the beginning of the second term of the school year at the rate of the annual salary, it will be presumed that the contract was to end with the year.

On exceptions by plaintiff. Overruled.

Assumpsit to recover payment for a year's salary as teacher of the high school in defendant town. At the trial of the action, after the

plaintiff's evidence was all in, a nonsuit was ordered and thereupon the plaintiff took exceptions.

The case is sufficiently stated in the opinion.

E. O. Greenleaf, for plaintiff.

Joseph E. Moore, for defendant.

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

PEABODY, J. The plaintiff brought suit against the defendant town to recover payment for a year's salary as teacher of the high-school.

After the evidence of the plaintiff was closed the justice presiding ordered a nonsuit; and the case comes before this court on exceptions.

The plaintiff was a school teacher of experience and made application for a situation to Tylor M. Coombs, superintendent of schools at Vinalhaven and received from him a letter in reply to come to Rockland and apply in person. He did not do this, but soon after received a telegram from Mr. Coombs which was as follows: "Vinalhaven, Maine, December 28, 1901. A. L. Dennison, Beans Corner, North Jay. Will you take high school here commencing Monday, salary $720 a year? Answer by message. Tylor M. Coombs." Upon receipt of the telegram he sent a message in reply and at once went to Vinalhaven, and reported to the superintendent of schools.

The plaintiff taught the high school two terms, the second and third terms of the school year. He received payment at various times from the town treasurer which amounted to what was full compensation for the two terms.

No contract or trade in reference to his employment was made with anyone except the superintendent and in the manner stated.

He received a letter from him July 7th, 1902, in which he stated that he had had a meeting of the school committee, and they advised a change of teachers in the high-school, and another July 16th, in which he notified him that a vacancy had been declared by the school committee.

The plaintiff was not dismissed for cause, but in a conversation with the superintendent he was informed of some dissatisfaction because the school was small. He lost a full term of teaching before he obtained another situation although he had made efforts to do so.

At the time of the negotiations between the plaintiff and the superintendent in regard to teaching the Vinalhaven high-school the school committee was by statute charged with the duty of hiring teachers. R. S., (1883), Chap. 11, sec. 87. But it appears by the evidence that it was customary in that town for the superintendent to hire the teachers. The school committee could not delegate this authority to any other person or persons in the sense of relieving themselves from responsibility, but there can be no question that the superintendent of schools could employ teachers at their request. Story on Agency, sec. 12—16. The maxim delegata potestas non potest delegari does not apply. They had his assistance merely as an instrumentality in performing their official duty. The plaintiff was justified in assuming that the superintendent, when so holding himself out, was authorized to make with him a valid contract for teaching the high-school. *Emerson, et al.*, v. *Providence Hat Mfg. Co.*, 12 Mass. 237. The officers of the town recognized the hiring as legal, and paid the plaintiff upon bills approved by the superintendent; and the action of the school committee was a recognition of the plaintiff's employment when they held a meeting and advised a change in the teachers of the high-school. 1 Dillon's Mun. Cor., sec. 464; *Wilson* v. *School District*, 32 N. H. 118. Even if the superintendent employed the plaintiff without any special authority his action was ratified by the acts of the school committee and town treasurer. *Woodbury* v. *Inhabitants of Knox*, 74 Maine, 462; *Mitchell* v. *Rockland*, 52 Maine, 118; *French* v. *Auburn*, 92 Maine, 452; *Otis, et al.*, v. *Stockton*, 76 Maine, 506; *Peirce* v. *Morse-Oliver Bldg. Co.*, 94 Maine, 406; *Pierce* v. *Greenfield*, 96 Maine, 350.

The contract upon which the action is brought originated in the telegram of the superintendent and the reply of the plaintiff, and is to be interpreted in connection with other facts indicating the intention and understanding of the parties. The telegram stated no definite term of hiring but named the amount of the annual salary.

Had the proposition been made prior to the beginning of the school year the inference would be that a full year was meant, but the plaintiff's engagement beginning later the logical term of his employment was for the remainder of the year. He knew when the school year began and closed, and he must be presumed to have understood the contract as the school committee and superintendent did, as indicated by their action. It does not appear that he made any protest or tender of his services upon receiving notice of his dismissal. The plaintiff has been paid for the period of his service.

Exceptions overruled.

ALIDA B. EMMETT *vs.* HAMA PERRY.

Waldo. Opinion April 7, 1905.

Real Action. Evidence. Boundaries. Declarations. Adverse Possession. Newly Discovered Evidence. S. J. C. Rule 16.

It is settled law in this state that the acts of the owner of land when upon it, pointing out the monuments and location of his line, and his declarations made at the time when no controversy exists, are competent to be submitted to the jury after his death, as having some tendency to prove the location of the line.

Such declarations are also competent to show the character of such possession, whether the declarant was occupying adversely under a claim of title in himself or in subservience to the title of another.

A motion for a new trial on newly discovered evidence is a motion grounded on facts not apparent from the record, and under Rule 16 of this Court should be verified by affidavit in order to entitle it to be considered.

Evidence is not newly discovered which at the time of the trial is known to the plaintiff in interest who had taken upon herself the prosecution of the case, and which any inquiry of her would have made known to the nominal plaintiff.

On motions and exceptions by plaintiff. Overruled.

Real action to recover land on Seven Hundred Acre Island in Islesboro. Plea, general issue with brief statement claiming title to the demanded premises by adverse possession. Verdict for defendant. Plaintiff took exceptions to the admission of certain testimony, and filed a general motion for a new trial, and also filed a motion for a new trial on the ground of newly discovered evidence.

The case is sufficiently stated in the opinion.

J. H. Montgomery and L. M. Staples, for plaintiff.

H. E. Cooledge and C. E. & A. S. Littlefield, for defendant.

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

POWERS, J. Real action to recover land on Seven Hundred Acre Island in Islesboro. The verdict was for the defendant and the case comes here on her motion and exceptions and also on her motion for a new trial on the ground of newly discovered evidence.

Plaintiff claimed title through intermediate conveyances by deeds to her father Daniel Philbrook from Job Philbrook and by deed to Job from William Griffin in 1802. Defendant claimed title by deed from her father Jabez Philbrook, and he by deed from Jones Shaw whose title was obtained in 1830. The defendant also claimed title by adverse possessions by her father and herself since 1830. Plaintiff's land lies south of and adjoining the land of the defendant. She contended that the original division line between the property of her father, Daniel Philbrook, and the defendant's father, Jabez Philbrook, was a straight line, while the defendant claimed that it deflected to the southwest following an old fence to the beach and taking in the land in dispute.

Plaintiff's exception is to portions of the testimony of Joseph and William Philbrook relating to declarations of their father, Jabez Philbrook, while in possession of the premises and who was deceased at the time of the trial. Joseph testified that his father used the beach, north of the line fence that is there now, to gather drift-wood which came ashore there, that while he was helping his father gather such drift-wood, his father pointed out the line on the beach between

himself and Captain Daniel Philbrook and said: "that was his line, over that side, and that was Captain Daniel's that side to the south." William testified that under like circumstances his father "told us not to go across that line there; he said the other was Captain Daniel's."

The defendant claimed title by disseizin. The declarations of her grantor while in possession were admissible to show the character of such possession, whether he occupied adversely under a claim of ownership in himself, or in subservience to the title of another as the plaintiff claims was the case. *School District* v. *Benson*, 31 Maine, 385.

They were also admissible as tending to show where was the division boundary of the land between Jabez and Daniel Philbrook. "The acts of the owner of the land when upon it, pointing out the monuments and location of his line, and his declarations made at the time in regard to them when no controversy exists, are competent to be submitted to the jury after his death, as having some tendency to prove the location of the line." *Royal* v. *Chandler*, 83 Maine, 153. This is settled law in this state, *Wilson* v. *Rowe*, 93 Maine, 207, and is decisive of the exceptions in this case.

There is a motion for a new trial on the ground that the verdict was against evidence and also a motion based upon newly discovered evidence. An examination of the case satisfies us that the weight of evidence at the trial was in favor of the defendant's contention that for more than seventy years prior to the bringing of this suit she and her grantors had been in open notorious and exclusive possession of the land in controversy, and that such possession was adverse and not permissive.

A motion for a new trial on newly discovered evidence is a motion grounded on facts not apparent from the record, and under Rule 16 of this court should be verified by affidavit in order to entitle it to be considered. This alone is a fatal objection to the plaintiff's motion. The present case is a good illustration of the wisdom of the rule, for a defeated litigant might well hesitate to make oath that the evidence relied upon is newly discovered. Georgiana Philbrook, the plaintiff's warrantor, employed counsel and took upon herself the prosecution

of the case. She was a witness at the trial, and the motion sets forth that at that time she well knew there was a large amount of evidence which could be obtained. In support of the motion she testified that the evidence which at the time of the trial she knew could be obtained was the same set out in the motion; that she knew all the people who testified in support of it, all of whom were in fact her relatives; that she supposed that they knew generally of the case; that if she were going to look up witnesses they were the very people to go to and the very ones she had in mind when she suggested to her counsel at the trial that she ought to have other witnesses there. Yet no delay was asked for. The real and nominal plaintiffs went to trial with what evidence they had, and took their chances of a favorable verdict. Having done so they cannot now be heard to say that evidence is newly discovered which at the trial was known to the plaintiff in interest, and which the slightest inquiry of her would have made known to the nominal plaintiff. The exercise of due diligence, such as the law requires of parties litigant, would have assured the production at the trial of all this evidence, the only thing about which that is newly discovered is the necessity for it, in the present exigencies of the plaintiff's case, to avoid the consequences of an unfavorable verdict against her.

Motions and exceptions overruled.

DWIGHT BRAMAN *vs.* CLARENCE C. DODGE, Appellant.

Hancock. Opinion April 7, 1905.

Landlord and Tenant. Lease signed by Landlord alone. Intent of Parties. Waiver. R. S., c. 75, § 13.

The owner of real estate may transfer his land by a lease signed by him alone.

This is true even though such lease contains an independent covenant for execution by the lessee, where the evidence shows that it was the intention of the parties it should take effect as a lease, without being signed by the lessee, and that the lessee's execution of such covenant was waived by the lessor.

On motion by plaintiff. Overruled.

Forcible entry and detainer. The action was brought originally in the Ellsworth Municipal Court where judgment was rendered for the plaintiff. The defendant appealed. Under the provisions of R. S., chapter 96, section 9, a writ of possession was issued and the plaintiff took possession of the premises. The appeal was tried at the October term, 1904, of the Supreme Judicial Court, Hancock County, and the verdict was for the defendant, and under the provisions of the aforesaid chapter and section, the jury assessed damages for the defendant in the sum of $183.00 for having been kept wrongfully out of his possession. The plaintiff then filed a general motion for a new trial.

The case is sufficiently stated in the opinion.

Hale and Hamlin, for plaintiff.

L. B. Deasy, for defendant.

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

POWERS, J. Action of forcible entry and detainer against an alleged disseizor. The issue at the trial was whether the defendant had a lease of the premises. There was testimony on the part of the defendant to the following effect: The plaintiff had a lease in two

parts prepared by his attorney who sent one part to the plaintiff in New York, and the other to the defendant who was living on the premises in Sullivan; that the plaintiff signed the part received by him and sent it to the defendant. The lease contained a covenant that the defendant should keep the buildings insured, and the defendant refused to sign it in that form. Thereupon the plaintiff told him to scratch it out, which he did, in the presence of the plaintiff, in the part received by the defendant from the plaintiff's attorney, and then and there signed and delivered that part to the plaintiff, who accepted the same and permitted the defendant to remain in possession of the premises for a long time thereafter without any objection. The part of the lease held by the defendant, containing the insurance clause, was signed by the plaintiff alone; and the part held by the plaintiff, containing no insurance clause, was signed by the defendant alone.

The evidence was conflicting but the jury were justified in finding the facts as claimed by the defendant. Upon these facts it was competent for the jury to find that the minds of the parties met; that there was a waiver on the part of the plaintiff of the execution by the defendant of any covenants other than those contained in the part of the lease executed by him; and that it was the intention of the parties that the part held by the defendant should take effect as a lease. The insurance clause therein contained, which in the inception was intended for execution by the defendant, was an independent covenant and its execution might be waived by the plaintiff.

The defendant invokes section 13, chapter 75, R. S., which provides that no estate greater than a tenancy at will, can be created unless by some writing signed by the grantor. The lease under which the defendant claims, however, was not the paper which the plaintiff did not sign but the one which he did sign, and which he permitted the defendant to retain. The plaintiff did not ask the defendant to sign this part, which contained the insurance clause, but accepted the other part with the insurance clause struck out in the plaintiff's presence and by his direction before it was signed. He permitted the defendant to remain in undisturbed possession of the premises, and long after, in speaking to the defendant of the writing held by him and signed by the plaintiff, he referred to it as "the other

lease." The defendant neglected to erase the insurance clause in that part of the lease which he held. Its exact terms do not appear. The only testimony was that it said the defendant should insure the buildings. At the time of the trial the plaintiff had obtained possession of both parts of the lease and produced neither. It was admitted that it was "an ordinary lease." Under these circumstances the jury might well find that the grant of the estate was unconditional, and the covenant in regard to insurance an independent one which might be waived. The owner of real estate may transfer his land by a lease executed by him alone, and the lease will be effectual although it contains covenants for the execution of the lessee by signing and sealing but is not in fact signed by the latter. The lessor may waive the covenants on the part of the lessee. *Libby* v. *Staples*, 39 Maine, 166.

In *Wilson* v. *Prescott*, 62 Maine, 177, cited by defendant, the lease was not signed by the party whom it was attempted to bind by it. In the case before us the plaintiff is bound by the lease which he signed, and if the defendant had signed the insurance covenant he would have been bound by that. Not having signed it he is not bound by it. It being an independent covenant the execution of which was waived by the plaintiff, such want of execution cannot detract from the binding force of the written grant of an estate signed and delivered by the plaintiff to the defendant in exact conformity to the understanding of the parties at the time.

Motion overruled.

A. C. STILPHEN, Admr., Appellant, from decree of Judge of Probate.

Kennebec. Opinion April 11, 1905.

Executors and Administrators. Decree of Probate Court. Appeal. Jurisdiction. Wills. Specific and Demonstrative Legacies. Descent and Distribution. How. Ann. Stat. (Mich.), § § 599, 6760. Code of Civil Proc. (N. Y.), § 2743. R.S., c. 65, § § 7, 28, 34; c. 67, § 20.

An administrator has no pecuniary or personal interests which can be affected by a decree of distribution of funds shown by his account to be in his hands. He has no property rights which can be established or divested by such a decree. It is immaterial to him to whom he is required to pay over such funds and he cannot be said to be aggrieved by a decree directing him to pay to a legatee rather than to an heir.

But as assignee of the distributive share of one of the heirs at law, the appellant has pecuniary interests and property rights which may be directly affected by a decree of distribution, therefore under the provisions of section 34 of chapter 65, R. S., the appeal was properly taken and prosecuted by the appellant and in his name as assignee of an heir at law.

It is not necessary that the question whether the legacy was specific or demonstrative, should have been determined as a preliminary question by a court of equity and not upon appeal by the Supreme Court of Probate. Jurisdiction of the Probate Court in such case is authorized by the plain terms of the statute and in accordance with the obvious intention of the legislature. The decree of the Probate Court is subject to revision on appeal to the Supreme Court of Probate, and a direct and convenient mode of procedure is thus provided for reaching a final decision of the question involved in the settlement of the estate.

The distinction between a specific and a demonstrative legacy involves not merely a technical question depending for its solution solely upon the precise language of the bequest, but a substantial inquiry respecting the intention of the testator as shown by the terms of the particular legacy, examined in connection with all the other provisions of the will. A specific legacy is a bequest of a specific article or particular fund which can be distinguished from all the rest of the testator's estate of the same kind, while a general legacy is payable out of the general assets of the estate.

While a demonstrative legacy partakes of the nature of a specific legacy by designating the fund from which the bequest is to be made, there is a vital distinction respecting the result in case of the failure of the particular fund mentioned. A specific legacy is adeemed or lost by the extinguishment of the specific thing or failure of the particular fund bequeathed,

while a demonstrative legacy is still payable out of the general assets if the fund specifically mentioned fails. Two elements are necessary to constitute a demonstrative legacy, viz: It must appear first that the testator intended to make an unconditional gift in the nature of a general legacy, and secondly the bequest must indicate the fund out of which it is payable.

In the case at bar, *Held:* that the legacy must be considered a specific one which was adeemed by the failure of the fund. Also held that the balance remaining in the hands of the administrator had not been specifically bequeathed, and should be distributed among the heirs as intestate property.

On report. Appeal from the decree of Judge of Probate. Appeal sustained.

Appeal by A. C. Stilphen, administrator with will annexed on the estate of Mary Augusta Randall, deceased, and also as assignee of James E. White, one of the heirs at law of said deceased, from a decree of distribution made by the Judge of Probate, Kennebec County, wherein it was ordered that the sum of $500.59 remaining in the hands of the appellant as administrator be paid to Mary D. (White) Dike, as legatee under the will of said deceased. After all the testimony had been taken out at the hearing in the appellate court, it was agreed that the testimony should be reported to the Law Court and that "upon so much of the evidence as is legally admissible the Law Court is to render such decree as the law and evidence require."

The case is sufficiently stated in the opinion.

A. C. Stilphen, pro se.

George W. Heselton, for appellee.

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

WHITEHOUSE, J. This is an appeal from a decree of distribution made by the Judge of Probate of Kennebec County wherein it was ordered that the sum of $500.59 remaining in the hands of the appellant as administrator, with the will annexed on the estate of Mary Augusta Randall according to the account filed by him, be paid to Mary D. (White) Dike of Melrose, Mass., as legatee under the will of the testatrix. The appeal is taken by him in his capacity as

administrator and also as assignee of James E. White, one of the heirs at law of the deceased.

By agreement of the parties the case is reported for the determination of the law court as the supreme court of probate. The statute authorizing appeals from decrees of the probate court is as follows:

"Any person aggrieved by an order, sentence, decree or denial, of such Judge . . . . may appeal therefrom to the supreme court to be held within the county, if he claims his appeal within twenty days from the date of the proceeding appealed from." R. S., c. 65, sect. 28. But everyone cannot be deemed aggrieved within the meaning of this statute who is dissatisfied with the decree or may happen to entertain desires upon the subject, but only those whose pecuniary interests are directly affected by the decree; those whose rights of property may be established or divested by the decree. *Wiggin, Administrator* v. *Swett*, 6 Met. 194; *Briard, Appt.* v. *Goodale*, 86 Maine, 100; *Sherer* v. *Sherer*, 93 Maine, 210; *Moore* v. *Phillips*, 94 Maine, 421; *Abbott, Appt.*, 97 Maine, 278.

It is obvious that an administrator has no pecuniary or personal interests which can be affected by a decree of distribution of funds shown by his account to be in his hands. He has no property rights which can be established or divested by such a decree. It is immaterial to him to whom he is required to pay over such funds and he cannot be said to be aggrieved by a decree directing him to pay to a legatee rather than to an heir.

But as assignee of the distributive share of one of the heirs at law, it is equally obvious that the appellant has pecuniary interests and property rights which may be directly affected by a decree of distribution. It is accordingly provided by sect. 34, of chapter 65, R. S., that "any person claiming under an heir at law has the same rights as the heir in all proceedings in probate courts including rights of appeal." It is therefore clear that in this case the appeal was properly taken and prosecuted by the appellant and in his name as assignee of an heir at law.

Under the reasons of appeal the only question raised by the appellant is whether the balance of the estate remaining in his hands as administrator on settlement of his account should be paid to Mary D.

Dike, as a demonstrative legacy or be distributed among the heirs as intestate property.

It has been suggested, however, that whether the legacy to Mary D. Dike was a specific or a demonstrative legacy should have been determined as a preliminary question by the court of equity and not, upon appeal, by the supreme court of probate. But we are unable to concur in his view.

Section 7 of chapter 65, R. S., declares in the first place that the judge of probate "has jurisdiction of all matters relating to the settlement of such estates."

Section 20 of chapter 67, R. S., provides that "when on the settlement of any account of an administrator or executor, there appears to remain in his hands property not necessary for the payment of debts and expenses of administration, nor specifically bequeathed, the judge . . . . shall determine who are entitled to the estate and their respective shares therein under the will or according to law, and order the same to be distributed accordingly."

In the case at bar the administrator appears to have accounted for a balance of $500.59 not necessary for the payment of debts, and finding that it was not specifically bequeathed, the judge of probate ordered it to be paid to Mary D. Dike as legatee under the will of Mary A. Randall.

It is difficult to discover any satisfactory reason why the exercise of jurisdiction of the probate court in such a case is not authorized by the plain terms of the statute, and in accordance with the obvious intention of the legislature. The decree of the probate court is subject to revision on appeal to the supreme court of probate, and a direct and convenient mode of procedure is thus provided for reaching a final decision of the question involved in the settlement of the estate.

This precise question arose in *Byrne* v. *Hume*, 86 Mich. 546, and the jurisdiction of the probate court was sustained by the supreme court, although the only basis of probate jurisdiction in such a case in that state is found in the following provisions of the statute, viz: "The judge of probate shall have jurisdiction of all matters relating to the settlement of the estates of deceased persons." How. Ann. Stat., § 6760. "After the payment of the debts, funeral charges and

expenses of administration and after the allowances made for the expense of the maintenance of the family of the deceased . . . . and after the assignment to the widow of her dower and of her share in the personal estate, etc., the probate court shall by a decree for that purpose assign the residue of the estate, if any, to such other persons as are by law entitled to the same." How. Ann. Stat., § 5964.

In that case the testator bequeathed to his father and mother the sum of $3,500 to be paid out of his "life insurance money as soon as collected." In the opinion the court say: "Whatever this legacy may be called, whether general, specific or demonstrative, the probate court had jurisdiction to direct, in a proper proceeding, a payment of the legacy, if withheld. We are not satisfied, however, that this was a specific legacy . . . . It is rather in the nature of a demonstrative legacy which is a pecuniary legacy, the particular fund being pointed out from which it is to be paid. Under such gifts the legatee will not lose the legacy if the fund fail . . . . In this view of the case the probate court has jurisdiction, in giving construction of the will, over this fund." The court say: "Such power is necessarily involved in the power to assign the estate of a testator on the settlement of an executor's account." So in *Glover* v. *Reid*, 80 Mich. 228.

The same doctrine was announced by the court "*In the matter of Verplanck*," 91 N. Y. 450. It is there said: "The surrogate has jurisdiction over the settlement of the accounts of executors and administrators," and in sect. 2743 (Code of Civil Proc.) it is provided that, "When an account is judicially settled as prescribed in this article, and any part of the estate remains, and is ready to be distributed to the creditors, legatees, next of kin, husband, or wife of the decedent or their assigns, the decree must direct the payment and distribution thereof to the persons so entitled, according to their respective rights. As incident to the duty thus cast upon the surrogate, he must have jurisdiction to construe wills, so far as needful, at least, to determine to whom legacies shall be paid." See also Smith's Appeal, 103 Pa. St. 559.

In this state the statute existing at the time of the decision of *Hanscom* v. *Marston*, 82 Maine, 288, was superseded by the more

definite and comprehensive language of chapter 49 of the laws of 1891, now found in section 20 of chapter 67, R. S., as already shown. That decision is therefore no longer to be considered an authority to support the contention that the question here raised is not cognizable by this court as the supreme court of probate.

Whether or not the decree of the probate judge in this case was correct is the question presented by the appeal to the supreme court of probate, and it is a question not entirely free from difficulty.

The first item in the will is as follows: "I direct my funeral expenses and doctor's bills to be paid from the $1100 now in the hands of my brothers, Charles A. and James D. White of Gardiner, Me., U. S. A." In item second, the testatrix gives to Sarah D. Butler a life estate in "the remainder of the $1100;" and the first clause of item third is as follows: "I give and bequeath to Mary D. White, the eldest daughter of Charles A. White, at the decease of the said Sarah D. Butler, in case the said Sarah D. Butler outlives me, otherwise at my decease, six hundred dollars of said $1100."

It appears from the statement of facts in the case that at the date of her will, June 17, 1878, the testatrix had in the hands of her brothers the sum of $1100 for which she held their promissory note, but in 1883 this sum with interest amounting to $1235.96 was paid to the testatrix and thereafter mingled with her other funds, and no specific fund of $1100 existed at her decease. It also appears that the entire amount of the estate possessed by the testatrix at her decease was exhausted by the administrator in the payment of expenses and specific legacies, and that it was only by reason of the income derived from the bank stock and savings bank deposits after the decease of the testatrix that the balance of $500.59 remained upon settlement of the administrator's account.

It is contended by the appellant that the bequest by the testatrix to Mary D. (White) Dike of $600 of the $1100 then in the hands of her brothers was a specific legacy which was adeemed by the failure of the particular fund bequeathed to her, and hence that the balance of $500.59 in the hands of the administrator should be distributed among the heirs as intestate property. On the other hand it is claimed that construed in the light of all of the other provisions o

the will, the clause in question shows an intention on the part of the testatrix to make an absolute gift of $600 to Mary D. White, payable out of her estate in any event, whether the particular sum of $1100 remained in the hands of her brothers, or should be withdrawn and invested elsewhere. It is accordingly contended that this was a demonstrative legacy, payable out of a designated fund if it existed, but like a general legacy payable out of the general assets of the estate if the particular fund should fail.

The distinction between a specific and a demonstrative legacy involves not merely a technical question depending for its solution solely upon the precise language of the bequest, but a substantial inquiry respecting the intention of the testator as shown by the terms of the particular legacy examined in connection with all of the other provisions of the will. A specific legacy is a bequest of a specific article or particular fund which can be distinguished from all the rest of the testator's estate of the same kind, while a general legacy is payable out of the general assets of the estate.

In Redf. on Wills, (2 ed.) 136, the author says: "There is an intermediate class of legacies between general and specific legacies, where a certain amount of money is given to come out of a particular fund. These are sometimes called, after the denomination in the civil law, demonstrative legacies. This class of legacies is not liable to be adeemed and so fail by the fund being called in or changed, but is still payable out of the general assets. In this respect it partakes more of the nature of a general legacy." See also 1 Roper on Leg., 198.

While a demonstrative legacy partakes of the nature of a specific legacy by designating the fund from which the payment is to be made, there is a vital distinction respecting the result in case of the failure of the particular fund mentioned. A specific legacy is adeemed or lost by the extinguishment of the specific thing or failure of the particular fund bequeathed, while a demonstrative legacy is still payable out of the general assets if the fund specially mentioned fails. Thus it is important to observe that two elements are necessary to constitute a demonstrative legacy. It must appear in the first place that the testator intended to make an unconditional

gift in the nature of a general legacy, and secondly the bequest must indicate the fund out of which it is payable. See *Crawford* v. *McCarthy*, 159 N. Y. 514, and Smith's Appeal, 103 Pa. St. 559, supra. The case of *Byrne* v. *Hume*, 86 Mich., supra, is a good illustration of a demonstrative legacy.

In *Davis* v. *Crandall*, 101 N. Y. 311, the testatrix bequeathed to one legatee "the sum of $243.92, a portion of the debt due me from the said James Davis secured by his notes," and to another "the sum of $243.92 another portion of the debt due me from the said James Davis and secured by his notes." At the time of making the will the testatrix held a single note against James Davis for the amount of the two sums thus bequeathed. It was held that each had a specific legacy for one-half of the note, and in the opinion the court say: "If that note had been paid during the lifetime of the testatrix or otherwise cancelled or destroyed, so that no obligation at her death rested upon James Davis to pay it, the two legatees would have taken nothing."

This case is an authority precisely in point in the case at bar. The language of the bequest is in effect exactly the same. In the case at bar the testatrix bequeathed to Mary D. White $600 of the $1100 in the hands of her brothers; and a careful examination of all the other provisions of the will in connection with this bequest fails to disclose any intention on the part of the testatrix to make an unconditional gift of $600 which should be payable out of her general estate in case of the failure of the fund specially mentioned. Only one of the elements which constitute a demonstrative legacy is found to exist in this case. A particular fund is pointed out from which the sum of $600 is to be paid. That fund was not in existence at the decease of the testatrix. The legacy must be considered a specific one which was adeemed by the failure of the fund. But the balance of $500.59 remaining in the hands of the administrator had not been specifically bequeathed, and should be distributed among the heirs as intestate property, after deducting the appellant's costs and expenses taxed at seventy-six dollars and eighty-one cents.

Appeal sustained with costs for appellant as stated. Decree of court below reversed. Case remanded for further proceedings in accordance with this opinion.

DISSENTING OPINION.

PEABODY, J. In so much of the opinion of Mr. Justice Whitehouse as determines the rule for the construction of the will of the testatrix relative to the legacy in controversy I concur; but I do not concur in the opinion as to the extent of the equity powers of Probate Courts in this state.

The Probate Court had authority conferred upon it by Chap. 49 of the laws of 1891, which it did not previously have to adjudicate between residuary legatees of a testate estate, the heirs at law of an intestate estate, and as between the residuary legatees and heirs in case of a controversy as to whether the residuum is testate or intestate property, but only when on the settlement of the administration account there appears to remain in the hands of an administrator or executor property not necessary for the payment of debts, expenses of administration nor specifically bequeathed. This statute did not give the probate court jurisdiction to construe wills further than is necessary to ascertain who are entitled to the balance of the estate and their respective shares therein left after payment of debts, expenses of administration, and definite legacies, nor power to order the residue paid, except to residuary legatees under a residuary clause if any, of a will, or otherwise to heirs at law. In his decree the Judge of Probate has adjudicated that the legacy of Mary D. White was not a specific legacy which had been adeemed by the testatrix, but was a demonstrative legacy to be paid generally out of the estate. This was an assumption of jurisdiction to construe the will which belongs only to the equity court, and the decree could not establish the rights of the parties. *Hanscom* v. *Marston*, 82 Maine, 288; *Mattocks* v. *Moulton*, 84 Maine, 545; *Graffam* v. *Ray*, 91 Maine, 234. Neither can the decree of this court acting in these proceedings as a supreme court of probate authoritatively decide between them. The supreme court of probate has appellate jurisdiction in matters determinable by the judge of probate, and may reverse or affirm the sentence or act appealed from, and pass such decree thereon as the judge of probate ought to have passed.

The judge of probate could not order the payment of a definite legacy out of the residuum of the estate. He had no occasion under

this petition to decide, and did not decide that the sum mentioned in the petition was the true balance left for final distribution. It was sufficient if it so appeared on settlement of the account. If all debts, administration expenses and definite legacies have been in fact paid, the balance is to be distributed to residuary legatees according to the will, if it directs, otherwise to the heirs according to law. The judge of probate had jurisdiction to decree distribution only among these two classes of the residuary fund as he might find it to be testate or intestate property. The question of the existing validity of the legacy to Mary D. White must be determined between the legatee and the administrator with the will annexed, as is the validity of other definite legacies or debts against the estate, preliminary to the proceedings for distribution of the balance remaining. Smith's Probate Law, (4th Ed.) 154.

The suggestion of the counsel for the appellee, that the balance stated in the petition, which may be part of the proceeds of the specific sum of $1100 in the hands of the brother of the testatrix, was in the nature of a remainder, is a fair argument in support of the theory that the testatrix intended the bequest of an amount and not of a particular investment; but the will discloses no intention of the testatrix to dispose of any residuary estate as such. There is no general residuary clause, and there are no testamentary expressions indicating the bequest of a particular residue. The appellant's reasons of objection to the decree, that it does not follow the petition, and does not legally dispose of the balance of the estate, seem to be correct.

We cannot, sitting as the supreme court of probate, decide whether or not the appellee is entitled to the payment of her legacy in full or in part, out of the property in the hands of the administrator with the will annexed, but that under the petition the decree which the judge ought to have made is, that the balance of the personal estate be distributed to the heirs at law of the testatrix as intestate property. This must be the decree of this court. The appeal should therefore be sustained.

EDWARD E. O'BRIEN, Appellant, from Decree of Judge of Probate.

Knox. Opinion April 12, 1905.

Wills. Testamentary Capacity. Undue Influence. Burden of Proof.

Mere advice, suggestions, reasons or arguments addressed to the judgment of a person who is contemplating making a will, and which are intelligently considered and adopted by such person, do not constitute undue influence, nor does importunity even and persuasion, if the testator has sufficient mental capacity and strength of will to properly weigh and consider them and to resist them, unless adopted by him in the free exercise of his judgment and volition. Upon the other hand, whatever may be the nature and extent of the influence, if, because of the physical or mental weakness of the testator, and the nature and persistency of the influence exerted, it is such that the testator is unable to resist it, if it deprives him of his power to act as a free agent in the manner that he otherwise would, it is sufficient to avoid the will, because a will made under such circumstances is not the will, and does not carry out the wishes of a capable testator, acting as a free agent.

It follows that the true test is to be found, not so much in the nature and extent of the influence exercised, as in the effect that such influence has upon the person who is making his will. Whatever the nature and extent of the influence exercised, if in fact it is sufficient to overcome the volition and free agency of the testator, so that he does that which is not in accordance with the dictates of his own judgment and wish, and what he would not have done except for the influence exerted, it is undue influence. But the mere fact that arguments and suggestions are adopted by a testator, and his will, on that account, is different from what it otherwise would have been, is not sufficient. It necessarily depends upon the further question as to whether such advice or suggestions are intelligently and freely adopted, because they have appealed to the judgment of the testator, so as to become in accordance with his own desires, or whether because of the persistency of the importunity, or for any other reason, the testator is unable to resist and finally yields, not because of the voluntary action of his own judgment, but because, on account of the strength of the influence, or the weakness of his own judgment and will he cannot resist longer.

According to the rules of evidence and of practice which prevail in this state, the burden of proof, in its technically proper sense, does not ordinarily shift from one party to the other in the trial of a cause so long as the parties remain at issue upon a proposition affirmed upon one side and denied upon the other.

The fact that a person who occupies a close confidential relation to a testator draws the will of such testator, or takes an active part in its preparation, and receives a considerable bequest thereunder, does not shift the burden of proof upon the issue of undue influence from the contestant to the proponent.

Such a situation is a most important one and should be entitled to much force and bearing upon the issue involved. It would undoubtedly be sufficient, as a matter of fact, to arouse suspicion and to require the closest scrutiny and most careful examination of all of the surrounding circumstances, but it still remains a condition or situation of facts, the force and weight of which are to be considered with all the other facts and circumstances of the case. Such a situation might, as a matter of fact, cast upon the proponent the burden of explanation, and the absence of satisfactory explanation would be an additional fact of more or less weight. But the burden of proof upon the whole evidence, taking into consideration the situation referred to and all other circumstances, is still upon the contestant, who is bound to sustain the proposition asserted by him by a preponderance of all the evidence.

Upon a careful consideration of the whole case, including the relations existing between the proponent and the testatrix, the physical and mental condition of the testatrix and all facts and circumstances which have any bearing upon the question at issue, quite fully stated in the opinion, *Held*, that the will and the provisions in favor of the proponent were not procured by any undue influence exercised by him upon the testatrix, and that the verdict was entirely justified by the evidence.

On motion by appellant. Overruled.

Appeal from the decree of the Judge of Probate, Knox County, admitting to Probate the will of Mary E. Campbell. In the appellate court a jury trial was had and the jury rendered a verdict in favor of the proponent of the will, and thereupon the contestant filed a general motion for a new trial.

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

C. E. & A. S. Littlefield, and R. I. Thompson, for appellant.

Heath & Andrews, and M. A. Johnson, for appellee.

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

WISWELL, C. J. This is an appeal from a decree of the Probate Court of Knox County admitting to probate the will of Mary E. Campbell. Upon the trial in the Supreme Court of Probate, three

issues were submitted to the jury; as to whether the testatrix knew the contents of the instrument purporting to be her will; whether she had testamentary capacity, and whether in making the will she was unduly influenced. The jury answered all of these questions in favor of the proponent of the will, and the case comes here upon the contestant's motion for a new trial. In the argument before the law court counsel for contestant abandons the other issues and relies wholly upon the allegation of undue influence. In fact, the testamentary capacity of Mrs. Campbell has been admitted in the stipulation signed by the counsel.

Before stating and discussing the facts it may be well to formulate a statement of what is and what is not undue influence which will vitiate a will, so far as this subject may be applicable to the facts of the case. False statements of material facts and deception may be eliminated from the discussion, since there is no evidence to show that any fraud of this nature was practiced upon the testatrix. Mere advice, suggestions, reasons or arguments addressed to the judgment of a person who is contemplating making a will, and which are intelligently considered and adopted by such person, do not constitute undue influence, nor does importunity even and persuasion, if the testator has sufficient mental capacity and strength of will to properly weigh and consider them and to resist them unless adopted by him in the free exercise of his judgment and volition. Upon the other hand, whatever may be the nature and extent of the influence, if, because of the physical or mental weakness of the testator, and the nature and persistency of the influence exerted, it is such that the testator is unable to resist it, if it deprives him of his power to act as a free agent in the manner that he otherwise would, it is sufficient to avoid the will, because a will made under such circumstances is not the will, and does not carry out the wishes, of a capable testator, acting as a free agent. It follows that the true test is to be found, not so much in the nature and extent of the influence exercised, as in the effect that such influence has upon the person who is making his will.

Whatever the nature and extent of the influence exercised, if in fact it is sufficient to overcome the volition and free agency of the

testator, so that he does that which is not in accordance with the dictates of his own judgment and wish, and what he would not have done except for the influence exerted, it is undue influence. But the mere fact that arguments and suggestions are adopted by a testator, and his will, on that account, is different from what it otherwise would have been, is not sufficient. It necessarily depends upon the further question as to whether such advice or suggestions are intelligently and freely adopted, because they have appealed to the judgment of the testator, so as to become in accordance with his own desires, or whether, because of the persistency of the importunity, or for any other reason, the testator is unable to resist and finally yields, not because of the voluntary action of his own judgment, but because, on account of the strength of the influence, or the weakness of his own judgment and will, he cannot resist longer. It is undoubtedly true as has been argued, that in some cases it may be very difficult to determine whether a suggestion has been thus freely adopted, or has been merely followed by the testator because it has overcome his free agency, but it is none the less the true and decisive question and must be determined as well as possible in each case from all the facts and circumstances of the case. The citation of authorities in support of these statements of the rule is unnecessary, because such authorities are so exceedingly numerous.

We come now to the consideration of the facts of this case, many of which are unquestioned and the most of which are uncontradicted. The person who is claimed to have exercised an undue influence over Mrs. Campbell was one William G. Starrett who was named as executor in the will and who was largely benefitted by some of its provisions. It becomes necessary in the first instance to state fully, but as briefly as the case will admit, Mr. Starrett's connection with the making of the will, his previous relations with Mrs. Campbell, as well as those that existed at the time, and what influence he did in fact exert over her as to any of the provisions of the will in question.

The will was executed on the thirty-first day of October, 1900. The husband of Mrs. Campbell had died on the first day of that month. At that time Starrett was living in Massachusetts, in the vicinity of Boston. Mrs. Campbell and Starrett were second cousins, her

mother and his father were cousins. About the middle of September prior to Mr. Campbell's death on the first day of October, Mrs. Campbell wrote to Starrett, telling him of the serious condition of her husband's health and requesting him to come to Thomaston, if possible, as there might be business of importance about which she desired to see him. In response to this letter and to a telegram of similar effect, he arrived in Thomaston on September fourteenth and stayed until the twenty-fourth, during which time he had various interviews with both Mr. and Mrs. Campbell, but did not talk with Mr. Campbell about business affairs. Mrs. Campbell told him during this visit that in case of her husband's death she should want him to manage and settle his property and business affairs. After having left Thomaston for his home on the twenty-fourth, he received a telegram on the first day of October announcing Mr. Campbell's death, and at once returned to Thomaston.

Going back to the previous acquaintance between Starrett and Mr. and Mrs. Campbell, and their relations with each other, we find that Starrett when he was twenty-one years of age went into the employment of Mr. Campbell as a clerk in the latter's store and remained there for a period of two years. In 1879, he went into the employment of Mrs. Campbell's father Edward O'Brien, who was then conducting a business in Boston under the firm name of R. G. Morse & Co. He remained in that employment until 1888, and after an absence of four years went back in 1892. Edward O'Brien had previously died and Mrs. Campbell and her brother Edward E. O'Brien, were carrying on the business. From 1892, Starrett had charge of the Boston business until 1899, when it was closed out and the property sold. During that time Edward E. O'Brien as a member of the firm of Burgess O'Brien & Co., failed and made an assignment and the Boston business was thereafter carried on by Starrett under a power of attorney from Mrs. Campbell, Edward E. O'Brien and the latter's assignee. It does not appear that Starrett had any business relations with Mr. or Mrs. Campbell, prior to the death of Mr. Campbell, except to have charge of the Boston business in which she was interested, and except that he had a sum of money in his hands belonging to her for investment. But the Campbells

were on quite friendly terms with both Mr. Starrett and his wife, they occasionally corresponded, and the Campbells would occasionally visit the Starretts when they were in Boston.

After the funeral of Mr. Campbell, Starrett stayed in Thomaston during the month of October, devoting considerable of his time to the business affairs and property matters of Mr. Campbell. On the tenth of October, Mrs. Campbell first mentioned to Starrett the subject of the disposition of her own property. In relation to this conversation his testimony is as follows: "She said that she wished to make some disposition of her property; that she did not wish any of it to go to Edward E. O'Brien, and while she hadn't decided just what disposition to make of it, she wanted me to advise her under the circumstances, and I advised her to make a will." Starrett further says in this connection that he has an impression that it would be legally necessary to mention her brother's name in the will, and so told her, and that she desired him to ascertain if this was true by consulting a lawyer. This he did and upon the twenty-fourth of October, or before that, informed her that he had ascertained that this would not be necessary. Between the twenty-fourth of October and the day of the execution of the will there were numerous interviews and conversations between them as to various bequests. Mrs. Campbell desired that great secrecy should be maintained as to the provisions of the will, and did not even want the scrivener, who drew portions of the will, and who advised in regard to its form, to know its contents. Upon this account, Starrett would frequently go to the office of L. F. Starrett, a counselor at law with an office at Rockland, obtain from him drafts of different clauses of the will, take them to Mrs. Campbell and submit them to her for approval or modification. While this work of preparation was going on in this manner, and after Mrs. Campbell had given Starrett the names of numerous beneficiaries, she said to him upon one occasion, and, as he says, without the slightest suggestion from him upon the subject, "Will, I am going to give you $15,000." The various bequests determined upon by Mrs. Campbell during these interviews, the nature of which will be later considered, including that of $15,000 to Starrett, aggregated $119,000. Then according to Starrett's testimony after she had

completed the lists of names and amounts, Mrs. Campbell said, "that is all, what shall I do with the rest?" We quote this reply as testified to by him: "I asked her if she did not wish to leave anything to anybody else, and she said 'no what shall I do with it'. I asked her again if she didn't wish to make a bequest to somebody, or to give something in addition to what she had already given, and she said 'no, what shall I do with it'? I said, 'if you think I will make a good use of it give it to me', and she said, 'I will'." Accordingly the residuary clause in favor of Starrett was subsequently incorporated in the will.

It appears that Starrett had made inquiries, some of them of the contestant, as to the values of different properties belonging to Mrs. Campbell, and at that time estimated her whole estate to be of the value of $137,000. He says that the estate turned out to be worth $125,858.87. During these conversations he says that he suggested to Mrs. Campbell the names of two of her relatives, asking if she did not want to include them among her beneficiaries, but that she decided not to do so. After these various bequests had been fully determined upon and the drafts of different clauses had been submitted to Mrs. Campbell and adopted by her, either with or without modification, L. F. Starrett drafted the will leaving blanks for the names and amounts which were inserted by the proponent in accordance with the testatrix's directions, and on the 31st of October Mrs. Campbell and Mr. Starrett went to L. F. Starrett's office in Rockland where the will was executed. The relationship between the proponent and L. F. Starrett, if any, is not stated in the case.

It next becomes important to consider the physical and mental condition of Mrs. Campbell at the time of the execution of her will, her relations with her only heir-at-law, the contestant of the will, and any other matters that may throw any light upon the question as to the effect that Starrett's advice, suggestions or other influence, if any, may have had upon her. We do not find any statement in the case as to the age of Mrs. Campbell. It is said in one of the briefs that she was between sixty-six and sixty-seven years of age at the time of her death. She died of apoplexy on the twenty-ninth of December 1903, three years and two months after the execution of her will,

without any previous sickness. So far as the case shows she was in good condition of health at the time of the execution of the will. As we have already seen, her husband died on the first day of the same month in which her will was executed. They never had had children. Mrs. Campbell was the daughter of Edward O'Brien, from whom a portion of her fortune was inherited, the balance coming from her husband. At the time of the execution of the will, and at her death, Edward E. O'Brien, her only brother, was her only heir-at-law. The relations between Mrs. Campbell and her brother were, at least, not cordial. They were on speaking terms when they met upon the street or elsewhere, but very rarely exchanged calls, if at all, although he lived in the same village and nearly opposite to her place of residence on the same street. During the sickness of Mrs. Campbell's husband, her brother did not come to the house, and he did not attend the husband's funeral although he was her only relative nearer than a cousin, niece or nephew. Edward E. O'Brien had been the administrator of his father's estate, and the difficulty between him and Mr. and Mrs. Campbell, the relations between the brother and Mr. Campbell being even more strained, arose largely from the belief, whether unfounded or not is of no consequence, upon the part of the Campbells, that Mrs. Campbell as an heir of her father had not been treated with entire fairness by the administrator. Mrs. Campbell had petitioned the probate court to re-open the estate of her father, and at the September term of this court 1898 for Knox county had entered an appeal from the decree of the probate court in relation to this matter. At the following term, Mr. Edward E. O'Brien entered in the same court six equity suits against Mr. and Mrs. Campbell which, so far as the case shows, were pending at the time of the execution of this will. For some reason, at any rate, as plainly indicated by the will itself, which we will refer to later, and by various declarations, Mrs. Campbell was firm in her decision that she should make a distribution of her property in some way, and not allow it to descend to her brother as it would if he survived her in case she died intestate.

The record contains much evidence in regard to the mental condition of Mrs. Campbell. At the trial her testamentary capacity was

in issue, and although that issue has now been abandoned her mental capacity and strength of mind and will are still of especial importance in considering the question whether she was or was not unduly influenced by Starrett. For many years Mrs. Campbell had had the unfortunate habit of drinking intoxicating liquors to excess. She was frequently intoxicated and frequently seen in that condition by her friends, neighbors, and others. It is not unnatural that when in that condition her manner and conversation were such as to give those who saw her the impression that she was more or less incoherent in her conversation and that her mind and memory were failing. But we are satisfied from all of the evidence in the case, especially from her voluminous correspondence, which was introduced upon this question, that when sober, and her habit of drinking was periodical rather than constant, she was a woman of, at least, the average mental ability and vigor. She read much both of newspaper and of current literature, and was especially well informed upon the topics of the day. She traveled considerably, using her means, large and ample for her, for the purpose of giving herself and the friends whom she took with her enjoyment in this manner. Dr. Walker, her attending physician for many years, says: "She was an intelligent woman, and a woman of average mental capacity." We are satisfied that this was a conservative statement in regard to the mental condition of Mrs. Campbell, and that in addition to this that she possessed, at least, the average strength of will. That she was not at all under the influence of liquor at the time of the execution and preparation of the will, is satisfactorily proved.

We will next consider the will itself, since in any case the will may or may not contain inherent evidence of undue influence or the absence of it. This will contains this clause at the beginning: "I have not fully decided as to the final disposition which I wish to make of my property. I do not wish it to go as the law would dispose of it in case I should die without making a will. Therefore, I make this will with the purpose of making another when I shall have more fully considered the matter, and if I should fail to make another before I die, this is the disposition which I make of my

property." The will then contains eighteen bequests to different relatives of Mrs. or Mr. Campbell in amounts of three, five and ten thousand dollars each; a bequest of $10,000 in trust for a niece of Mr. Campbell's; a bequest of $5000 to a woman who had worked for her, and whose husband had long been in the employ of Mr. and Mrs. Campbell; of $5000 to the Congregational Church at Thomaston, of which society she was a member; of $5000 to the town of Thomaston, in trust, the income to be devoted to the care of the cemetery lot in which her father, mother and husband were, and she was to be, buried, with the right to use any excess of the income, over what was required for that purpose, for the general improvement and care of the cemetery; and a bequest of $10,000 to the town of Thomaston to be held in trust for the benefit of the poor of that town. The will also contained the bequest to the proponent of $15,000 and the residuary clause in his favor.

We think, that the foregoing is a sufficient statement of all of the material facts. Do they show that, in accordance with the principles laid down in the beginning of this opinion, such influence was exerted by William G. Starrett for his own benefit, and that it had such an effect upon the free agency of the testatrix, that this instrument should not be admitted to probate as her last will and testament. In support of his contention, the contestant relies upon the great secrecy that was observed by Mrs. Campbell and Mr. Starrett, upon the confidential relations which existed between them and the great confidence that she reposed in his suggestions and judgment, upon the fact that the proponent was largely benefitted by certain provisions of the will, and participated to such an extent in its preparation, upon the fact that he advised making a will in the first instance, and upon other considerations. Let us consider to some extent the facts and testimony already mentioned with reference to these claims of the contestant. The will itself, omitting from consideration for the present the clauses in favor of the proponent, certainly contains no inherent evidence to the effect that the testatrix was influenced in any way or by any person in making it. It has a strong tendency, we think, to show exactly the contrary. The first clause, which we have quoted in full, shows that she was considering

her own wishes and making up her own judgment in regard to the disposition of her property. She had not fully determined just what that disposition should be in all respects. But although this uncertainty existed, she had no doubt of one thing, that she proposed to make a different disposition than the law would make if she should die intestate. For this reason she appreciated the importance of making a will at that time, even if she should later find it desirable to modify it in some respects, so that in case she should die before making a change it would carry out her purpose so far as she had at that time decided. We can hardly imagine that a person, who was designing to procure a will for his own sinister purposes, containing provisions beneficial to himself, would allow such a clause to be inserted at the commencement if he had sufficient influence to prevent it.

The testatrix remembered numerous relatives, although not all, of her own and of her husband's, from whom a portion of her property came. She made as we have seen, eighteen different bequests to such relatives. Some of these recipients of her bounty were entirely unknown to the proponent, and none of them were at all upon intimate terms with him. She provided liberally for the care of the cemetery lot in which those nearest to her had been buried, and where she would be. She made a most generous provision for the poor of the town in which she had lived so many years, and provided that the management of this fund should be the same as that of the fund created by her father for the same purpose. She remembered her church, making a substantial provision for its assistance in the future. In all of these respects there is absolutely nothing to show, that in making these testamentary provisions, she was not following absolutely the dictates of her own judgment and carrying out her own wishes. The contrary conclusion is certainly to be drawn therefrom.

As to the nature and extent of the influence exercised by the proponent, if we consider the only direct testimony in the case, there was nothing said or done by him which could be said to amount to influence of any kind. And this direct testimony is supported rather than contradicted by a careful consideration and analysis of all of

the circumstances. True, he advised her to make a will, but it was after she had said to him that she must make some disposition of her property because she did not want it to go to her heir-at-law, and after she had asked for his advice. The advice given was not only entirely proper but it was the only advice that could properly be given under the circumstances. The necessity for her to make some disposition of her property had evidently become impressed upon her mind by the recent death of her husband.

So far as the $15,000 bequest to the proponent was concerned, he says, that this was entirely the suggestion of the testatrix without the slightest suggestion being made by him. As to the residuary clause, we have quoted the proponent's testimony as to all the conversation upon this subject. What was said by the proponent amounted merely to a suggestion, it was not influence of any kind, proper or improper. If his testimony is true, it could not have been sufficient to overcome the free agency of a person of average strength of intellect and of will. There was no persuasion attempted or persistent importunity of any kind, merely a suggestion, which, we are satisfied, could not have been sufficient to have had any undue influence upon the testatrix.

In considering this question, we should not lose sight of one of the most important considerations in the case, the bodily and mental condition of Mrs. Campbell at the time to which we have already alluded. She was not enfeebled in mind or body; the will was not made during the period of sickness; she was intelligent and well informed; she had sufficient mental ability to intelligently form her own judgment upon suggestions made, and sufficient strength of will to resist those that did not appeal to her judgment.

But it is argued that Mrs. Campbell had so much confidence in the proponent and placed so much reliance upon his judgment that any suggestion of whatever nature made by him was unhesitatingly adopted by her. It is true, that as to the management of her business affairs from this time until her death, the proponent testified that she accepted his advice and suggestion without question, the counsel for contestant argues that it necessarily follows that any suggestion made by him relative to the disposition of her property

would be as unhesitatingly adopted. We do not think that this follows. As to the investment, sale, reinvestment and care of her property, she, not unnaturally, followed the advice and suggestion of the person to whom she had entrusted the same. These were matters about which she perhaps had little knowledge and took less interest, but she knew whom she desired to make the recipients of her bounty by testamentary devise, in regard to such matters she did not need his advice. Because a woman with a considerable amount of property should accept all suggestions as to the management of that property, made by the person to whom its management had been entrusted, it does not at all follow that she would adopt, without the exercise of her reason and judgment, his advice concerning matters about which she was capable of forming a judgment of her own, and about which she evidently had a mind of her own.

It is true, as argued, that great secrecy was observed by Mrs. Campbell and the proponent. No one had any knowledge in regard to the provisions of the will, and no one, except those who were obliged to, the scrivener and the witnesses, that she was making a will at all. It is undoubtedly true that where a will is made under such circumstances, and where a person who is largely benefitted by its provisions has much to do with its preparation, suspicion is naturally aroused, and all of the facts and circumstances surrounding the making of the will should be scrutinized with jealous care.

In this connection we may as well consider another proposition contended for by counsel for the contestant. It is this, that although the burden of proof, in the first instance, is upon a contestant who seeks to avoid a will upon the ground of undue influence, to use his own language, "where a party occupying a close confidential relation to the testatrix, himself draws the will or takes an active part in its production, and himself receives a considerable bequest thereunder, the law from these facts alone presumes, as a presumption of fact, the existence of undue influence, and the burden is upon such party seeking to prove the will, to rebut that presumption by the surrounding facts and circumstances." We are not sure that the counsel by this language means to claim that where this state of facts is shown to exist, the burden of proof upon the issue of undue

influence shifts from the contestant to the proponent. If he does we should not care to adopt it as an entirely accurate statement of the law, although it is undoubtedly in accordance with statements contained in many decisions which are to be found and which have been cited. According to our rules of evidence and of practice the burden of proof, in its technically proper sense, does not ordinarily shift from one party to the other so long as the parties remain at issue upon a proposition affirmed upon the one side and denied upon the other. The condition of things stated by the counsel in the statement of his proposition of law is undoubtedly a most important one, and would naturally and properly be entitled to much force and bearing upon the issue involved. It is undoubtedly sufficient, as a matter of fact, to arouse suspicion, and to require the closest scrutiny and most careful examination of all of the surrounding circumstances, but it still remains a condition or situation of facts, the force and weight of which is to be considered in connection with all of the other facts and circumstances surrounding the case. Evidence showing the condition of facts referred to may, or may not, be sufficient to sustain the burden of proof resting upon the contestant, according to the other circumstances of the case, and the determination of the tribunal which is passing upon the issue. Such a condition might, as a matter of fact, cast upon the proponent the burden of explanation, and the absence of satisfactory explanation would be an additional fact of more or less weight. But we do not regard it as accurately correct to say that upon the proof of this situation the burden of proof shifts from the one party to the other. This burden upon the whole evidence, taking into consideration the situation referred to and all of the other circumstances, is still upon the contestant, who is bound to sustain the proposition asserted by him by a preponderance of all the evidence. Nor do we regard it as entirely proper to say that the existence of this state of facts, as a matter of law raises a presumption of fact that undue influence has been exercised by the person occupying this close confidential relation. The issue is one of fact, to be determined by the tribunal to which it is submitted, and we do not approve of a statement to the effect

that any particular evidence is sufficient to change the issue from one of fact to one of law.

In determining this question, which so far we have considered independently of the verdict of the jury, we have given due weight to the situation that in fact existed. A close business relation did exist between the testatrix and the proponent. This relation had only commenced at the time that this will was being prepared. It continued from that time to the time of the testatrix's death. It is not entitled to precisely the same weight that it would have been if it had existed for some time prior to the making of the will, but still it should be very carefully considered, especially in connection with the further fact that the proponent was largely benefitted by some of the provisions of the will and had much to do with its preparation. In our opinion the proponent has satisfactorily sustained the duty of explaining the circumstances which have given rise to any suspicion as to the propriety of his conduct. His testimony was very full, and he was apparently especially frank in telling with great detail his entire connection with the preparation of the will. He has apparently attempted to conceal nothing, but with perfect freedom and frankness has admitted some things which might have some tendency against him upon this issue, and which could not have been otherwise proved.

We do not consider it at all unnatural that she should have made the bequests in his favor. She had already remembered all of the relatives, and had made all the bequests of a public nature, that she cared to. She naturally appreciated the kindness and the attention of the proponent, and his willingness to come to her and render assistance when she was in need of it, and when she was in great trouble on account of her husband's fatal sickness and death. It is a reasonable conclusion that she knew of no more satisfactory way to her to dispose of this sum of $15,000, and of the residuum that might be left after making all of these specific bequests, than to give it to him. For these reasons we are entirely satisfied with the verdict of the jury upon this issue. As we have already said, the situation, unexplained, was sufficient to arouse suspicion as to the propriety and good faith of the proponent, and for this reason we think

that no costs should be allowed against him. The motion for a new trial is therefore overruled, and a decree will be signed affirming the decree of the Probate Court and remanding the case to the Probate Court for further proceedings in accordance with this opinion and the decree.

Motion overruled. Decree to be signed in accordance with the opinion.

GEORGE L. BRYANT

vs.

THE GREAT NORTHERN PAPER COMPANY.

Somerset. Opinion April 12, 1905.

Master and Servant. Notice of Danger. Assumption of Risk.

The duty of an employer to give notice to his servant of dangers in the operation of machinery, or of changes in machinery, which increase or which change the nature of dangers to be avoided, is confined to such dangers and changes as are not known to the servant, and to such as would not naturally be discovered by him by the exercise of the power of observation on his part. It is not the duty of an employer to give his servant notice of anything which the latter has an ample opportunity to become aware of himself by observation, if he exercises that reasonable care which the law requires of him in order to protect himself from harm.

As to the plaintiff's first cause of complaint, that there might have been at the place where he was caught between the cogwheels, guards or a protection of some kind which would have prevented an accident of that nature the plaintiff cannot recover, because, if there should have been some protection other than was provided, the plaintiff knew that there was none, and by his continuing in the employment for a long period of time with full knowledge of the absence of such protection as he claimed should have been furnished, he assumed the risk attendant upon the performance of his work about this machinery in the condition in which it was.

As to the second cause of complaint, that during his absence from the mill on account of sickness the revolution of the cogwheels was changed, so

that they revolved towards each other, upon the top, instead of away from each other as before, without notice being given to him or knowledge had by him, the Court is satisfied that he had ample opportunity during the four weeks that he was engaged as oiler of the machinery after this change was made, to observe it both by his sense of sight and from the fact that by reason of the change it was necessary for him to entirely change his movements in his work of oiling the shaft, a duty performed by him twice each day. And that, if, as he says, he did not observe in any way during this period of four weeks, that the change had been made, it was simply the result of his thoughtless inattention.

Held: that the accident to the plaintiff cannot be attributed to any fault upon the part of the defendant.

On motion by defendant. Sustained.

Action on the case to recover damages for personal injuries sustained by the plaintiff in the defendant's mill, at Madison, where he was employed. Verdict for plaintiff for $2500. Defendant then filed a general motion for a new trial.

The case is sufficiently stated in the opinion.

Forrest Goodwin, for plaintiff.

E. N. Merrill, for defendant.

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

WISWELL, C. J. While the plaintiff was engaged in his work of oiling certain machinery and shafting in the defendant's pulp mill, he, in some way, became caught in the cogwheels of a plunger pump and sustained serious injury. To recover for this injury he brought this action, and, at the trial, recovered a verdict with damages assessed at $2500. The case comes here on the defendant's motion for a new trial.

The plaintiff's first cause of complaint, is that there might have been, at the place where he was caught between the cogwheels, guards or a protection of some kind which would have prevented an accident of that nature, and that the defendant was negligent in failing to provide such protection as was feasible. Assuming the truth of the plaintiff's contention in this respect, the complete answer to it, and one which should prevent his recovery upon that ground, is, that the plaintiff had been engaged in this particular work, oiling

this identical pump, from early in October until the time of the accident on February 22, 1903, a period of nearly five months, except that he had been out of the mill during that time, on account of sickness, for about five weeks. If there should have been some protection other than was provided by the defendant, the plaintiff knew that there was none, and by his continuing in the employment for this period of time with a full knowledge of the absence of such protection as he claims should have been furnished, he assumed the risk attendant upon the performance of his work upon this machinery in the condition in which it was.

Another cause of complaint is this: prior to the time that the plaintiff was absent from his work on account of sickness, for a period of about five weeks, this pump was driven by steam power and the two cogwheels connected therewith, and between which he was caught, revolved outward or away from each other, on top. While he was out of the mill, the steam engine was replaced with an electric motor, and the direction of the revolution of the cogwheels was changed so that they revolved inward or towards each other, on top, thereby, it is claimed, increasing the chance of injury to him. And of this change he complains that he received no notice and had no knowledge. But from the time that the plaintiff came back to his work, after his absence of five weeks, and after the direction of the revolution of the wheels had been changed, he worked as an oiler upon this same pump and in the immediate vicinity of the intersection of these cogwheels for four weeks, oiling the bearings twice each day. One of these wheels was forty-two inches in diameter, about twelve feet in circumference, and its revolution was only twenty-six times a minute, so slow that anyone whose duty called him into its vicinity could easily observe the direction of its revolution. Not only this, the reversal of the revolution of the wheels caused a reversal of the crank shaft which made a complete revolution with each revolution of the larger wheel. There was a receptacle for oil on top of this crank shaft which had to be supplied with oil while in motion; to do this, the oiler was obliged to insert the nozzle of his oil can in the oil receptacle and follow it so long as he could in its revolution. Revolving in one direction, this

was done while the crank shaft was going up, in the other, while it was going down. So that the oiler, not only had ample opportunity to observe the change in the direction of the revolution of the wheel by the use of his sense of sight, but this change in the movement of the crank shaft also caused him to entirely change his movements in the performance of his duty of oiling the shaft.

If, as he says, he did not observe in any way that this change had been made during the period of four weeks that he was at work upon the pump after the change had been made, it was, we feel satisfied, simply the result of his thoughtless inattention. The duty of an employer to give notice to his servant of dangers in the operation of machinery, or of changes in machinery which increase or which change the nature of dangers to be avoided, is confined to such dangers or changes as are not known to the servant, or to such as would not naturally be discovered by him by the exercise of the powers of observation on his part. It is not the duty of the employer to give his servant notice of anything which the latter has a perfect opportunity to know himself by observation, if he exercises that reasonable diligence which the law requires of him to protect himself from harm.

After a careful consideration of the whole testimony, and notwithstanding the verdict of the jury, we feel satisfied that the unfortunate accident to the plaintiff cannot be attributed to any fault upon the part of the defendant, that consequently he is not entitled to be compensated in damages, and that the verdict was clearly wrong.

Motion sustained. New trial granted.

LOIS RICHARDSON *vs.* JULIAN D. TAYLOR, Admr.

Kennebec. Opinion April 12, 1905.

Accord and Satisfaction. Offer and Acceptance. Payment.

If an offer of money is made to one, upon certain terms and conditions and the party to whom it was offered takes the money, though without words of assent, the acceptance is an assent de facto and he is bound by it. The acceptance of the money involves the acceptance of the condition.

Shortly after the death of the defendant's intestate the plaintiff presented her claim to the defendant, and after the latter's appointment as administrator, he sent the plaintiff a check for the sum of $100, enclosed in a letter of the following tenor: "If you choose to accept the enclosed check in satisfaction of all demands against my father's estate will you please sign and return to me the accompanying receipt. If not, please return the check." The plaintiff received this letter and the enclosed check and retained the check, later obtaining the money thereon, but she did not sign and return the receipt.

Held: that the plaintiff having accepted the check upon the condition clearly stated, she received it in full satisfaction of all demands that she had against the decedent's estate, and that this action cannot be maintained.

On motion and exceptions by defendant. Motion sustained.

Assumpsit against the defendant as administrator of his father's estate to recover for services rendered to the intestate. The action was brought and tried in the Superior Court, Kennebec County. Verdict for plaintiff for $223.10. Defendant filed a general motion for a new trial and also took exceptions to certain rulings made by the presiding Justice. Case decided on the motion. Exceptions not considered.

The case is sufficiently stated in the opinion.

Brown & Brown, for plaintiff.

Charles F. Johnson, for defendant.

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

WISWELL, C. J. Action against the defendant as administrator of his father's estate to recover for services rendered to the intestate.

Shortly after the death of the defendant's intestate the plaintiff presented her claim to the defendant, and on June 5, 1902, after the defendant's appointment as administrator, he sent the plaintiff a check for the sum of $100 enclosed in a letter of the following tenor: "Miss Lois Richardson: — If you choose to accept the enclosed check in satisfaction of all demands against my father's estate will you please sign and return to me the accompanying receipt. If not, please return the check."

The accompanying receipt was as follows: "Received from J. D. Taylor, adm., one hundred dollars in full satisfaction of all claims against the estate of Daniel Taylor, deceased."

The plaintiff received this letter and the enclosed check, and retained the check, later obtaining the money thereon, but she did not sign and return the receipt. Subsequently she commenced this suit, giving credit for this payment upon account. At the trial the jury returned a verdict for the plaintiff for the amount claimed. Irrespective of the merits of the plaintiff's original claim, we are of the opinion that the verdict was clearly wrong and that the plaintiff cannot maintain this action because of the acceptance by her of this payment of $100 under the terms and conditions made by the defendant and clearly stated in the letter in which the check was enclosed. "If an offer of money is made to one, upon certain terms and conditions, and the party to whom it is offered takes the money, though without words of assent, the acceptance is an assent de facto and he is bound by it. The acceptance of the money involves the acceptance of the condition. Under such circumstances the assent of the creditor to the terms proposed by the debtor will be implied, and no words of protest even can affect this result." *Anderson* v. *Standard Granite Company*, 92 Maine, 429.

The letter from the defendant to the plaintiff clearly expressed the terms and conditions upon which the check for $100 was sent

her. If she chose to accept it, it was to be "in satisfaction of all demands" against his father's estate, if she did not choose to accept it in full satisfaction, she was to return the check. The defendant had the right to impose the terms upon which this payment should be accepted, if accepted at all. He did impose terms in language clear and emphatic, and as to the meaning of which there was no opportunity for doubt upon the part of the plaintiff. The plaintiff accepted the check upon these terms, she therefore took it in full satisfaction of all demands that she had against the decedent's estate.

Motion sustained. New trial granted.

CHARLES T. RANDALL *vs.* AUSTIN WENTWORTH.

Waldo. Opinion April 12, 1905.

Deed. Condition Subsequent. Failure to Comply. Forfeiture.

The defendant acquired title to the demanded premises by a deed from the demandant which contained this clause: "The above named Association (the grantee) to erect and maintain a fence around the remainder of the lot, of which the above mentioned ten acres is a part, and lying between said Association track and the County road, said Association or their successors failing to erect and maintain a suitable fence this instrument becomes null and void."

Held; that this clause constituted a condition subsequent, and that upon the failure of the grantee to comply with the condition, its title was forfeited and the demandant had the right to make an entry upon the premises for the purpose of revesting himself with the estate.

Held; also, that the case shows that the defendant has failed to comply with the terms of this condition subsequent, and that the plaintiff, prior to the commencement of this action, made an entry upon the premises for the purpose of revesting himself with the estate, and that he is consequently entitled to a judgment in his favor.

On report. Judgment for defendant.

Real action to recover possession of certain land situated in Montville, Waldo County. Plea, the general issue with a brief

statement alleging "that the title to the land described in the plaintiff's writ and declaration is and was at the date of said plaintiff's writ in the West Waldo Agricultural Society, a corporation duly established by the laws of Maine, and not in the plaintiff, and that the possession and right of possession was at said time in said West Waldo Agricultural Society, and not in the plaintiff, and that whatever said defendant has done in the premises has been as an officer and servant of said Association." Evidence reported to the Law Court by agreement, with the stipulation that the case is "to be determined in accordance with the rights of the parties."

The case is sufficiently stated in the opinion.

R. F. Dunton, for plaintiff.

W. P. Thompson, for defendant.

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

WISWELL, C. J. This is a real action. The demanded premises at one time belonged to the demandant. On October 17, 1887, he conveyed the same to the George's River Trotting Park Association, the name of which Association was subsequently changed to the West Waldo Agricultural Society. The defendant's plea is the general issue, with a brief statement in which he justifies his possession as an officer and agent of the West Waldo Agricultural Society. That corporation has title to the demanded premises unless its estate has been forfeited by its failure to comply with the following condition contained in the deed from the demandant to it, under its previous name: "The above named Association to erect and maintain a fence around the remainder of the lot, of which the above mentioned ten acres was a part, and lying between said Association's track and the county road, said Association or their successors failing to erect and maintain a suitable fence this instrument becomes null and void."

This clause constituted a condition subsequent. Upon the failure of the grantee or its successors to comply with the condition, the title of the grantee was forfeited and the demandant had the right

to make an entry upon the premises for the purpose of revesting himself with the estate. There is no serious question but that the Agricultural Society has failed to perform this condition. It originally built a fence as required thereby, but has not maintained it. The Association held its last fair upon its grounds, including the demanded premises, in 1897 and has not occupied the grounds since. From 1898 until the time that the plaintiff took possession in January, 1903, this fence has not been maintained as required by the condition. Although the necessity for the maintenance of the fence provided for in the condition may not have been so great since as during the period of time that fairs were held upon the Association's grounds, necessity for this or any other reason was not made a limit upon the duty of the Association to maintain the fence, and it does not affect the respective rights of the parties. There is no evidence from which any waiver upon the part of the demandant could be implied. Upon the contrary, the evidence shows that the demandant insisted upon a compliance with the condition, and so notified an officer of the Association in writing some three months before making a re-entry upon the premises.

The demandant therefore had the right to make an entry upon the premises for the purpose of revesting himself with the title as a prerequisite to the maintenance of an action for possession. Before the commencement of this action the plaintiff made an entry upon the premises for this purpose, sufficient in act and intent for the purpose. He is consequently entitled to a judgment in his favor.

Judgment for Demandant.

STATE OF MAINE *vs.* WILLIAM F. ROBB, Appellant.

Cumberland. Opinion April 14, 1905.

Constitutional Law. Municipal Ordinances. Police Powers. House Offal. Removal. Monopoly. Const. of Maine, Art. 4, part 3, § 1. R. S., c. 4, § 93, cl. 3.

1. Under a city ordinance providing that "no person shall go about collecting any house offal, consisting of animal and vegetable substances, or carry the same through any of the streets, lanes or courts of the city," except the person appointed for that purpose by the Sanitary Committee, the term house offal is held to include refuse food from the table, discarded victuals, and swill consisting of refuse from the table, though none of it be in a decayed condition.
2. Reasonable municipal regulations for the purpose of promoting the health of the citizens are clearly within the police power of the state. Among such regulations are those for the collection and removal of refuse and offal in thickly populated cities.
3. Reasonable municipal health regulations, under the authority of the state, are not void as taking private property without due process of law, or as a taking of private property without just compensation.
4. A municipal ordinance which by its terms gives the exclusive privilege of collecting and removing all refuse matter constituting house offal or swill, within the city, to a person or persons specially appointed, and which prohibits all other persons from engaging in that business, is not void as creating a monopoly and as being in restraint of trade.
5. The defendant in this case is only charged with having gone about "collecting certain house offal, consisting of animal and vegetable substances," in violation of the ordinance. The charge extends only to offal collected elsewhere than on his own premises. To that extent, at least, the prohibitory ordinance is valid.
6. An ordinance may be valid in part and void in part, and the valid part may be carried into effect, if what remains after the invalid part is eliminated, contains the essential elements of a complete ordinance.
7. Even if the ordinance in question here is invalid so far as it concerns the removal of offal in a proper manner by the defendant from his own premises, a question which it is not necessary to decide, the remainder of the ordinance, with a violation of which alone he is charged, is valid.
8. Upon the admitted facts, *Held:* that the defendant is guilty, as charged.

On agreed statement. Judgment for the State.

This was a complaint made on the ninth of September, 1903, by the City Marshal of Portland against William F. Robb of South Portland, Cumberland County, Maine, alleging that he did on the ninth day of September, A. D. 1903, at Portland in said county, "unlawfully go about collecting certain house offal consisting of animal and vegetable substances the said Robb not being then and there duly authorized and appointed thereto according to law nor then and there the deputy of any person so authorized and appointed as aforesaid." On said complaint the respondent was arrested and brought before the Municipal Court for the City of Portland on the eleventh of September, 1903. A hearing on the complaint was waived and the respondent pleaded not guilty and appealed to the Superior Court for the County of Cumberland at the January term, 1904, duly recognized and entered the appeal. The case was submitted to the Law Court on an agreed statement of facts. If according to this statement respondent has violated the City Ordinances and if the City Ordinances are constitutional, then respondent shall be adjudged guilty, otherwise not guilty.

The question also submitted is "What is house offal?"

The agreed statement of facts is fully stated in the opinion.

Robert Treat Whitehouse, County Attorney, for the State.

Dennis A. Meaher, for defendant.

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

SAVAGE, J. Complaint for violation of section 17 of an ordinance of the City of Portland. The ordinance in question provides that:

"Sect. 14. All house offal, whether consisting of animal or vegetable substances, shall be deposited in convenient vessels, and be kept in some convenient place, to be taken away by such person or persons as shall be appointed by the Sanitary Committee for that purpose.

Sect. 15. All persons shall promptly deliver the offal so accumulated on their premises to the person appointed as aforesaid to receive the same. And if any person shall neglect to provide suit-

able vessels for the deposit of house offal, or shall in any way hinder or delay the person so appointed to receive it, in the performance of his duty aforesaid, he shall forfeit and pay a sum not less than two nor more than twenty dollars for each and every offense.

Sect. 16. The collection of house and fish offal, and the disposal of the same; and the cleansing of street culverts and catch basins, shall be under the charge of a committee consisting of three members of the board of mayor and aldermen, to be known as the sanitary committee; but all matters relating to privy vaults and the collection and disposal of night soil shall be under the direction of the board of health.

Sect. 17. No person shall go about collecting any house offal, consisting of animal or vegetable substances, or carry the same through any of the streets, lanes or courts of the city, except the person appointed as aforesaid, or his deputy, under a penalty of not less than two nor more than twenty dollars for each and every offense.

The case comes up upon an agreed statement of facts which shows that the respondent "at the time of the complaint was proprietor of the Chadwick House and part of the Chase House in said Portland and daily removed therefrom and on the day alleged in said complaint did remove therefrom to his home in South Portland, the refuse food and discarded victuals. He prepared himself with proper vessels and made proper sanitary arrangements so that in removing the same to his home there was no occasion to complain against the manner in which the removing was made or the services rendered. He was the keeper of many hogs in South Portland, probably thirty hogs and a flock of hens for which he carried the so called swill or offal. He gathered swill also from the Dairy Lunch in Portland and from the Columbia and on an average would remove four barrels in a day. All the work was done in a workmanlike manner. The swill consisted of refuse from the table including bread, meat, vegetables and broken victuals none in any decayed condition. He had been engaged in this business during about four years prior to the complaint, and was conducting said business on the day alleged therein, and prior to the time of this complaint he made application

to the Board of Health or Sanitary Committee for a license to remove the offal and also made application to the City Government of the City of Portland stating in the petition that the business was done in a workmanlike manner and subject to sanitary rules. No license was granted him. The offal was probably worth $8.00 a month. Mr. Robb paid $65.00 a year for the offal of the Columbia and $35.00 for the offal of the Dairy Lunch. Mr. Robb had men working for him who attended to the details of the work. The offal was removed in covered barrels placed on wagons and hauled out of the city. No scatterings were allowed on the road. The removal was made daily and in the summer time often twice a day. The offal was used in feeding the hogs and hens and was all used up on Mr. Robb's home place. The removal was generally in a covered cart.

Respondent has never consented to allow any other person than the one in his employ to enter his premises for the removal of house offal and those from whom he received house offal, so called, forbade others gathering house offal on their premises.

It is further agreed that a Sanitary Committee for the City of Portland was duly appointed and constituted as provided by section sixteen of the City Ordinances hereinbefore set forth and that the said William F. Robb was not on the day when said offense was alleged in said complaint to have been committed the person appointed by said Sanitary Committee for the purpose of taking away house offal, and never has been appointed or authorized so to do by said Committee and that he was not the agent or deputy of any person so authorized and appointed as aforesaid, but that one Samuel D. Plummer was on the fifth day of June, 1903, duly appointed and authorized as the person to take away house offal as provided for in sections fourteen and fifteen of the City Ordinances of Portland hereinafter set forth, and has ever since held that position." It is stipulated that "if according to this statement the respondent has violated the city ordinances, and if the city ordinances are constitutional, then respondent shall be adjudged guilty, otherwise not guilty."

I. Upon the first proposition there can be no difficulty. The ordinance prohibits all persons, except the regularly appointed

scavenger, from going about collecting, or from carrying through the streets any house offal, consisting of animal or vegetable substances. The respondent admits that he removed from certain buildings or hotels in Portland, of which he was proprietor, the refuse food and discarded victuals and carried them to South Portland, also that he collected swill from the Dairy Lunch and the Columbia Hotel in Portland and removed it to South Portland, and that the swill consisted of refuse from the table, including bread, meat, vegetables and broken victuals, though none were in a decayed condition. These articles as described come within any proper definition of "house offal." The respondent in the agreed statement which was apparently prepared by his counsel denominates them as "offal." Offal is defined in the Century Dictionary as "that which is suffered to fall off as of little value or use, waste meat, waste or refuse of any kind"; in the Standard Dictionary, as "that which falls off as fragments or leavings, regarded as of trifling value," and in the 21 Am. & Eng. Ency. of Law, 830, as "waste meat, carrion, refuse; that which is thrown away as of no value or fit only for beasts." Surely under these definitions, refuse food from the table, and discarded victuals, and swill consisting of refuse from the table, are house offal. And the respondent, not being the appointed scavenger, thus violated the ordinance in question.

II. But the respondent contends that these ordinances are unconstitutional in that, they are in restraint of trade, they create a monopoly, and they constitute an unwarrantable interference with the rights of the owners of private property.

The state on the other hand says that they are a proper exercise of the police power of the state as delegated by statute to the city of Portland. The constitution of the state, Art. IV, part 3rd, sec. 1, provides that the legislature shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this state. The legislature in R. S., c. 4, sect. 93, clause 3, has provided that towns, cities and village corporations may make and enforce ordinances, "respecting infectious diseases and health." And it is not contended here but that under this statutory authority the city of Portland had the power to enact reasonable

rules and regulations for the government of persons and property within its limits so far as necessary to promote health and prevent disease. This right is generally based upon what is called the police power of the state. The warrant of the state to legislate upon the subject of health, and of the various municipal subdivisions of the state to act under the authority of the state upon the same subject, is found, under the terms of the constitution, in the police power or sovereign right of the state to provide for the safety, protection, health, comfort, morals and general welfare of the public. A much quoted definition of this power is that found in *Com.* v. *Alger*, 7 Cush. 53, at page 85, where Chief Justice Shaw said,—"The power we allude to is rather the police power, the power vested in the legislature by the constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and services of this power, than to mark its boundaries, or prescribe limits to its exercise." And all persons exist, and all property is held subject to that power and right. *Com.* v. *Alger*, 7 Cush. 53; *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Stone* v. *Mississippi*, 101 U. S. 814; *Thorpe* v. *Rutland R. R. Co.*, 27 Vt. 140. All property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. *Mugler* v. *Kansas*, 123 U. S. 623; *State* v. *Speyer*, 67 Vt. 502.

The constitutional guaranties that no person shall be deprived of life, liberty or property, without due process of law, and that no state shall deny to any person within its jurisdiction the equal protection of the laws were not intended to limit the subjects upon which the police power of a state may lawfully be exerted. *Minneapolis Railway Co.* v. *Beckwith*, 129 U. S. 26; *Jones* v. *Brim*, 165 U. S. 180. In *Barbier* v. *Connolly*, 113 U. S. 27, the court used this language: "But neither the amendment [XIVth],— broad as it is— nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe

regulations to promote the health, peace, morals, education and good order of the people." See *The Slaughter House cases*, 16 Wall. 36. Proper police regulations "though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury it is either damnum absque injuria, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. The citizen owns his property absolutely, it is true; it cannot be taken from him for any private use whatever, without his consent, nor for any public use without compensation; still he owns it subject to this restriction, namely, that it must be so used as not to injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors, or the citizens generally." 1 Dillon on Mun. Corp. sect. 141. To the same effect are the decisions of this court in *Wadleigh* v. *Gilman*, 12 Maine, 403, and *Boston & Maine R. R. Co.* v. *County Commissioners*, 79 Maine, 386, in the latter of which cases this whole question is fully discussed. See also *Preston* v. *Drew*, 33 Maine, 558; *State* v. *Gurney*, 37 Maine, 156. Injurious property may be seized and confiscated. *Fisher* v. *McGirr*, 1 Gray, 1; *Train* v. *Boston Disinfecting Co.*, 144 Mass. 523.

The preservation of the health of the inhabitants is one of the most important purposes of municipal governments, so important that in England, reasonable by-laws in relation thereto have always been sustained as within the incidental authority of municipal corporations to ordain. 1 Dillon on Municipal Corp. sect. 369. And reasonable regulations for the purpose of promoting the health of the citizens are clearly within the police power of the state. Such is the law everywhere. See 1 Dillon on Municipal Corp. sects. 144, 369; cases cited in 22 Am. & Eng. Ency. of Law, 922; Cooley on Constitutional Limitations, 244. It may therefore be regarded as settled that reasonable municipal health regulations, under the authority of

the state, are not void as taking private property without due process of law, or as a taking of private property without just compensation.

But the regulations must be reasonable. They must be reasonable as to particular subject matter, and as to method of enforcement. *Jones* v. *Sanford*, 66 Maine, 585; *Austin* v. *Murray*, 16 Pick. 121. To arrive at a correct decision whether a by-law be reasonable or not, regard must be had to its object and necessity. *In re Vandine*, 6 Pick. 187. That some regulation of the collection and removal of refuse and offal in thickly populated cities is not denied. It needs no argument to show that if the disposal of matter of that sort already decayed or which will forthwith decay, be left to the will or whim or negligence, or ignorance of its owner, or of those to whom the owner may commit it for removal, the health, to say nothing of the comfort, of the public, will be seriously endangered. Ordinances or other regulations with respect to the collection and disposal of offal and garbage have frequently been before the courts, and in no case has the power and propriety of regulation been questioned, though in some cases objectionable features in the method of regulation have been discovered. To some of these cases which have been collected by the diligence of counsel reference will be made hereafter.

The question now reverts to whether the regulation adopted in this case was reasonable and lawful. By its terms it gives the exclusive privilege of collecting and removing all refuse matter constituting house offal or swill, within the city of Portland, to a person or persons specially appointed, and prohibits all other persons from engaging in that business. It even prohibits the owners upon whose premises the refuse is made, from carrying it through the streets,—no matter how carefully and safely,—to uses of their own outside of the city. That house offal has some appreciable value, we think, may be assumed, but as we have already seen, that fact does not save it from police regulation, if it is already noxious, or is in such condition as to require prompt intervention to prevent its becoming noxious and dangerous to health. *Harrington* v. *Board of Aldermen*, 20 R. I. 233, 38 L. R. A. 305. The state may even direct its destruction. *Lawton* v. *Steele*, 152 U. S. 133; *Preston* v. *Drew*, supra; *Fisher* v. *McGirr*, supra.

The respondent says that such an ordinance as this, even if it does not offend against express constitutional safeguards of property rights, is, under general common law rules, void as creating a monopoly and as in restraint of trade. The question may be viewed in two aspects, so far as this respondent is concerned, first, as respecting the prohibition which the ordinance in effect is, against the collection as vendee or agent of others of house offal, and the carrying of it through the streets of the city, that is, the prohibition of the business of scavenging house offal by anyone except the appointee of the Sanitary Committee; and secondly, the prohibition against the owner's carrying through the streets the offal made by himself.

1. Upon the first point by far the greater weight of authority supports the ordinance. In the *Slaughter House cases*, 16 Wall. 36, it was held that the grant of an exclusive right or privilege in pursuance of the exercise of the police power of the state, in the promotion of health and comfort, was not only not forbidden by the Fourteenth Amendment to the Constitution, but was clearly within the power of a state legislature and was not a monopoly at common law. The prohibition of the common law against monopolies extended only to such franchises and agreements as tended to restrict trade, and had no application to mere police regulations in the interest of public health or morality. 20. Am. & Eng. Ency. of Law, 851, and cases cited.

Of cases having direct reference to offal and garbage, and similar substances, that of *In re Vandine*, 6 Pick. 187, is a leading one. It was decided in 1828. It involved the validity of a by-law of Boston which provided that "no person shall remove, cart or carry through any of the streets . . . . of the city, any house dirt, refuse, offal, filth or animal or vegetable substance from any of the dwelling houses . . . . in any cart, ... or other vehicle, unless . . . duly licensed . . . . by the mayor and aldermen upon such terms and conditions as they shall deem the health, comfort, convenience or interest of the city require." Vandine engaged in the business without being licensed. It would seem that the city had made an exclusive contract with some person or persons to do the work, for one of the instructions excepted to was

that in the performance of the duty of the city to remove from the streets and houses all nuisances which might generate disease, it was both reasonable and proper that it should be in the city's discretion to contract with persons to perform the work, so that it might be done on a general system. It was contended that the by-law was void as in restraint of trade and operated as a monopoly. The Court said: "Every regulation of trade is in some sense a restraint upon it; it is some clog or impediment, but it does not therefore follow that it is to be vacated. If the regulation is unreasonable, it is void; if necessary for the good government of society, it is good." And again:—"The great object of the city is to preserve the health of the inhabitants. To attain that, they wisely disregard any expense which is deemed to be requisite. They might probably have these offensive substances carried out of the city without any expense, if they would permit the people from the country to take them away at such times and in such manner as would best accommodate them. Everyone will see that if this business were thus managed, there would be continual moving nuisances at all times, and in all the streets of the city, breaking up the streets by their weight and poisoning the air with their effluvia. It is obvious, that the object and interest of the city, and those of the carmen in this concern, are extremely different. But it is contended that the city authorities may regulate strangers and unlicensed persons, in regard to the number of horses and kind of carts to be employed, just as well as they can carts and the conduct of the licensed persons. It seems to us, however, that the city authority has judged well in this matter. They prefer to employ men over whom they have an entire control by night and by day, whose services may be always had, and who will be able from habit, to do this work in the best possible way and time. *Practically* we think the main object of the city government will be better accomplished by the arrangement they have adopted, than by relying upon the labor of others, against whom the government would have no other remedy than by a suit for a breach of contract. The sources of contagion and disease will be speedily removed in small loads, which will not injure the pavements, nor

annoy the inhabitants. We are all satisfied that the law is reasonable, and not only within the power of the government to prescribe, but well adapted to preserve the health of the city."

In *State* v. *Orr*, 68 Conn. 101, it appeared that the common council of Bridgeport had authority to regulate the collection and removal of garbage and offal. They ordained that the board of health might contract with one or more persons for the removal, among other things, "of such refuse matter as accumulates in the preparation of food for the table,"—a good definition of "house offal" as used in the Portland ordinance. All other persons were forbidden to collect and transport such refuse, without a permit from the board. The defendant offered to show that he had been formerly engaged in the business of collecting and removing garbage in Bridgeport, in carts so constructed as to meet the requirements of the ordinance, that he had applied for a permit and had been refused, and that all the garbage collected by him came from certain restaurants, with the proprietors of which he had contracts for its removal, all of which was held to have been properly excluded. The court, after stating that "refuse matter" as the term was used in the ordinance, can embrace nothing which has not been refused or rejected as unsuitable for table use, that it may be thus rejected because it has little or no value for human food, that it must in its nature be perishable, and can include little which is not liable to become decomposed or offensive, if left where it falls, decided that by the granting of an exclusive privilege for the removal of such matter, "no monopoly was created by which the common law rights of citizenship would be infringed upon." And further: "It was a violation of the ordinance to collect and transport the kitchen refuse which was its subject, whether such of it was being transported at the time of the act complained of was noxious or innoxious. It was enough that it was "such refuse matter as accumulates in the preparation of food for the table. There is so much of this kind of matter that is offensive and dangerous to the health of the community, that all may be properly made the subject of public supervision and control . . . . Any occupation comes within the range of the police power which is such as to be naturally liable to create a nuisance, unless

subjected to special regulations; whether it be so conducted as, in fact, to create a nuisance, or not. The prevention of nuisances is quite as important as their abatement." See *Harrington* v. *Board of Aldermen*, supra.

In *Grand Rapids* v. *De Vries*, 123 Mich. 570, under an ordinance authorizing it, the city had contracted with one person, giving him an exclusive right to collect and remove garbage and offal. The ordinance denied the right to all others. The defendant engaged in the business of collecting garbage in violation of the ordinance. He objected that the ordinance created a monopoly and tended to restrain trade. The court said: — "The gathering of garbage is not a trade, business or occupation in any proper sense, and such employment does not come under the doctrine in reference to monopolies, or in reference to legislation in restraint of trade. It is a matter in which the public agencies are authorized to pursue the best means to protect the public health" . . . . "The ordinance is one of the police regulations of the city for the benefit of the public health."

In *Walker* v. *Jameson*, 140 Ind. 591, the court held that an ordinance under which an exclusive contract was made for the collection and removal of garbage was a mere sanitary regulation, and not an attempt to create a monopoly. Among other things, the court said: "We recognize the rule that a municipal corporation has no power to treat a thing as a nuisance which cannot be one, but it is equally well settled that it has the power to treat as a nuisance a thing which from its character, location and surroundings, may or does become such." . . . . "It may be that the hotel and restaurant keepers will lose money on their garbage under the workings of this contract, where they before derived a revenue, but if, under this plan, the sources of contagion and disease will be more speedily and effectively removed, the city was empowered to make this contract."

To the same effect are *Smiley* v. *MacDonald*, 42 Nebraska, 5; 27 L. R. A. 540; *Coombs* v. *MacDonald*, 43 Nebraska, 632; *Louisville* v. *Wibble*, 84 Ky. 290; *State* v. *Payssan*, 47 La. Ann. 1029; *Ouray* v. *Corson*, 14 Colo. App. 345; *Morgan* v. *Cincinnatti*, 9 Ohio Dec. 280; *State* v. *Lowery*, 49 N. J. Law, 391; *Swift* v. *New York*, 83

N. Y. 528; *Boehm* v. *Baltimore*, 61 Md. 259. See also Dillon on Municipal Corporations, sect. 369, and 2 Beach on Corporations, sect. 995. In *Iler* v. *Ross*, (Neb.) 57 L. R. A. 895, an ordinance by virtue of which an exclusive contract was given to one person for the removal of all garbage, filth and other noxious and unwholesome substances, ashes, stable manure, rubbish and other waste and refuse matter was sustained as to dead animals, garbage and other noxious substances. But it was held that as to ashes, rubbish and other innoxious substances it was invalid. The court said: — "Such attempted regulation is, in our judgment, unreasonable, oppressive and contrary to sound public policy. The ordinance not only grants a monopoly, always odious in the eye of the law, without justification or necessity therefor, as a sanitary measure for the protection and preservation of the public health, comfort and welfare, but it is also an unwarranted invasion of the natural rights of the inhabitants of the city."

Our attention has been called to only two cases which may fairly be said to be to the contrary. All the other cases cited by the defendant are distinguishable. In the case of *In re Lowe*, 54 Kansas, 757, 27 L. R. A. 545, while it was admitted that monopolies may be upheld when deemed necessary in executing a duty incumbent on the city authorities or the legislature for the protection of the public health, the court held that an ordinance which gave to scavengers the exclusive privilege of cleaning privy vaults and cesspools, and of removing garbage, not only from the streets, but from the private premises of the citizens, and which in terms prohibited the owners from performing these services for themselves, created an unlawful monopoly and was invalid. In *River Rendering Co.* v. *Behr*, 77 Mo. 91, an ordinance which undertook to confer upon one person the right to remove and convert to his own use the carcasses of all dead animals, not slain for food, found in the city, to the exclusion of the right of the owners to remove and use them before they became a nusiance, was declared to be invalid, as authorizing the taking of private property for private use, and as depriving the owner of property without due process of law.

Upon a review of all the authorities, we conclude that the rule most consonant with authority as well as with reason is, that a city in the exercise of the police power granted to it by the state may, by reasonable ordinance, regulate the collection and disposal of substances within the city, which are of such a condition and of such a character as to be nuisances per se, and deleterious to the public health or comfort, or which are liable to become nuisances and noxious and deleterious, unless immediate care is taken to prevent their becoming so. We think that a city may prevent conditions injurious to health as well as abate them. It does not create an unlawful monopoly, or unlawfully restrain trade to commit the business of collecting and disposing of such substances to one person, and to exclude all others from such business. That it is reasonable to so limit the business appears clearly we think from the reasons assigned in *In re Vandine*, supra, which we have quoted. We think "refuse food and discarded victuals," and "swill consisting of refuse from the table including bread, meat, vegetables and broken victuals" are not only "house offal," as we have already said, but from their character and condition, if not already decayed, noxious and deleterious to health, are extremely liable to become so unless promptly taken care of. Hence the city may lawfully commit the business of their collection and disposal to one person, and forbid others to collect and carry away the same.

2. But the respondent contends that the ordinance in terms is so comprehensive as to prohibit the owner of premises upon which is created offal, consisting of "table refuse and discarded victuals" not then in a decayed or noisome condition, from removing it through the streets, and out of the city, and that such offal is property, and, that in such quantities at least as are produced in hotels such as the respondent's, it has considerable pecuniary value. He urges that no necessity is shown which justifies any such interference with the rights of property, and hence that the ordinance is, in this respect, unreasonable and destructive of constitutional property rights.

But that question does not arise in this case. The respondent is not charged with having carried through the streets offal made upon his own premises, but with having gone about "collecting certain

house offal, consisting of animal and vegetable substances." This has no reference to offal made on his own premises. It has reference to offal collected elsewhere. And the collection of such offal falls within the reasonable prohibition of the ordinance.

Now, if it were true as claimed, concerning which we express no opinion, that the ordinance is invalid in respect to the removal of house offal by the respondent from his own premises, still, we think it can be enforced as to the offal purchased from others and removed by him. A by-law or ordinance, like a statute, may be valid in part and void in part. Where it consists of several distinct or separable parts or provisions, the invalidity of one or more of these will not render the entire ordinance void. 21 Am. & Eng. Ency. of Law, 993. Thus where an ordinance contains two separate prohibitions of different acts, or a prohibition applying to different classes of objects, it may be valid as to one, and invalid as to the other. Such was *Iler* v. *Ross*, supra, where an ordinance was held valid as to garbage and offal, and invalid as to ashes and rubbish. So where two distinct penalties are affixed, one of which is invalid, the other may be applied. Dillon on Municipal Corporations, sect. 421. *Com.* v. *Dow*, 10 Met. 382. If the part of a by-law or statute which is valid can be separated from that which is void, and carried into effect, it may be. *Amesbury* v. *Bowditch M. F. Ins. Co.*, 6 Gray, 596. But it is necessary that the good and bad parts be so distinct and independent that the invalid parts may be eliminated, and what remains constitute the essential elements of a complete ordinance. *Passaic Water Co.* v. *Paterson*, 65 N. J. Law, 472; *State* v. *Hoboken*, 38 N. J. Law, 110; *State* v. *Webber*, 107 N. C. 962. See note to *Eureka City* v. *Wilson*, (Utah), 62 Am. St. Rep. 910; *Fisher* v. *McGirr*, 1 Gray, 1; *Warren* v. *Charlestown*, 2 Gray, 84.

In Cooley on Const. Lim. the author says, "Where therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have

missed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section; for the distributions into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. . . . . If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other."

In the case at bar the second clause in sect. 17 of the ordinance, "Or carry the same through any of the streets" etc., is in the alternative. If this clause be stricken out as invalid on the ground that it is an unreasonable interference with property rights, that which remains is complete in itself. It is the remaining provision which is found in the complaint, and it is independent of the provision omitted from the complaint. We think it should be sustained. In accordance with the stipulation, the entry will be

Judgment for the State.

JOSEPH W. FOSTER *vs.* SEBAGO IMPROVEMENT COMPANY.

Cumberland. Opinion April 25, 1905.

Flowage. Mill and Mill Dam. Prescriptive Right to flow Land. "Mill Act," Private and Spec. Laws, 1893, c. 481, § 4. R. S., c. 94.

It is the settled law in this state that in order to acquire a prescriptive right to flow land by means of a mill dam without the payment of damages, it must appear that the land was flowed for twenty consecutive years, and that some appreciable damage to it was thereby occasioned.

While the owner of the land sustains no damage and can therefore maintain no suit or process, or in any way prevent such flowing, he cannot be presumed to have granted or relinquished any of his legal rights.

At common law the foundation of a prescriptive right to an easement in another man's land is the adverse and uninterrupted enjoyment of it for a period of twenty years under a claim of right without payment of damages and without consent of the owner. But the overflowing of another's land, by the owner of a mill, to work it, by means of a dam, the mill and dam standing upon his own land, being secured by the provision of the Mill Act, his common law remedy for damages, when sustained, is taken away, and he can recover against the owner of the mill, only in the mode and in the cases provided for by the Mill Act.

If the owner of the land flowed has not been injured by the flowing, he cannot maintain an action under the Mill Act, against the owner of the mill for flowing his land; and having no power to prevent the flowing in such case, no prescriptive right to flow the lands without the payment of damages can be acquired against him. But if the owner of the land flowed, has a right to maintain a complaint against the owner of the mill for such flowing, the latter may acquire a prescriptive right to flow the land without payment of damages.

In the case at bar, it only appears that the plaintiff's land was continuously flowed by the dam for twenty years prior to the date of the writ. It does not appear that there was any actual damage to the land the first three years of that time. It does not appear that the flowage during those three years was adverse, under a claim of right, without payment of damages or without consent of the owner. For aught that appears, the flowage during those three years may have been with the permission of the land owner. *Held:* that the case fails to disclose any foundation for a prescriptive right to flow the plaintiff's land during that period.

On exceptions by defendant. Overruled.

Complaint for flowage brought under the provisions of section 4 of chapter 481 of the private and special laws of 1893, entitled "An Act to Incorporate the Sebago Improvement Company," to recover damages sustained by the plaintiff by the alleged flowing of his land by means of the defendant's dam. The defendant claimed a prescriptive right to flow the plaintiff's land without compensation.

At the trial the following question was submitted to the jury. "At the date of the complaint, had the respondent a prescriptive right to flow the land of the complainant to the same extent it was flowed at the date of the complaint?" To this question the jury returned an answer in the negative.

The defendant took exceptions to certain instructions given to the jury by the presiding justice and also took exceptions to the refusal of the presiding justice to give certain requested instructions.

The material facts sufficiently appear in the opinion.

Llewellyn Barton and Foster & Hersey, for plaintiff.

Bird & Bradley, for defendant.

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

WHITEHOUSE, J. This is a complaint for flowage founded on the provisions of chapter 481 of the private laws of 1893, entitled "An Act to Incorporate the Sebago Improvement Company."

By section 3 of that act the defendant corporation is authorized to construct dams, canals, locks, breakwaters and piers and to make such other improvements as may be necessary and proper to facilitate navigation in Songo River; and the last clause in section 4 of the act is as follows: "for any damages by flowage, said corporation shall make reasonable compensation to the parties injured, to be ascertained in the same manner as now provided by law in the case of flowing lands by erection of dams and mills.

It is alleged in the complaint that for three years prior to its date the defendant corporation owned and maintained a dam including a lock on land of its own at a place called Songo Lock in the town of Naples, which flowed the water back upon the plaintiff's land and caused damage to the amount of $350.00 per year.

In defense, the defendant claimed a prescriptive right to flow the plaintiff's land without compensation.

"At the trial evidence was introduced by defendant tending to show that the plaintiff's land had been each year continuously flowed by means of defendant's dam for more than twenty years prior to the date of the writ; but no evidence of actual damage to the land arising from such flowage (other than such as might be inferred by the jury from the fact of flowage if any) prior to seventeen years before the date of the writ was introduced."

At the trial the presiding justice at the request of the defendant instructed the jury "that the last paragraph of section 4 of chapter 481 of the Private Laws of 1893 neither changes nor modifies the common law right of the defendant so far as relates to the facts essential to the acquisition by it of the right of flowage by prescription." The defendant further requested the following instruction to be given the jury, viz: "that it is unnecessary for the defendant in order to obtain a prescriptive right of flowage, to show actual damage to land of the plaintiff as required by the Mill Act." This instruction the presiding Justice refused to give; but charged the jury as follows:

"This plaintiff would have no right of action against the defendant, unless there had been some damage occasioned to him by the flowing of the water upon his land. So it is important for you to determine whether, as a matter of fact, any appreciable injury from the overflow of the land, occasioned by this dam, was sustained by him for a period of twenty years. This adverse possession which entitles a person to a right in the lands of another, must continue for that period of time, and if it is in reference to the flowage of land, the land must be overflowed continuously during this period of time, in each year, to such an extent as to cause some appreciable injury. If that was not the case, if it did not continue during that period of time, in each year of this period, and did not occasion some injury, the defendant would not acquire a prescriptive right which would enable him to flow the land of another, without compensation, because it was not to that degree which would authorize the plaintiff to institute proceedings against him for damages."

The case comes to this court on exceptions to this instruction and to the refusal to give the instruction requested. The charge of the presiding judge is made a part of the bill of exceptions but the case is not accompanied by any statement of facts other than that above given.

The law recognizes a clear distinction between the facts essential to acquire a prescriptive right to flow land under the Mill Act, and those required to establish such right at common law. The reasons for this distinction are thus stated by the court in *Underwood* v. *North Wayne Scythe Co.*, 41 Maine, 291. "At common law, an easement may be acquired upon the land of another, without proof that the owner has sustained damage. For the least appropriation of the land, without the consent of the owner, is an invasion of his rights, and an action can be maintained for such invasion. But the overflowing of another's land, by the owner of a mill, to work it, by means of a dam, the mill and dam standing upon his own land, being secured by the provision referred to, his common law remedy for damages, when sustained, is taken away; and he can recover against the owner of the mill, only in the mode, and in the cases provided for by the statute.

If the owner of the land flowed has not been injured by the flowing, he cannot maintain the action under the statute, against the owner of the mill for flowing his land; and having no power to prevent the flowing in such case, no prescriptive right to flow the lands without the payment of damages can be acquired against him. But if the owner of the land flowed, has a right to maintain a complaint against the owner of the mill for such flowing, the latter may acquire a prescriptive right to flow the land, without the payment of damages. It follows, that to maintain this prescriptive right to flow, it must be shown, that the flowing for the twenty years, and upwards, has caused damages to the owner of the land.

As a basis of a complaint for the recovery of damages for the flowing of lands by means of a dam and mills thereon, damages must have been sustained by the owner of the land."

Thus it has become settled law in this state that in order to acquire a prescriptive right to flow land by means of a mill dam

without the payment of damages, it must appear that the land was flowed for twenty consecutive years, and that some appreciable damage to it was thereby occasioned. *Augusta* v. *Moulton*, 75 Maine, 284. While the owner of the land sustains no damage and can therefore maintain no suit or process, or in any way prevent such flowing he cannot be presumed to have granted or relinquished any of his legal rights. At common law the foundation of a prescriptive right to an easement in another man's land is the adverse and uninterrupted enjoyment of it for a period of twenty years under a claim of right without the payment of damages and without the consent of the owner. *Nelson* v. *Butterfield*, 21 Maine, 235.

It is contended by the defendant in support of the exceptions that the legislative act of 1893, upon which this complaint is based, does not have the effect to modify the common law rule respecting the facts essential to establish a prescriptive right to flow lands and that it is unnecessary for the defendant to prove actual damage to the plaintiff's land in order to acquire such right.

On the other hand, the plaintiff contends that the private act in question conferred upon the defendant company rights, privileges and liabilities precisely equivalent to those created by the general mill act, and consequently that a prescriptive right to flow could not be acquired by the defendant without proof that appreciable damage to the land was occasioned by the flowing for a period of twenty years.

The defendant corporation had acquired no statutory right to construct or maintain the dam in question prior to the date of the charter granted to it by the act of 1893, and there is no evidence in the case to show that its predecessors in the ownership of the dam were ever authorized by law to maintain it, or that they ever, in any way, acquired the rights conferred by the Mill Act. It is suggested that the character of the occupancy prior to 1893, must have been such that if it had been continued for twenty years the defendant's predecessors in title would have acquired a prescriptive right at common law to flow the plaintiff's land without proof that appreciable damage to it was thereby occasioned. It is accordingly contended that inasmuch as the "evidence tended to show that the plaintiff's land had

been each year continuously flowed by means of the defendant's dam for more than twenty years," the period of occupancy by the defendant's predecessors, with their common law rights respecting prescription, should be counted with that of the defendant corporation, holding by privity of estate, with all the rights of the owner of a mill dam, in order to make up the period of twenty consecutive years required to establish a prescriptive right. It is contended that as the instructions of the presiding judge required the defendant to prove actual damage throughout the entire period of twenty years as a basis for the acquisition of a prescriptive right to flow, making no distinction between the period of the defendant's ownership and that of its predecessors, the defendant corporation was altogether deprived of the benefit of such prior occupancy, and that the instructions complained of, if correct as to the period of the defendant's ownership, must be erroneous as to the period of occupancy by its predecessors.

But assuming that this contention is correct and that it was not necessary for the defendant, in order to establish a right to flow by prescription, to show that any actual damage to the land was occasioned by the flowage during that portion of the twenty years prior to 1893, and hence that the instruction complained of was erroneous as applied to that portion of time, still, the error cannot be deemed exceptionable for the reason that it does not affirmatively appear from the statement of facts that the defendant is aggrieved by the ruling. It only appears that the plaintiff's land was continuously flowed by the dam for twenty years prior to the date of the writ. It does not appear that there was any actual damage to the land during the first three years of that time. It does not appear that the flowage during those three years was adverse, under a claim of right, without the payment of damages or without the consent of the land owner. For aught that appears in this case the flowage during those three years may have been by permission of the land owner. The case fails to disclose any foundation for a prescriptive right to flow the plaintiff's land during that period. The entry must therefore be

Exceptions overruled.

STATE OF MAINE

vs.

CANADIAN PACIFIC RAILWAY COMPANY.

Penobscot. Opinion May 6, 1905.

Statutes. Construction. Railroads. Taxation. Apportionment. Mileage Basis. Franchise Tax. Stat. 1901, c. 145. R. S. (1883), c. 6, § 42. (R. S., c. 6, § 25.)

Words in a statute are to be construed in reference to the subject to which they relate and the connection in which they are used, and where in such connection their meaning is ambiguous the consequences of an interpretation made according to their ordinary and popular definition may be considered in determining their legal signification.

As used in sec. 42, chap. 6, R. S. 1883, amended by chap. 145 Public Laws 1901, the word "railroad" comprehends the equipment, roadbed, sites of depots and warehouses, and other real estate incidentally used in its business, and from it the words "line or system" cannot be disconnected. There is meant in this connection a railroad "operated as a part of a line or system extending beyond this state."

The mileage basis of apportionment in taxing railroads and other public service companies is eminently just, but there are exceptional cases where deductions should be made to prevent manifest inequality of value per mile.

A railroad may be in a legal sense considered a unit capable of proportionate subdivisions measured by miles, but where it is especially chartered to own and operate, in connection with its transportation business, lines of steamboats across navigable waters beyond its termini the length of such lines should be excluded from the computation in determining the franchise tax.

The spirit and intention of the statute are evidently to include only the miles of single track of actual railroad lines.

On agreed statement. Judgment for the State.

Debt brought by the State of Maine against the Canadian Pacific Railway Company to recover the semi-annual installments of the excise tax assessed by the Board of State Assessors against said company for the year 1902.

The case is stated in the opinion.

George M. Seiders, Attorney-General, for the State.

C. F. Woodard, for defendant.

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

PEABODY, J. This is an action of debt brought by the State of Maine against the Canadian Pacific Railway Company to recover the semi-annual installments of its excise tax for the year 1902.

It is reported to the law court upon an agreed statement of facts to determine the legal construction of the statute sec. 42, chap. 6, R. S. (1883) as amended by chap. 145 Public Laws, 1901, fix the amount of the tax in accordance therewith, and render judgment accordingly. The statute is as follows:—"The amount of such annual excise tax shall be ascertained as follows: the amount for the gross transportation receipts as returned to the railroad commissioners for the year ending on the thirtieth day of June preceding the levying of such tax, shall be divided by the number of miles of railroad operated, to ascertain the average gross receipts per mile; when such average receipts per mile do not exceed fifteen hundred dollars, the tax shall be equal to one-half of one per cent of the gross transportation receipts; when the average receipts per mile exceed fifteen hundred dollars and do not exceed two thousand dollars the tax shall be equal to three-quarters of one per cent of the gross receipts; and so on increasing the rate of the tax one-quarter of one per cent for each additional five hundred dollars of average gross receipts per mile or fractional part thereof, provided that the rate shall in no event exceed four per cent. When a railroad lies partly within and partly without the state, or is operated as a part of a line or system extending beyond the state, the tax shall be equal to the same proportion of the gross receipts in the state, as herein provided, and its amount shall be determined as follows: the gross transportation receipts of such railroad, line or system, as the case may be, over its whole extent, within and without the state, shall be divided by the total number of miles operated to obtain the average gross receipts per mile, and the gross receipts in the state shall be taken to be the average gross receipts per mile multiplied by the number of miles operated within the state." It provides for an excise tax upon a railroad based upon the average gross transportation receipts per mile of the railroad operated.

The defendant company operates in connection with its railroad, several lines of steamships upon the Pacific Ocean and upon certain inland waters. It is claimed by the defendant that these steamship lines with its main, double, and side tracks form a composite line or system, whose length should be reckoned as the number of miles operated within the meaning of this statute. The total length of railroad and steamship lines combined was 15633.7 miles, and the gross receipts of these combined lines were $30,307,990.54, making the gross receipts per mile $1938.63. There being 232.8 miles in the state the gross receipts in the state, if determined upon this basis would amount to $451,313.06; the tax would be at the rate of three quarters of one per cent, amounting to $3384.84. The State Assessors determined the amount of the tax on the basis of the length of single track of the whole line of railroad, excluding steamship lines, double, and side tracks. The length of the single track was 7563.3 miles; the gross earnings of the railroad exclusive of steamship lines were $27,925,229.98, making the gross receipts per mile $3692.20 and the gross receipts in the state $859,544.16; the rate of taxation would, on this basis, be one and three quarters per cent, and the tax would be $15,042.02. There has been paid on account of the tax $4,808.50.

The defendant resists the payment of the tax because: 1. The assessors did not include in their computation the transportation lines across the Pacific Ocean. 2. They did not include the yard, siding and second track lines in their computation.

The regularity of the proceedings of the Board of State Assessors is not otherwise questioned, and the constitutionality of our statute instituting the excise tax has been established by judicial decision in the case of *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217. The sole question presented is the legal construction of the words "railroad," "line" and "system" in the last clause of the statute quoted. They should be construed according to their ordinary and popular meaning in connection with the subject matter to which they relate. The word "railroad" comprehends not only the equipment and road way but the sites of depots, warehouses, and other real estate incidentally connected with the business, including property

which would properly be subject to local taxation independently of the excise tax. The signification of the words "line or system" depends upon the subject to which they are applied, and the connection in which they are used. They have not in themselves a meaning so clear and explicit that they must be interpreted according to their ordinary and popular meaning, regardless of the consequences of interpretation. Endlich on Int. Stat. sec. 26; *Clark* v. *Maine Shore Line R. R. Co.*, 81 Maine, 477; *Coffin* v. *Rich*, 45 Maine, 507; 4 Bacon's Ab. 652. They are used in a statute which provides a franchise tax upon railroads for the right and privilege of doing business in the state in their corporate capacity, and defines the basis upon which the tax is to be determined; and the purpose of the statute and the language used in other parts of the section must be considered in interpreting these words. Endlich on Int. Stat. secs. 35-41. The tax is not upon the business of the railroads as property, but it is an annual sum having reference to their gross transportation receipts returned to the railroad commissioners in proportion to their mileage in the state; and to find this sum these receipts are divided by the number of miles of railroad operated to determine the average gross receipts per mile; and when the railroad lies partly within and partly without the state or is operated as a part of a line or system extending beyond the state the receipts over its whole extent are divided by the total number of miles operated to obtain the average gross receipts per mile. It seems obvious that the words "line or system" cannot be disconnected with the word "railroad" of which they are predicated. It is a railroad "operated as a part of a line or system extending beyond the state." It is claimed by the defendant that the punctuation is significant as separating the words "line or system" from the word "railroad," but the force of the word "such" preceding them requires this punctuation. The full rendering of the clause is, "The gross transportation receipts of a railroad which lies partly within and partly without the state, or a railroad which is operated as a part of a line or system extending beyond the state, as the case may be, over its whole extent within and without the state, shall be divided by the total number of miles operated to obtain the average gross receipts per mile; and the gross receipts in

the state shall be taken to the average gross receipts per mile, multiplied by the number of miles operated within the state."

The defendant company was chartered by the Canadian Parliament in 1881, with authority to construct lines of railroad and in addition to own and run steam and other vessels, and consequently was not operating its railroad in this state at the time the present method of taxing railroads was adopted. The words "line or system" first used in the statute of 1881 did not expressly apply to any railroad having authority to acquire lines of steamers and steamships for carrying on, in connection with their railroad business, transportation business across the American Continent, including its navigable waters and across the Pacific Ocean. It cannot be presumed that the legislature contemplated, when it adopted the present rule of determining the amount of the excise tax, railroads having as part of their lines and systems steamboat and steamship lines over navigable waters. The reverse would be true, for a corporation formed for the purpose of constructing and operating a railroad cannot, unless special powers and authority are granted under the general law or by a special statute of a state, engage in the business of running steamboats and steamships beyond its terminus. This would be as distinct from railroad transportation as the business of express, telegraph, or pipe-line companies. *Pearce* v. *Madison, etc., R. R. Co.*, 21 Howard (U. S.) 441; *Green Bay, etc., R. Co.* v. *Union Steamboat Co.*, 107 U. S. 98; *Shawmut Bank* v. *Plattsburgh, etc., R. Co.*, 31 Vt. 491. The physical conditions governing the operation of such transportation companies are unlike those pertaining to railroads, and while they would be subject to an excise tax it might not be equitable or reasonable to determine the amount by the same rules. And it is to be considered that steamboat lines instead of passing over territory, for which states could properly impose a tax, pass over inland waters or waters of the ocean, public highways which subject them to no burden of taxation. Several of the states have adopted the mileage basis of apportionment in taxing railroad and other public service companies; and some beside Maine assess the tax on the amount of gross transportation receipts, and others variously on profits, cash values of property, or capital stock. This method has been held by the U. S.

Supreme Court to be not only legal but eminently fair. Mr. Justice Brewer in *Pittsburgh, etc., R. R. Co.* v. *Backus*, 154 U. S. 421, says of the statute of Indiana, which places the tax on the cash value of railroad property, "It is ordinarily true that when a railroad consists of a single continuous line the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road." To the same effect is the opinion by Mr. Justice Miller in *State R. R. Tax Cases*, 92 U. S. 575. This view is also approved in other cases relative to excise taxes on gross receipts, income or value of the franchises. *Del. R. Tax Case*, 18 Wall. 206; *Erie R. R.* v. *Pa.*, 21 Wall. 492; *Western Union Telegraph Co.* v. *Mass.*, 125 U. S. 530; *Pulman's Palace Car Co.* v. *Pa.*, 141 U. S. 18; *Charlotte, Columbia, etc., R. R. Co.* v. *Gibbes*, 142 U. S. 386; *Columbus Southern Railway* v. *Wright*, 151 U. S. 470; *Maine* v. *Grand Trunk Railway*, 142 U. S. 217, supra. These cases recognize the fact that there may be exceptional cases where deductions should be made to prevent a manifest inequality of values per mile, but holding generally that a railroad can be considered a unit so far as to be capable of fair proportionate subdivisions measured by miles. The statute of Michigan expressly excludes from the computation the number of miles of water roads over navigable waters of the U. S. and within the state. It would be difficult to find a case where the miles of a line of transportation should more properly be excluded in computing the tax than that of steamboats or steamships, whose water roads are untaxable, and whose lines are defined by no fixed limits but subject to voluntary deviation and such as is occasioned by winds and currents.

We think the contention of the state, that the spirit and intention of the statute are to include only actual railroad lines as existing on the face of the earth and operated as such, should be sustained.

Judgment for the plaintiff.

In Equity.

WILLIAM C. HOLWAY

vs.

FRANK S. AMES and ALFRED K. AMES, Admrs.

Washington. Opinion May 8, 1905.

Decedent's Estate. Limitations. Equitable Relief. Culpable Neglect. R. S. (1883), c. 87, § 19. (R. S., c. 89, § 21.)

The relief in equity given by chap. 87, sec. 19, R. S. 1883, depends upon the following propositions:

1. The existence of a claim due the creditor enforcible by an action at law except for the special statute bar of limitations.
2. That there are undistributed assets of the estate.
3. That justice and equity require it.
4. That the creditor is not chargeable with culpable neglect in not seasonably prosecuting his claim.

The meaning of culpable neglect in the statute is negligence less than gross carelessness but more than failure to use ordinary care; it is a culpable want of watchfulness and diligence, the unreasonable inattention and inactivity of "creditors who slumber on their rights."

It is the policy of the law to insure the speedy administration and distribution of the estates of deceased persons.

Where a creditor had general knowledge of transactions conducted by the deceased as general manager of business in which he was interested, and had access to the books of the debtor from August to November before his action at law was barred, he will be held chargeable with culpable neglect in not prosecuting his claim against the estate within the time limited by statute, unless he has been misled by fraud, or has relied upon the agreement of the administrator.

In Equity. On appeal by plaintiff. Appeal dismissed. Bill dismissed. Decree below affirmed.

Bill in equity brought under the provisions of section 19 of chapter 87 of the Revised Statutes of 1883, now section 21 of chapter 89 of the Revised Statutes of 1903.

The case is sufficiently stated in the opinion.

Louis C. Stearns and Pattangall & Smith, for plaintiff.

C. B. Donworth, for defendants.

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

PEABODY, J. This was an equity suit brought under the provisions of R. S. (1883), chap. 87, sec. 19, as follows: "If the Supreme Judicial Court, upon a bill in equity filed by a creditor whose claim has not been presented within the time limited by the preceding sections, is of opinion that justice and equity require it, and that such creditor is not chargeable with culpable neglect in not prosecuting his claim within the time so limited it may give him judgment for the amount of his claim against the estate of the deceased person, but such judgment shall not affect any payment or distribution made before the filing of such bill."

The case was heard by a single justice upon bill, answer, and proof, who, after consideration, ordered, adjudged and decreed that the bill be dismissed with costs, and it comes before the law court on appeal.

The right of the plaintiff to the relief sought depends upon the following propositions:—

"1. The existence of a claim due him and enforceable by an action of law except for the special statute bar of limitations.

2. There are undistributed assets of the estate.

3. Justice and equity require it.

4. He is not chargeable with culpable neglect in not seasonably prosecuting his claim."

It appears that the plaintiff and the defendants' intestate, John K. Ames, during the years 1882 to 1889 inclusive, were tenants in common, in different proportions, of timber lands on or near the Machias and St. Croix rivers, and that Ames acted generally as

managing owner; that with the knowledge and consent of the plaintiff he permitted parties from time to time to cut and haul into "Calais Waters," the St. Croix river and its tributaries, from the common property in townships numbers 37 and 43. Logs were also cut from the timber lands on the "Machias waters" which were divided each season between the owners. Stumpage for timber on the Calais waters was collected by Mr. Ames and the question involved in the first proposition is whether he accounted for and paid to the plaintiff his share. The plaintiff shows by undisputed evidence the sale by Mr. Ames of a considerable quantity of timber to various persons, and that the settlements therefor were made with him, the payments being by check and sometimes on drafts, but in a few instances the purchasers of the stumpage made payment in notes given directly to the several owners. These instances so far as shown did not account for the larger part of the amount of sales. The books of the plaintiff show receipts of some payments on account of the stumpage on Calais waters but not to an amount equal to his share. No books of the defendants' intestate are introduced which show the full transactions relative to the stumpage. The theory and contention of the defendants are that a division and payment were made from year to year as the transactions were closed, by payment in cash or notes.

On November 30, 1901, the defendants brought an action at law against the plaintiff for $45,383.71, and credits in their account annexed to the writ were given to the plaintiff for certain items of stumpage collected by the intestate. The plaintiff as defendant in the action at law filed an account in set-off and the action was referred to three referees, who, after various hearings commencing in August and ending in November, 1902, filed their report. It is admitted that the referees' report did not take into consideration the claim presented at the hearing in this cause.

John K. Ames, the intestate, died March 22, 1901, and the defendants were appointed administrators of his estate April 9, 1901, and gave notice of their appointment April 15, 1901, the last publication of the public notice being May 4th, 1901. The plaintiff has proved by competent evidence prima facie that but for the statutory bar he

has a valid claim against the estate of the intestate which became due October 1, 1896, then amounting to $3,090.

The meaning of "culpable neglect" in the statute referred to has been repeatedly interpreted by judicial decisions in this state and by authority of decided cases in Massachusetts under a similar statute. It is less than gross carelessness, but more than the failure to use ordinary care, it is a culpable want of watchfulness and diligence, the unreasonable inattention and inactivity of "creditors who slumber on their rights." It is the policy of the law to insure the speedy administration and distribution of estates of deceased persons. *Bennett* v. *Bennett*, 93 Maine, 241; *Purrington* v. *Dunning*, 11 Maine, 174; *Rutland* v. *Mendon*, 1 Pickering, 153; *Waltham Bank* v. *Wright*, 8 Allen, 121; *Jenny* v. *Wilcox*, 9 Allen, 245; *Wells* v. *Child*, 12 Allen, 333; *Sykes* v. *Meacham*, 103 Mass. 285. The plaintiff, in a general way, knew of the lumbering operations on the Calais waters at the times they occurred, but there is no evidence that he knew the amount of the stumpage. The defendants, in August, 1902, at the plaintiff's request agreed to go over the matter of the Calais stumpage and spent two or three days doing this and informed the plaintiff or his representative that they could not find the information requested. The plaintiff from August to November had access to all the regular books of the intestate, and his son came to the office of the defendants spending three or four days weekly for three weeks in the examination. In addition to the regular books the township book kept by Mr. Ames, and the scale bills were furnished for his inspection. There seems to have been no examination of checks and drafts made nor inquiries of Calais parties whose testimony was presented before the justice in this case. During the pendency of the hearing before the referees errors were discovered on both sides of the accounts and by mutual consent corrected. The defendants did not concede that the omission of stumpages in the plaintiff's account in set-off was an error but claimed that they thought the stumpages had been paid and did not admit any liability therefor. When the plaintiff on November 15, 1902, offered the account of the stumpages to the referees in the suit at law, the defendants objected and the account was excluded. Prior to that date the

time limited by statute had expired. The evidence does not show that the plaintiff was mislead by fraud, or that there was any agreement or understanding from which it might be inferred that the defendants would consent to an amendment of the plaintiff's account in set-off by including the claim in question. The evidence clearly justifies the finding of the justice "that several weeks before the special statute of limitation had expired the plaintiff was in possession of all facts necessary to the institution of a suit at law or a bill for an accounting on account of these stumpages." The plaintiff had the same opportunity of securing information from the witnesses who have testified in this cause before the limitation of the action at law as now. There may be in this case an appearance of hardship in adhering to the judicial construction given to the statute, but it is less apparent when it is considered that the facts are not verified or modified by the testimony of those who had fullest knowledge of them, the defendants' intestate who is dead, and the plaintiff who is thereby disqualified as a witness. The plaintiff must be held chargeable with culpable neglect in not prosecuting his claim within the time limited by statute.

Bill dismissed with additional costs; appeal dismissed; decision of the sitting justice affirmed.

INHABITANTS OF PERU AND DIXFIELD

vs.

PETER G. BARRETT AND IRVING C. KIDDER.

Oxford. Opinion May 8, 1905.

Pleading. Ferries. Transportation for Hire. Interference with Ferry Franchise. Remedy. Statutes. Evidence. R. S. (1883), c. 20, §§ 2, 6.
(R. S. c. 25, §§ 2, 6.)

The only proprietorship in a ferry in this state is the franchise conferred by statute, and the person holding it has no common law remedy against those who interfere with his profits, but the remedy is by sec. 6, chap. 20, R. S. 1883.

In a civil action it is not necessary to set out a statute or to make any reference to it in the declaration; it is sufficient if the case is brought within its provisions by alleging the requisite facts.

Where a town provides a person to be licensed to keep a ferry and pays the expenses beyond the amount of tolls received for maintaining it, it is entitled to the tolls and profits of the ferriage and has a right of action against those interfering with the business.

Any person has a right to keep and use boats for his own accommodation in passing over a river, or transporting his family, servants, and goods, and to occasionally carry over strangers within the line of travel implied in the location of an established ferry, because it would not be public carrying for hire; but he has no right to transport passengers and goods for hire so as clearly to diminish the profits of the ferry, the criterion being the interference with the ferry franchise causing a natural, appreciable loss of patronage.

Where a merchant controls land on both sides of a river near the location of a ferry and has a store on one side and a warehouse on the opposite side of the river, and keeps two rowboats by which he transports his customers and their purchases without charge, there being no public crossings, except the ferry, nearer than a bridge three and one half miles above and another seven miles below the ferry, and this privilege was known to those trading with him and was an inducement intended to increase and did increase his business and diminished the profits of the ferry, *held*, that this was in effect a transportation of persons and property for hire, and that he is liable to the holder of the ferry franchise for interfering with his profits.

On report. Judgment for plaintiffs.

Action on the case under the provisions of section 6 of chapter 20 of the Revised Statutes of 1883—now section 6 of chapter 25 of the Revised Statutes of 1903—brought by the plaintiff towns as proprietors of a ferry across the Androscoggin River at Peru Center, Oxford County, against the defendants to recover damages caused by the interference of the defendants with the rights of the plaintiff towns in ferrying passengers and property.

After the evidence had all been taken out, it was agreed to report the same to the Law Court with the stipulation that "upon so much of the evidence as is legally admissible the Law Court is to render such judgment as the rights of the parties require. If the plaintiffs are entitled to recover, damages to be assessed at nisi prius."

The case is sufficiently stated in the opinion.

John P. Swasey and John S. Harlow, for plaintiffs.

George D. Bisbee and Ralph T. Parker, for defendants.

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

PEABODY, J. This is an action on the case brought by the plaintiff towns as proprietors of a ferry across the Androscoggin river at Peru Center in Oxford County, Maine, against the defendants for damages caused by interference with their rights in ferrying passengers and property.

The case comes before the law court on report.

The ferry was legally established prior to the date of the alleged wrongful acts of the defendants, and the plaintiffs were charged with the duty of its maintenance in accordance with the provisions of chap. 20, sec. 2, R. S. (1883), which is as follows, "Sec. 2. They, (County Commissioners), may establish ferries at such times and places as are necessary, and fix their tolls. When no person is found to keep them therefor, the towns in which they are established shall provide a person to be licensed to keep them, and shall pay the expenses, beyond the amount of tolls received, for maintaining them. When established between towns, they shall be maintained by them

in such proportions as the commissioners order. For each month's neglect to maintain such ferry or its proportions thereof, the town forfeits forty dollars."

The defendants contend that the declaration neither sets out sufficiently a statutory or common law cause of action. The only proprietorship in a ferry in Maine is the franchise conferred by statute, and the party holding it has no common law remedy against those, who, without right, interfere with his profits but the remedy is by sec. 6, chap. 20, R. S. (1883). The right of the plaintiff towns to receive the compensation fixed for ferriage is incident to the obligation imposed upon them by law to maintain the ferry, and the statute protects them against wrongful interference. *Day et al.*, v. *Stetson*, 8 Maine, 365; *Blisset* v. *Hart*, Willes, 508. The declaration is sufficient to present a case by statute. It is not necessary in a civil action to set out the statute or to make any reference to it in the declaration, but the case must be brought within its provisions by alleging the requisite facts. 1 Chitty on Pleading, (16 Am. Ed.) 237; Gould's Pleadings, 111, sec. 16, note 3; 20 Enc. Pl. Pr. 594-595; *Griswold* v. *Gallup*, 22 Conn. 207; *Chicago, etc., R. Co.* v. *Porter*, 72 Ia. 426; *Hayes* v. *West Bay City*, 91 Mich. 418; *Bogardus* v. *Trinity Church*, 4 Paige, (N. Y.) 178; *Kennayde* v. *Pacific R. Co.*, 45 Mo. 255.

While the obligation rests upon the plaintiffs to maintain the ferry so as to make it convenient for the public, they were only required to act when no person was found to keep the ferry for the established tolls. They were then obliged to provide a person to be licensed to keep it and to pay the expenses beyond the amount of tolls received for maintaining it. It was necessary that the ferry keeper should be licensed and give bond to the state for the protection of passengers over the ferry, whether the licensee was appointed by the County Commissioners or provided by the towns to be licensed when no person was found to keep the ferry for the tolls. When the towns provide a person to keep the ferry they are entitled to the tolls and profits of the ferriage and have a right of action against those interfering with them. It is unnecessary to allege in the declaration the action of the town in providing the ferry keeper or that the keeper was licensed and gave bond as required by law. It is presumed that all

things have been correctly done by the plaintiffs to entitle them to a right of action. If any prerequisites have been omitted the defendants may raise the question in defense. It appears from the report that the defendants for four years prior to May, 1902, were operating the ferry under an arrangement made with the selectmen of the two towns, and that since this arrangement ceased the ferry has been operated under the direction of the municipal officers.

The liability of the defendants depends upon the character of their acts in respect to the plaintiffs' ferry. They deny that they kept a ferry contrary to secs. 1 and 2 of chap. 20, R. S. (1883), or transported passengers or property across any licensed or established ferry for hire, or furnished for hire a boat or other craft for such purpose, and they claim that whatever construction may be put upon their acts as being within the definition of keeping a ferry, they did not interfere with the franchise of the plaintiffs. They were merchants and kept a country store in Peru on the Androscoggin river, near the ferry in question, and had a storehouse on the opposite side of the river in Dixfield. In the storehouse they deposited grain and merchandise for their customers on the Dixfield side. At a short distance below the ferry approaches they controlled land on each shore of the river and one or two small row boats which they had used in going back and forth from the store to the store house, and they gave their customers free use of the boats in crossing the river to trade at their store or store house. This privilege was well known to persons trading with the defendants. It was an inducement intended to increase and did increase their business and actually diminished the tolls of the ferry. It was in effect a transportation across the river of persons and property for hire; they received in the profits of the sales what was a full equivalent for the ferriage of their customers, consisting of the public generally. The defendants had an undoubted right to keep and use boats for their own accommodation in passing over the river and transporting their families, servants and goods, and to occasionally carry across a customer and his purchases, or to use them under any similar conditions, because this would not constitute a public carrying for hire. The statute fixes no limit to the exclusive privilege of the holder of a ferry franchise to transport passengers

and property, and in deciding this case it must be determined, by a rule of interpretation consistent with reason and justice, whether the defendants' boats were run usually within the line of travel implied in the location and establishment of the plaintiffs' ferry. There was a change, by regular proceedings, of the location of this ferry up the river thirty or forty rods from the original ferry known as "Green's Ferry", which was then abandoned; and changes were made in the highways leading to the new location in Peru and Dixfield. There was a bridge three and one-half miles above and another seven miles below the ferry. The defendants' boats were kept for the most part at the landings of the old ferry and were run at different points between the old and new locations. Occasionally they were run in and above the passway of the new ferry. The transportation of passengers and goods at this point clearly diminished the plaintiffs' profits; and we therefore hold that these boats were run within the line of travel to which the plaintiffs had the exclusive ferry rights, the criterion being the interference with the ferry franchise causing a natural, appreciable loss of patronage. *Warren, et al., applts.*, v. *Tanner*, 49 L. A. R. 248; *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 420.

Judgment for plaintiffs. Damages to be assessed at nisi prius.

In Equity.

FRED LAFOREST *vs.* WILLIAM L. BLAKE COMPANY.

Cumberland. Opinion May 13, 1905.

Equity Practice. Master's Report. Exceptions. Report to Law Court. Mortgagor. Premature Action. Mortgage. Foreclosure. Accounting. Rents and Profits.

The plaintiff conveyed in mortgage to the defendant certain land in Saint John Plantation. The plaintiff failed to perform the condition of the mortgage and the defendant took possession of the mortgaged premises for the purpose of foreclosure, and retained such possession. The plaintiff then demanded an account of the defendant of the amount due on the mortgage and of the rents and profits. The defendant rendered to the plaintiff an account which the plaintiff claimed was not a true account. Thereupon the plaintiff brought a bill in equity to redeem. After answer filed, a master was appointed to hear the parties and determine the amount due on the mortgage after deducting the rents and profits, if any. The master heard the parties and made his report to the court stating the amount he found to be due under the mortgage. Both parties excepted to the master's report.

A hearing was had before a single Justice "upon exceptions of both the plaintiff and the defendant to the master's report," and thereupon, without any ruling or decision by the sitting Justice, it was reported to the Law Court "for decision upon said exceptions," stipulating that "all further issues of law and fact necessary for a final decision of this cause," be before a single Justice whose decision "shall be accepted as final." This was irregular. Reports are intended to take up the whole case for the Court to make final disposition. It should not come up by installments. Here nothing is reported except such evidence as bears upon the acceptance or rejection of the master's report. All the Court is authorized to do is to sustain or overrule the exceptions. Whether the bill can be maintained or not, or whether plaintiff has a right to redeem, is not submitted, and the Court can give no direction as to the final disposition of the cause. It should have proceeded to a decree upon the merits before the sitting Justice and then come to the Law Court, or the whole cause both law and fact should have been reported.

Ordinarily, a partial report like this would be discharged. But, notwithstanding the irregularity, as the parties appear to have stipulated that after decision by the Law Court upon the exceptions to the master's report, all further issues of law and fact are to be determined finally by a

single Justice, and, therefore, the case may not come to the Law Court again, so the Court has concluded to entertain this limited report. But it is not to be regarded as a precedent of practice.

Where a mortgagee who has taken and retained possession of a mill property, under his mortgage, has used reasonable diligence to find a tenant for the premises but owing to the hostile attitude and threats of the mortgagor, the tenant which had been secured was led to abandon his agreement to hire the premises and refused to take possession thereof, and the mortgagee was in a large measure prevented from securing any other tenant by reason of the hostility of the mortgagor, such mortgagee will not be charged with rents and profits during the time such mill was idle. The mortgagor has only himself to thank for the non-productiveness of the property.

Held: All the master's findings are approved and his report must be accepted, allowed and confirmed.

In Equity. On exceptions by both plaintiff and defendant, to master's report. Overruled.

The case is sufficiently stated in the opinion.

Peter C. Keegan and Drummond & Drummond, for plaintiff.

Symonds, Snow, Cook & Hutchinson, and Albert S. Woodman, for defendant.

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

STROUT, J. April 17, 1901, plaintiff conveyed in mortgage to the defendant, certain land in Saint John plantation, on which there was a mill with machinery for the sawing of logs and shingles. The condition was for the payment of "the amount of the indebtedness now owing by said grantor to said grantee, to wit, the sum of fourteen hundred and forty-six dollars and forty cents, in manner following, namely, five hundred dollars upon demand, and nine hundred and forty-six dollars and forty cents upon August 1, 1901, with interest at the rate of six per cent per annum" and also to pay all future indebtedness, and a provision as to insurance. Plaintiff failed to perform the condition of the mortgage, and on the twenty-eighth day of May, 1902, defendant took possession of the mortgaged premises for the purpose of foreclosure, and has ever since retained such possession. October 16, 1902, plaintiff demanded an account of the

defendant of the amount due on the mortgage and of the rents and profits. October 21, 1902, defendant rendered to plaintiff an account, which plaintiff claimed was not a true account. Thereupon he brought this bill in equity to redeem. After answer filed a master was appointed, to hear the parties and determine the amount due upon the mortgage, after deducting the rents and profits, if any. The master heard the parties and their evidence and made his report to the court that there was due under the mortgage on October 21, 1902, the date when defendant rendered its account to plaintiff, three thousand six hundred and eight dollars and one cent, a less sum than that claimed by defendant in its account rendered to the plaintiff, and that on May 5, 1904, the date of the master's report, the amount due was four thousand three hundred and sixty-four dollars and seventy-three cents. Both parties except to the master's report.

A hearing was had before a single justice "upon exceptions of both the plaintiff and defendant to the master's report," and thereupon, without any ruling or decision by the sitting justice, it was reported to the Law Court "for decision upon said exceptions," stipulating that "all further issues of law and fact necessary for a final decision of this cause" be before a single justice whose decision "shall be accepted as final." This was irregular. Reports are intended to take up the whole case, for the Court to make final disposition. It should not come up by installments. Here nothing is reported except such evidence as bears upon the acceptance or rejection of the master's report. All we are authorized to do is to sustain or overrule the exceptions. Whether the bill can be maintained or not, or whether plaintiff has a right to redeem is not submitted, and we can give no direction as to the final disposition of the cause. It should have proceeded to a decree upon the merits before the sitting justice, and then come here by appeal, or the whole cause both law and fact should have been reported. Ordinarily a partial report like this would be discharged.

But notwithstanding the irregularity, as the parties appear to have stipulated that after decision here upon the exceptions to the master's report, all further issues of law and fact are to be determined finally by a single justice, and therefore the case may not

again come here, we have concluded to entertain this limited report, but it is not to be regarded as a precedent of practice.

Defendant objects to the master's ruling that interest upon the fourteen hundred dollar item mentioned in the condition of the mortgage, should commence at the date of the mortgage, and claims that interest should be computed from an earlier date, when the debt in fact accrued. We are unable to see any reasonable ground for this claim. The language is "the amount of the indebtedness now owing by said grantor to said grantee, to wit, the sum of fourteen hundred and forty-six dollars and forty cents." This language clearly fixed the amount of that debt at that time. It may have included prior interest, if any was due, but the master was justified, in fact, required, to rule as he did.

Defendant also claimed interest on each subsequent merchandise account from the date of the charge, whereas the master allowed a credit of thirty days and computed interest thereafter. It is sufficient to say of this claim, that the defendant in its account rendered plaintiff, made its account in the same manner adopted by the master, allowing thirty days credit, before charging interest. It cannot now demand what it did not claim in October, 1902. Afterthoughts are not favored.

In the account rendered plaintiff, defendant claimed one hundred and fifty dollars for care of the property up to that time, and before the master claimed two hundred and fifty dollars additional for the care since, in all four hundred dollars. Both claims were rejected by the master. It must be borne in mind that the defendant resides in Portland, and the mortgaged estate is in Aroostook county, some three hundred and fifty miles distant. Personal care was therefore impracticable. Defendant employed an attorney in the vicinity of the property and several other agents to care for it. The master has allowed all disbursements to these parties. The defendant's travelling salesman had occasion to be in the locality somewhat frequently, and much of the effort to lease the mill was through those agencies and by correspondence. Only one hundred dollars has been received as the rents and profits of the property since

possession taken by defendant. Under all the circumstances, we think the master's ruling upon this question was correct.

The plaintiff's several exceptions to various disbursements by defendant on account of the property are not well taken. These disbursements were amply proved, and were clearly suitable and necessary in the care of the property, and were rightly allowed. His main objection is that only one hundred dollars have been realized as rents and profits, and he claims that a large amount could and ought to have been realized, and that the defendant should be charged accordingly. Upon this the master says, "I find that the respondent used reasonable diligence in endeavoring to find a tenant for the premises, and that owing to the hostile attitude and threats of the complainant, the tenant which had been secured by the respondent was led to abandon his agreement to hire the premises and refused to take possession thereof, and that the respondent was in a large measure prevented from securing any other tenant by reason of the reported hostility of the complainant." This finding is supported by the evidence. The plaintiff was incensed because possession was taken by defendant, and instead of aiding, as he could have done, or even acquiescing in the efforts made to render the mill productive, he pursued a course calculated, if not designed, to prevent any profitable leasing of the premises. Instead of complaining of the defendant in this regard, he has himself to thank for the non-productiveness of the property.

All the master's findings are approved. The master's report must be accepted, allowed and confirmed; all further proceedings to be before a single justice, whose decision, according to the stipulation of the parties, is to be final.

Exceptions of both parties overruled.

DILLA McTAGGART, Admx.,

vs.

MAINE CENTRAL RAILROAD COMPANY.

Waldo. Opinion May 19, 1905.

Master and Servant. Negligence. Reasonable Care. Scope of Employment. Evidence.

1. When a case is reported to the law court, with a stipulation that it is to be heard as if a verdict had been rendered for the plaintiff, and a motion for a new trial had been filed by the defendant, all conclusions and inferences of fact, which a jury would have been warranted by the evidence in finding for the plaintiff, must be found by the court for the plaintiff.
2. It is the duty of a master to exercise reasonable care so to place its appliances, boilers and pipes, as to make it reasonably safe for the servant to perform any service which the master has any reason to expect that the servant may properly do, at that place, by virtue of his employment; and omission to exercise such care is negligence.
3. It matters not whether the appliance is so placed as to be safe or unsafe as to other servants in the performance of their respective duties.
4. The plaintiff's intestate, a baggage master in the employment of the defendant, was requested while in his car in the train, by one of the station agents and telegraph operators along the line to take a telegraphic message addressed to one of defendant's construction crew, and to throw it off when the train reached the place where the crew was at work. It is claimed that while the baggage master was engaged in throwing off the message and while standing on one of the steps at the rear end of his car, his head was struck, and he was killed, by a perpendicular iron pipe erected by the defendant, and standing about six inches from the outside of the baggage car as it passed. He was seen to throw off the telegram twenty-five feet before he reached the location of the pipe, but no one saw the accident itself. His dead body was soon after found in a coal bin twenty-seven feet from the pipe on the other side from where the telegram was thrown off. The defendant's station agent acted as telegraphic operator for the commercial business of the telegraph company, remitting all proceeds to the latter company, but being himself paid for his services both as such agent and operator, by the defendant. By virtue of its contract with the telegraph company, the defendant agreed to deliver such commercial or public messages as were received. The case otherwise

discloses no special authority in the station agent, or duty in the baggage master.

5. The court is of opinion that the case fails to show that the station agent was authorized to require the baggage master to undertake the delivery of a telegram by throwing it off a moving train, or that it came within the scope of the baggage master's employment to perform such a service. Nor does the case show any such custom of the station agent and baggage master to forward and deliver messages in this way, from which it might be inferred that the defendant knew and assented to the practice. Therefore it is held that the defendant was not bound to anticipate the performance of any such service by the baggage master, as was undertaken in this case, and did not owe him the duty of providing so that he might do it safely.

6. It is held further, that, even if the foregoing were otherwise, the defendant had no reason to anticipate that a baggage master in a car with two high and wide doors on the side, as here, made on purpose to be used by him, would leave the car and go down upon the lower steps, as the deceased must have done, if he was hit by the pipe, for the purpose of throwing off a message, when he could have done it safely and conveniently from one of the side doors.

7. The court is further of opinion that it is not proved that the deceased was hit by the pipe at all. He may have been; he may not have been. The train passed slowly over the bridge, and then accelerated its speed. If then the deceased lost his balance and fell upon the coal bin, as he might have done, all other known conditions would be met, as well as by the theory that he was hit by the pipe. As between these two possible causes, it seems to be purely conjectural which is the true cause. The court cannot, and a jury should not, select as between conjectures, unless there is something more which may lead a reasoning mind to one conclusion rather than to the other. The court is of opinion that there is no such determining factor in this case.

On report. Judgment for defendant.

Action on the case to recover damages for wrongful injuries causing the immediate death of John McTaggart, the plaintiff's intestate. After the evidence had been taken out, it was agreed that the case should be reported to the Law Court, with the following stipulations: "The case is to be heard as if a verdict had been rendered for the plaintiff and a motion had been filed by the defendant for a new trial. If upon the admissible evidence the action is sustainable, judgment is to be rendered for the plaintiff for $5,000 damages; otherwise judgment for the defendant. The defendant is to carry the case forward."

The case is sufficiently stated in the opinion.

R. F. Dunton and John R. Dunton, for plaintiff.
C. F. Woodard, for defendant.

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

SAVAGE, J. Case for wrongful injuries causing immediate death of John McTaggart, plaintiff's intestate. This case is now before us on report, with a stipulation that it is to be heard as if a verdict had been rendered for the plaintiff, and a motion had been filed by the defendant for a new trial. All conclusions and inferences of fact, therefore, which a jury would have been warranted by the evidence in finding for the plaintiff, must be found by us for the plaintiff. Substantially all the evidence was put in by the plaintiff, and there is little dispute, so far as it goes.

It appears that for some time prior to the injury complained of, a construction crew of the defendant had been repairing the abutments of a bridge on the "Belfast Branch" between Unity and Burnham Junction. Not far from the northerly end of the bridge and towards Burnham, a platform had been erected, at about the level of the rails. Upon this platform stood a donkey engine and boiler, the latter being about four feet from the rails. Northerly of the engine and boiler was a coal bin. Southerly, towards the bridge and about twenty-five feet distant from the engine was a derrick which was operated by the donkey engine. At this point the railroad runs upon a narrow and somewhat steep embankment, with water on both sides. On August 21, 1903, a two inch iron steam pipe was connected with the top of the boiler, and extended towards the railroad track about three feet, then down perpendicularly to within eighteen inches of the level of the rails, then turned towards the rail three inches, then down to the ground and under the rails to a pump below.

McTaggart, the deceased, was a railroad man of long experience. He had been section foreman, foreman of construction crew, and brakeman, and for eleven years before his death had been baggage master on the "Belfast Branch." He made two round trips a day

between Belfast and Burnham, and had therefore passed the engine and boiler above spoken of four times daily since they had been placed in position. On several occasions, while his train waited at Burnham, he had gone from Burnham to the bridge in question as brakeman on a construction train, and when at the bridge, had been on the platform where the engine and boiler were, remaining about there from half to three-quarters of an hour. One of these occasions at least was after August 21, when the steam pipe was connected with the boiler.

On the morning of September 4, 1903, one Whitehouse, the station agent and telegraph operator at Unity, handed McTaggart, in the baggage car of the train, a telegram addressed to one of the construction crew at the bridge, and asked him to throw it off as the train passed the bridge. Whitehouse had tied the telegram to a stick about a foot long. He told McTaggart the contents of the message, which was that the wife of the addressee was sick. He also told him that they wanted to get the message to the man so that he could go home to his wife as soon as possible. As the train approached the bridge it slowed down somewhat, and started up again after it crossed. While the baggage car was crossing the bridge, the engineer of the donkey engine, standing by the engine, saw McTaggart standing on one of the steps at the rear end of the car, waiving the message with one hand and holding on to the car rail with the other. The witness could not tell which step he stood upon. When he got opposite the derrick, about twenty-five feet southerly from the boiler, he threw out the message. He was then standing "about square on the steps or platform." What happened afterwards was not seen by any human eye.

As the train passed, the engineer, unconscious that McTaggart had been struck by any object, picked up the message and started to deliver it. But immediately it was discovered that McTaggart was lying dead in the coal bin, twenty-seven feet northerly from the boiler. His face and head were bruised in several places. The most noticeable bruise was a long, straight one just back of the right ear. From these circumstances, the plaintiff contends that a jury would have been warranted in finding that as McTaggart passed the boiler, his head hit the steam pipe, causing the long, straight bruise,

and he was thereby knocked off the steps of the car. The height of the steam pipe and its distance from the baggage car as it passed is left uncertain, but we think a jury might properly have found that it extended two or three feet above the floor of the car, and was about six inches from the outside surface of the car. The outside of the lowest step was two inches inside of the outside of the car. That step was two feet and ten inches lower than the floor of the car. If the plaintiff's theory is right, the position of the bruise referred to shows that after McTaggart threw out the message, he leaned forward bringing his head six or eight inches outside the car, and was looking backward when he was hit by the steam pipe.

Various defenses are strongly urged. We shall not have occasion to examine them all. In the first place, assuming that he was hit by the steam pipe, it is contended that at the time of his injury McTaggart was not engaged in the performance of any service which he owed the defendant by virtue of his employment, that it was no part of his duty as baggage master to deliver telegrams along the route, and, therefore, that it was not the duty of the defendant to anticipate that he would do so, and so to arrange its boilers and steam pipe that he might do so safely. This question must be considered in the light of the defendant's duty to the deceased at the time. It was its duty to exercise reasonable care so to place its boiler and pipe as to make it reasonably safe for him to perform any service which it had any reason to expect that he might properly do at that place, by virtue of his employment. Any omission to exercise such care would be negligence as to him. It matters not whether the pipe was so placed as to be safe or unsafe as to other servants in the performance of their respective duties. It was not negligence, as to McTaggart, unless there was a failure of duty on the part of the defendant with respect to service reasonably to be expected of him in his employment, and service performed in a reasonable and proper manner.

The case shows that the telegraph business, along with the Belfast Branch, both railroad and commercial, was done on a single wire, under a joint contract between the defendant and the Western Union Telegraph Company. The telegraph company furnished

the poles and wire and the general outfit, which the defendant had the right to use for its own business without the payment of tolls. The station agent at Unity, employed and paid by the defendant, was also the telegraph operator there, and handled all telegraphic business, without expense to the telegraph company. As to commercial business he acted under the rules, regulations and orders of the telegraph company, and remitted all proceeds to that company. By the contract referred to, the defendant agreed to deliver such commercial or public messages as were received. We think, however, it is fairly to be inferred from the evidence that in a case like the present where the addressee was two miles distant from the office, delivery was obligatory only when charges for delivery were guaranteed beforehand. This, however, is immaterial, if the defendant, or its servants, by authority of the defendant, which is the same thing, undertook to deliver the message. The only fair inference to be drawn from the testimony of the station agent is that he understood the message was being forwarded as a matter of accommodation, and not as a matter of duty. But even that makes no difference, if the station agent was authorized to require the service, and it came within the scope of McTaggart's employment to perform it, unless it is shown that McTaggart undertook to carry it as a matter of accommodation, and not of duty. The service here was the carrying of a telegraphic message to be delivered by throwing it off a moving train. This case discloses no special authority in the station agent or duty in the baggage master. The station agent being inquired of about his duties as station agent and telegraph operator, replied "about everything around a country station," and in the same connection that he had "general direction of the business of the road at that point," which is of course, the ordinary duty of a station agent. It does not mean that he was an unlimited agent. *Davies* v. *Steamboat Company*, 94 Maine, 379. The ordinary duties of such agents and of baggage masters are now so well known and so generally uniform that the court may take judicial notice of them. But if more than that is claimed, it must be proved. Nor does the case disclose any such custom of the station agent and baggage master to forward and deliver messages in this way, from which it might be inferred

that the company knew and assented to the practice. There was evidence indeed that McTaggart had been seen to throw off letters or telegrams at this place several times before. The case does not show which. Therefore it cannot be said that he threw off telegrams. And if he threw off letters the natural inference would be that he did it as an accommodation.

Taking the case as a whole then, can it be said that McTaggart, in undertaking to deliver the message, was acting within the scope of his employment? That is to say, was he doing something which the railroad company was bound to anticipate that he might do, and which, therefore, it was bound to provide for his doing safely? We think not. The railroad company may have been under obligations to deliver the message. It may not have been improper for the station agent to ask McTaggart to throw off the message, and he may have been willing to do so. But it was not a part of his duty to do it. And what he did, he did voluntarily as an accommodation. The case of *Davies* v. *Steamboat Company*, supra, is instructive upon this point.

And it is argued with much force, and we think fairly, that even if it were otherwise, the railroad company would have no reason to expect that a baggage master in a car with two high and wide doors on the side, as here, made on purpose to be used by him, would leave the car and go down to one of the lower steps, as McTaggart must have done, if he was hit by the pipe, for the purpose of throwing off a message, when he could have done it safely and conveniently from one of the side doors of the car. The message was tied to a stick, undoubtedly for the purpose of making it easy to throw it out and away from the car.

But there is another ground also which we think is fatal to the plaintiff's case. We do not think it is proved that he was hit at all by the steam pipe. He may have been, he may not have been. Whether he was is conjectural. When last seen on the car he was not in position to be hit by it. He had thrown the message off, had completed his service, and was standing up "square." He was not seen to bend forward and look back. He was not seen or known to strike the pipe, though a man who had seen him a second or two

before was standing within six or eight feet of the pipe. He was found after having passed 27 feet beyond the pipe. The plaintiff argues that he was hit by it, because the pipe was there, where he could be hit by it, if he leaned out, and because of a bruise upon the head which could have been caused by it. The plaintiff thus shows a possibility. But that alone is not enough. She must show a probability. She must do more. She must show enough to lead a fair and reasoning mind to conclude that the pipe actually hit McTaggart. *Seavey* v. *Laughlin*, 98 Maine, 517. She might, in a supposed case, do this by showing some distinctive mark upon the pipe, as hair or blood, or some bruise upon the head that was peculiar to the pipe, or she might by elimination or exclusion of other causes lead to a natural conclusion that he was hit by the pipe. There is, in this case, however, another theory which, for anything that we know or is proved, seems equally plausible to account for his injury. The case shows that the train quickened its speed as it left the bridge, and that McTaggart was standing on the steps of the car. If, when the train started up quickly, or if for any other reason, McTaggart lost his balance, and fell out, all the remaining circumstances are as well accounted for as upon the plaintiff's theory. There was nothing in the appearance of the bruise back of the ear which might not as well be attributed to his hitting some part of the coal bin as he fell, as to his hitting the steam pipe. But it is said, this is conjecture. So it is. But is not the other theory conjecture, also? Both are conjectures, one seemingly as plausible as the other. And either might be the truth. But conjectures are not proof. A proposition is not proved so long as the evidence furnishes ground for conjecture only, or until the evidence becomes inconsistent with the negative. *Smith* v. *Lawrence*, 98 Maine, 92. Can we say then that it is proved that the pipe hit the deceased? Might a jury properly say it? Would a jury be warranted selecting upon which of two conjectures they would base a verdict? And the burden of proving being upon the plaintiff, might they select a conjecture favorable to her, and reject the other? Certainly not. *Seavey* v. *Laughlin*, supra. Nor does this militate against the doctrine that the reasonable inferences drawn by juries from undisputed facts will not be disturbed.

That implies judgment and decision. That involves the weighing of the evidence and the formation of belief, from the evidence. It is not a mere process of arbitrary selection. To choose between two possibilities is guess work, and not decision, unless there is something more which may lead a reasoning mind to one conclusion rather than to the other. We think there is no such determining factor in this case.

Therefore, for the reasons stated, we are of opinion that the plaintiff is not entitled to get or hold a verdict.

Judgment for defendant.

In Equity.

C. B. ABBOTT et als., *vs.* HENRIETTA D. GOODALL et als.

Cumberland. Opinion May 27, 1905.

Equity. Insolvent Foreign Corporation. Jurisdiction. Procedure and Practice. Colorado Session Laws, 1885, page 264, sect. 1.

A suit in equity by creditors of an insolvent Colorado corporation, on behalf of themselves and other creditors who may choose to come in, against Maine creditors alone to enforce their double liability under the statute of that state, Session Laws of Colorado, 1885, page 264, section one, cannot be sustained.

The statute contemplates only a pro rata contribution by all the stockholders, sufficient to satisfy creditors. Hence only a suit in equity to which the corporation is a party, brought for the benefit of all creditors against all the stockholders, can be maintained.

The courts of Maine have no jurisdiction over the corporation. The court of Colorado which has such jurisdiction is the only court which can finally ascertain the deficiency of assets and the amounts due the several creditors. The stockholders also by virtue of their membership in the corporation are within the jurisdiction of that court so far as is necessary for the determination of their rights and liabilities among themselves.

Matters of procedure and practice are governed by the law of the forum where the remedy is sought. The rights of a citizen of the forum should not be prejudiced or the public policy of the state controvened. It is against the policy of this state to enforce a remedy against its citizens upon a liability created by a statute of Colorado, which places them in a worse position than that occupied by citizens of that state whose liability under the same statute is sought there to be enforced.

On appeal in equity by plaintiffs. Appeal dismissed.

Bill in equity brought in the Supreme Judicial Court, Cumberland County, by four hundred and fifty plaintiffs, all of Colorado, as creditors of the State Bank of Monte Vista, a corporation organized under the laws of and located in Colorado, on behalf of themselves and such other creditors of said Bank as might join, to enforce the Colorado statutory liability of the defendants, citizens of Maine, as stockholders in said Bank. All of the several defendants demurred to the bill either generally or specially. The Justice of the first instance sustained the demurrers and decreed that the bill be dismissed. From this decree, the plaintiffs appealed.

All the material facts are stated in the opinion.

D. A. Meaher, George W. Heselton, and Tolles & Cobbey, for plaintiffs.

Allen & Abbott, for Henrietta D. Goodall, Ruth W. Goodall, Ida F. Illigan, and E. M. Goodall, Admr., defendants.

Anthoine & Talbot, for James A. Spaulding, defendant.

Reuel Robinson and Eben Winthrop Freeman, for Fred Lewis, A. F. Miller, and Emma D. Sherman, defendants.

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

POWERS, J. Appeal from the decree of a single justice sustaining the defendant's demurrer and dismissing the bill.

This suit is brought to enforce the statutory liability of the Maine stockholders in the State Bank of Monte Vista, a corporation organized under the laws of and located in the State of Colorado. The plaintiffs, four hundred and fifty in number, aver that they are creditors of said bank to the amounts stated opposite their respective names, that they appear in behalf of themselves and all other

creditors of said bank who have joined or may hereafter be joined with them in the suit, that the bank became insolvent on June 15, 1889, and made an assignment under the laws of Colorado of all its assets to an assignee who entered upon his duties and is now acting as such assignee, that prior to the bringing of this bill the estate of said bank has been fully administered and all the assets disposed of and distributed by said assignee among its creditors in accordance with the laws of Colorado, that the plaintiffs have no power to collect further from said bank and that the bank has no further assets but has a large amount of indebtedness still unpaid.

Of the demurrers of the several defendants some are general and some are special, but all the matters relied upon are defects in the jurisdiction or the substance of the bill, viz., for want of equity, for want of necessary parties, for multifariousness and for want of necessary jurisdiction and power in the court to enforce the statute of Colorado.

At common law the shareholders of a corporation were under no individual liability to its creditors beyond the extent of their subscription to its capital stock. Such liability where it exists is always a creature of statute. The statute of Colorado, Laws of 1885, page 264, section 1, creating such liability is set out in the bill and is as follows: "Shareholders in banks, savings banks, trusts, deposit and security associations shall be held individually responsible for debts, contracts and negotiations of the said associations in double the amount of the par value of the stock owned by them respectively." The bill further alleges that under and by virtue of the statutes of the State of Colorado each and every stockholder of said corporation agreed to assume and did assume liability for the indebtedness of said corporation, in the case of deficiency or insufficiency of corporate assets to liquidate such indebtedness, in double the amount of the par value of his stock; that each fully agreed in case of such deficiency to pay or contribute for the equal benefit of the creditors of such corporation such amount, not exceeding double the par value of the stock held by each stockholder, as might be required to make up the deficiency.

The nature and extent of the stockholders' liability is to be determined by the statute creating it. In the interpretation of a statute great weight should be given to the construction put upon it by the court of last resort of the state of its enactment. In *Zang* v. *Wyant*, 25 Colo. 551, the Supreme Court of Colorado say: "We are satisfied that both upon reason and authority, the additional liability of stockholders imposed by our statute, constitutes a fund for the benefit of all the creditors which may be pursued in equity for their common benefit, by or for all." The fund thus created, however, is not the primary resource for the payment of the debts of the corporation. It constitutes no part of its assets. The liability of the defendants is collateral to the principal obligation which still rests upon the corporation, the State Bank of Monte Vista, and is conditional upon its insolvency or an inability to enforce payment against it by the ordinary process. The general statute of Colorado above recited makes the defendants, "individually responsible" for the debts of the bank. While, however, each stockholder is thus made individually liable for the bank's debts, in case of any deficiency of the corporate assets, to the extent of double the amount of the par value of his stock, his fellow stockholders are under the same liability, and if he pays more than his share, they can be compelled to contribute to him the excess so paid. As between creditors and stockholders, each stockholder is severally liable to all the creditors, but as between themselves each stockholder is to pay in proportion to his stock. As against the corporation the stockholder also has a claim for reimbursement to the full extent of the amount which he is compelled to pay. In *Terry* v. *Little*, 101 U. S. 216, the charter of the Merchants Bank of South Carolina provided that in case of failure of the bank "each stockholder should be liable and held bound individually for any sum not exceeding twice the amount of his shares," language very similar to that in the Colorado statute. The court there said: "This we think means that on the failure of the bank each stockholder shall pay such sum, not exceeding twice the amount of his shares, as shall be his just proportion of any fund that may be required to discharge the outstanding obligations. The provision is in legal effect for a proportionate liability of the stockholders."

Such being the nature and extent of the defendants' liability, in what manner is it to be enforced? When the statute creating the liability provides a special remedy it can be enforced in no other manner. *Fourth Nat. Bank of N. Y.* v. *Francklyn*, 120 U. S. 747. In the case before us the statute of Colorado provides no remedy. Under such conditions, both upon authority and reason, the proper remedy is by a suit in equity by or for all the creditors and against all the stockholders and the bank itself. The amount of the creditors' claims and the extent of the deficiency of the corporate assets must be judicially ascertained and declared, *Gillen* v. *Sawyer*, 93 Maine, 167. Otherwise the defendants might be compelled to litigate these questions each time that they sought to enforce contribution in another jurisdiction. This should be done once for all, and can only be done in a proceeding to which the corporation is a party. Judgments are binding upon parties and their privies, and every stockholder in a corporation is so far a privy in interest in an action against the corporation that he is bound by the judgment against it. *Bank* v. *Farnum*, 176 U. S. 640. "He is so far an integral part of the corporation that in view of the law he is privy to the proceedings touching that body of which he is a member." *Hawkins* v. *Glenn*, 131 U. S. 329. The bank of Monte Vista is not a party to this suit and the court of this state can obtain no jurisdiction over it. The court of Colorado which has jurisdiction of the corporation is the only tribunal which can finally ascertain the deficiency of assets and the amounts due the several creditors. The stockholders also by virtue of their membership in the corporation are within the jurisdiction of that court so far as is necessary for the determination of their rights and liabilities among themselves. *Howarth* v. *Lombard*, 175 Mass. 577; *Bank of North America* v. *Rindge*, 154 Mass. 207.

It is urged that the court of Colorado in *Zang* v. *Wyant*, supra, has decided that neither the corporation or its assignee need be a party to the suit. We do not so understand that decision. After deciding that they need not be made parties plaintiff the court said: "Conceding that, for the purpose of a complete determination of all the rights involved they should have been made parties defendant, — the failure to do so cannot be considered here, because the

appellants, by answering over after demurrer, on the ground of defect of parties, have waived the right to raise the question on appeal," page 566. Admitting, however, that the decision on this point in *Zang* v. *Wyant*, is as claimed by the plaintiffs, still it would not bind this court. This is not part of the substantive provisions of the statute creating the defendants' liability. It relates solely to the procedure and practice under it. Such matters are governed by the law of the forum where the remedy is sought. *Drinkwater* v. *Portland Marine Ry.*, 18 Maine, 35. Neither is it difficult to distinguish this case from *Pulsifer* v. *Green*, 96 Maine, 438. There the creditors of a Kansas corporation, having obtained a judgment against it in that state, brought an action at law against a single creditor in Maine. The remedy sought was provided in the statute creating the liability and, as we have seen, was exclusive. Here no method of enforcing the liability created is provided by the statutes of Colorado, but the plaintiffs seek to maintain a suit in equity against part of the stockholders and without joining the State Bank of Monte Vista, contrary to the familiar rule of equity practice that all persons interested in the subject matter of the suit should be made parties, in order that the whole controversy may be finally settled in one suit and at one time.

The suit in its present form is more oppressive and burdensome upon Maine stockholders than would be a suit in Colorado against stockholders resident there; for the court there would have power to compel the bank to become a party. The rights of a citizen of the forum should not be prejudiced or the public policy of the state controvened. *Childs* v. *Cleaves*, 95 Maine, 498. It is against the policy of this state to enforce a remedy against its citizens upon a liability created by a statute of Colorado, which places them in a worse position than that occupied by the citizens of Colorado whose liability under the same statute is sought there to be enforced. In other words, the defendants should not suffer because they are citizens of Maine. A suit in equity in the home of the bank itself, is peculiarly adapted to work out just and equitable results. In this way only can a legion of actions for contribution be avoided, in each one of which the amount of each of the plaintiffs' debts might be a

subject of litigation, and in which the burden of proof upon that issue would be upon these defendants in courts having no jurisdiction over the corporation and no control over its officers, books or papers. The corporation is an indispensable party to a suit in which the amount of its debts is involved. *Wetherbee* v. *Baker*, 35 N. J. Eq. 507.

Bates et al., v. *Day*, 48 Atl. Rep. 407, was a bill in equity brought by certain creditors of the Colorado Savings Bank, an insolvent corporation, against a Pennsylvania stockholder whose liability was created by the same statute we have been considering. It was held by the Supreme Court of Pennsylvania that the corporation was a necessary party and the decree below dismissing the bill was affirmed.

Miller et al., v. *Smith*, 58 Atl. Rep. 634, was a suit in equity by creditors of this same State Bank of Monte Vista, for and in behalf of themselves and such other creditors as might choose to come in, against a stockholder a citizen of Rhode Island to enforce his double liability under the same statute. It was held that the suit would not be entertained, the statute contemplating only a pro rata contribution by all the stockholders sufficient to satisfy all the creditors, and only a suit to which all the creditors and all the stockholders were parties being adequate to work out the equities.

Finally *Clark* v. *Knowles*, 187 Mass. 35, is a case precisely the same as the one at bar. It was there held by the Massachusetts court that a suit in equity by creditors of a Colorado corporation, on behalf of themselves and other creditors who may choose to come in, against a Massachusetts stockholder to enforce his double liability, under Laws Colo., 1885, p. 264, section 1, could not be maintained, the statute contemplating only a pro rata contribution by all the stockholders sufficient to satisfy all the creditors; and that only a suit in equity to which the corporation is a party brought by all the creditors against all the stockholders can be maintained.

The three cases last cited are the most recent utterances of courts of high authority involving the very question presented in the case before us.

For want of necessary parties the defendant's demurrer was rightly sustained and the bill dismissed.

Decree affirmed. Appeal dismissed with costs.

INHABITANTS OF DURHAM

vs.

LISBON FALLS FIBRE COMPANY.

Androscoggin. Opinion June 2, 1905.

Waters and Water Courses. Dams. Deflection of Current. Damage to Highway. Damnum Absque Injuria. Spec. Laws, 1875, c. 6, sec. 2. R. S., c. 94, sec. 1.

When under the provisions of the Mill Act, R. S., chapter 94, section 1, a dam has been legally erected across a non-navigable river, for the purpose of operating a mill, and the location of such dam is neither illegal nor wrongful, and such dam has been constructed in a suitable, skillful and proper manner and is in no way defective or inadequate for the purpose for which it was constructed, and the owners of such dam have neither unreasonably, negligently nor wantonly discharged the head of water accumulated by such dam, but by reason of such dam the current or flow of such river has been deflected towards the shore thereby causing injury to a highway along the bank of such river, *Held:* that such damage is the damnum absque injuria of the common law.

If the plaintiff has suffered damages in consequence of an act lawfully committed by the defendant company in the exercise and enjoyment of a right acquired by virtue of the express provision of the statute, then the plaintiff cannot recover therefor. In this state, this question must be deemed res judicata.

The plaintiff's injury, if any, does not flow from the wrongful act of anyone and hence is damnum absque injuria. To hold otherwise, to hold that the mere tendency of an increased flow of water, at times, in its natural channel to wear away soil, is in itself a cause of action against the owners of mills and dams, would prevent all improvement of inland navigation, and would paralyze all industries dependent on water power.

On motion and exceptions by defendant.

Motion sustained.

Exceptions not considered.

Action on the case to recover damages which plaintiff town claimed to have sustained by reason of the defendant's dam across the Androscoggin River deflecting the current or flow of said river towards the Durham shore thereby causing injury to the highway along said shore. Plaintiff recovered a verdict for $1,489.15. Defendant filed a general motion for a new trial, and also excepted to certain instructions and refusals to instruct. The exceptions were not considered.

The case is sufficiently stated in the opinion.

Newell & Skelton, for plaintiff.

George C. Wing, George C. Wing, Jr., and Henry E. Coolidge, for defendant.

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

WHITEHOUSE, J. In 1889 the defendant company erected on its own land and has since maintained, a dam across the Androscoggin river at Lisbon Falls, for the purpose of operating its paper mill there located. In order to obtain a suitable landing for the dam on the Durham side of the river, and give to the structure proper security and efficiency, the main dam, 311 feet long was constructed diagonally across the river, the upper side forming an obtuse angle with the Durham shore. A canal was cut on the Lisbon side in order to divert the water from its natural channel and make it available to propel the machinery of the defendant's mill. The bulkhead of the dam was built as far into the natural bank of the Lisbon shore as it was practicable to place it having regard to the location of the canal, and from that point downward, a wing dam or wing wall 200 feet long was constructed between the canal and the river nearly at right angles to the main dam and parallel with the Lisbon shore. At the lower end of this wing dam was located the penstock which conducts the water to the wheels of the defendant's mill, and the vent of the water from these wheels is at right angles to the river and towards the Durham shore. Prior to the construction of these works a ledge projected into the river some ten or twelve feet at the point where the main dam landed on the Durham

shore, and a portion of this rock was blasted off in order to form a broader rollway. Some of this blasting, however, was done by the defendant's predecessors in title. It is contended in behalf of the plaintiffs that whereas the projecting ledge had some tendency formerly to set the current of the river towards the Lisbon shore, the removal of a portion of the rock, the diagonal course of the main dam, the spillway over the wing dam and the flow of water from the mill wheels, have all had such a strong tendency the other way that the current of the river has been entirely changed from the Lisbon to the Durham shore, causing the injury to the public highway in Durham, a short distance below the dam, which forms the basis of this common law action for damages. It is claimed that the highway was undermined and rendered defective and dangerous by such diversion of the current of the river to their shore, and that the repairs thereby made necessary involved an expenditure of $3000. The jury returned a verdict for the plaintiff of $1489, and the case comes to this court on the defendant's motion and exceptions.

The plaintiff's fundamental proposition of fact that the current of the river has been entirely changed by the construction of the defendant's work is strongly controverted by the defendant. It is contended that the main current of the river is nearly midway between the two shores, and that it is substantially in the same place in which it was before the dam was built. It is insisted that whatever change has taken place in the current of the water after passing over the dam, is only such as might reasonably be expected to result and frequently does result in times of freshet, from the obstruction of the flow of a great volume of water by the erection of any dam. Upon this point there was a sharp conflict of testimony. But assuming that by reason of the defendant's works as constructed, the current acquired a greater momentum and velocity in falling from the crest of the dam at high water, and a stronger tendency to press against the Durham shore causing the injurious effect upon the highway to become more marked since the erection of the dam, it is still confidently asserted that no illegal or wrongful act has been committed by the defendant company which can create any liability on its part to pay damages for a consequential injury to the Durham highway.

It is not in controversy that the defendant company had a legal right to erect a dam across the Androscoggin river at Lisbon Falls for the purpose of operating its mill. It is provided by section 1 of the mill act, R. S., chapter 94, section 1, that "any man may on his own land, erect and maintain a water mill and dams to raise water for working it, upon and across any stream not navigable; or for the purpose of propelling mills or machinery, may cut a canal and erect walls and embankments upon his own land, not exceeding one mile in length, and thereby divert from its natural channel the water of any stream not navigable," etc. It is admitted that the defendant owned the land on both sides of the river at each end of the dam, and the land on which the canal was cut, the wing wall built and all the works in question constructed. It is not in controversy that the Androscoggin river at this point was a stream not navigable. The defendant was entering upon the establishment of an important industrial enterprise involving the development of a large and valuable water power. It is in evidence and undisputed that the dams were located in pursuance of plans devised by competent and skillful engineers, and all the works constructed under their direction and supervision. It is conceded in the plaintiff's argument that the general plan of the works was in accordance with correct principles of engineering as far as the defendant's purposes were concerned. There is no allegation in the writ that the peculiar location of the works was illegal or wrongful or the particular method of construction adopted by the defendant was negligent, unskillful or improper. The declaration states the fact that a dam was erected across the river at Lisbon Falls, and a wing dam constructed on the Lisbon side; alleges that the current of the river was thereby deflected towards the Durham shore, undermining the highway and rendering it dangerous for public travel, and concludes with the general averment that "the expense thereby incurred in repairing and protecting the same" were caused solely by the wrongful and negligent acts of the defendant in thus turning the waters of said river from their natural course," etc. There is no allegation that the main dam was built at an improper angle with the current of the river, or that the location of the canal and the wing wall, or the construction of any special part of the

work, was "negligent and wrongful." The act of the defendant in building these works is represented to be negligent and wrongful because it produced the result complained of; but there is no averment that this result was occasioned by any improper or negligent method of construction. There is no distinct allegation that the manner of building these dams was unreasonable, or was not necessary in order to secure the requisite strength and efficiency for the defendant's use and convenience. There is no averment that it was unreasonable or unnecessary or contrary to established rules of engineering to locate the dam diagonally across the river. There is no allegation that any part of the works was in any way defective or inadequate for the purpose for which it was erected.

It should also be noted here that there is no specific averment in the writ that the defendant company had accumulated a large head of water by its dams, and had then unreasonably, negligently and wantonly discharged it to the detriment of the highway on the Durham shore below the dam. It is not an action for damages resulting from any such unreasonable use or management of the water, as in *Frye* v. *Moore*, 53 Maine, 583.

But it is unnecessary to consider whether or not a demurrer would lie to the plaintiff's declaration, for the report fails to disclose any evidence in this case which would warrant a jury in finding that the defendant's works were either unlawfully or unreasonably located, or negligently, unskilfully or improperly constructed. Much prominence is given by plaintiffs' counsel to the discussion of the effect alleged to be produced by the water turned over the spillway and vented from the wheels at right angles to the natural channel of the river. But it appears from actual measurements made by the defendant's engineer at the time of the trial that the amount of water then running over the spillway was only a little more than 10 per cent of the amount flowing over the main dam, and the defendant's evidence in this case based upon actual tests and observation, shows that the water from the spillway as well as that vented from the mill wheels, is carried downward by the main current before it reaches the middle of the river. However that may be, there is neither allegation nor evidence that the canal, spillway, wheels and

tailraces were not reasonably and properly located and designed. On the contrary the evidence is positive and undisputed that all of these works were built according to the "approved fashion" under the immediate direction of competent engineers. Furthermore, it has been seen that the defendant company was expressly authorized by the statute above quoted, to divert the water from its natural channel by the construction of a canal and wing wall, and it needs no expert to tell us that such a canal with wing dam, in order to accomplish the object of it in a reasonable manner, must necessarily be substantially parallel with the shore and the water returned from the canal to the river nearly at right angles to the main current. This is shown by the testimony to be the approved and customary method of constructing these works; and it is obvious that to hold otherwise would practically abrogate the plain provisions of the statute which confer upon the land owner authority to construct such works.

Nor is it satisfactorily shown by evidence that the slightly oblique course of the dam across the river, in itself, exerts any appreciable influence upon the direction of the current of water below the dam. In any event, as already stated, there is neither allegation nor proof that the dam was located at an improper angle with the river or that the blasting off of a portion of the projecting ledge to obtain a suitable landing, was not reasonably necessary and proper under the circumstances of this case, in order that the defendant might enjoy the benefits of the right conferred by the statute.

Upon this state of the evidence, the question presented for determination is whether the plaintiffs are entited to compensation for the consequential injury to the highway below the defendant's dam resulting at freshet seasons from an increase in the volume, momentum and velocity of the water, and in the incidental pressure against the Durham shore, the dam being reasonably and properly located and rightfully constructed by the defendant company on its own land in accordance with the express authority of the statute, for the purpose of propelling a mill. It is the opinion of the court that the plaintiffs have thereby sustained a loss in fact without a wrong in law, the damnum absque injuria of the common law. They have

suffered damages in consequence of an act lawfully committed by the defendant company in the exercise and enjoyment of a right acquired by virtue of the express provision of the statute.

In this state the question must be deemed res judicata. In *Brooks* v. *Cedar Brook Improvement Co.*, 82 Maine, 17, it was held that where a dam, erected in accordance with legislative authority upon a non-tidal public stream to facilitate the driving of logs, caused an increased flow of water at times in the channel below, thereby widening and deepening the channel and wearing away more or less, the soil of a lower riparian owner, it is not such a taking of property as entitles the owner to compensation, but a case of damnum absque injuria. In that case the defendant company was incorporated by virtue of chap. 106 of the special laws of 1875, the second section of which provides as follows:

"Said corporation may construct as many dams, side dams, and sluices for the purpose of holding water on Cedar Brook and that part of Swift Cambridge river, situate in the town of Grafton, in the county of Oxford, as they may deem necessary for the purpose of floating or driving logs down said streams to lake Umbagog, and also to remove all stones, trees and other obstructions from the beds thereof, and said corporation may take land and materials for the purpose of locating and constructing said dams, and making other improvements and being accountable to the owners thereof for all damages, if any, to be ascertained by reference or by action upon the case."

In the opinion the court say: "The plaintiff brings this common law action to recover damages for that injury to his land. He makes no other complaint. None of his land has been appropriated by the defendants. They have not flowed nor occupied his land. They have not diverted any water from, or upon it. So far as appears, they have by their erections detained the water a reasonable time, and let it down in reasonable quantities, at proper seasons. This is just what is being continually done on nearly every stream in the state, and what every riparian owner submits to with little thought of claiming damages.

The plaintiff's injury, if any, does not flow from the wrongful act

of any one, and hence is damnum absque injuria. To hold otherwise, to hold that the mere tendency of an increased flow of water, at times, in its natural channel to wear away soil, is in itself a cause of action against the owners of mills and dams, would prevent all improvement of inland navigation, and would paralyze all industries dependent on water power. A law, requiring such a judgment, can never have been established by the people."

In *Henry* v. *Railroad Co.*, 30 Vt. 638, the defendant company in pursuance of legislative authority, built a bridge across a river with two piers in the stream, whereby the natural channel was obstructed and the current turned against the plaintiff's farm, washing away a large quantity of his land. It was held that the injury was consequential and that the plaintiff had no cause of action. In the opinion the court say: "It is not a cause of injury whose operation can be calculated or limited in its extent and operation or defined in any mode, and by consequence not one which in the nature of things can be guarded against. It is not a cause of damage which inevitably produces its effect, but only one which in its operation may require greater precaution against injury, to be used by proprietors below. Hence the law rather chooses to leave each proprietor to guard his own shore than to require the riparian owners above to forego any use of the water which they may deem beneficial to themselves. Thus mill owners or those who use water from a running stream for purposes of irrigation have never been required to restore the water to the stream at any particular point, or so as to leave the force and direction of the stream precisely the same as before, and if any such duty had existed, traces of it would, undoubtedly be found in the books. The act complained of is merely consequentially injurious, producing no direct injury like the flow of land, even by means of an obstruction in a running stream, and the damage to riparian owners below, by means of the change in the current, is so remote and uncertain a consequence that the law has not, and we think, it cannot hold the owner above liable for such consequences. It is one of those remote consequences of which the law takes no such account as to make it the basis of an action."

See also *Hollister* v. *Union Co.*, 9 Conn. 436; *Alexander* v. *Milwaukee*, 16 Wis. 264; *Green* v. *Swift*, 47 Cal. 536; *Holyoke Water Power Co.* v. *Conn. River Co.*, 20 Fed. Rep. 71.

The conclusion therefore is that the verdict of the jury was clearly against the law and the evidence and must be set aside.

Motion sustained. Verdict set aside.

H. F. CORBIN et al. *vs.* PETER A. HOULEHAN.

Kennebec. Opinion June 19, 1905.

Intoxicating Liquors. Constitutional Law. Interstate Commerce. Contracts Valid Where Made. Enforcement of Same in Another State. Sale. Action for Price. Illegal Purpose. Knowledge of Vendor. Foreign Laws. Recognition of Same. Comity of Nations. Obligation of Contracts.—R. S. (1883), c. 27, § 56. R. S. 1903, c. 29, § 64. XIV Amendment U. S. Constitution.

The statute, R. S., c. 29, § 64, which prohibits the maintenance of an action in the courts of this state to recover for intoxicating liquors bought in another state with intention to sell the same in this state in violation of law, is not in violation of that clause of the Federal Constitution which gives Congress the power to regulate commerce between the states.

It is a fundamental and elementary rule of the common law that courts will not enforce illegal contracts, or contracts which are contrary to public policy, or which are in contravention of the positive legislation of the state. To the general rule that the question whether a contract is a legal or illegal one, is judged by the law of the state or country, in which it was made, and that a contract good where made is good everywhere, there are some exceptions the most important of which is, that where the contract violates the positive legislation or the established public policy of the state of the forum, it will not be enforced in that state, although perfectly valid and legal according to the laws of the state or country where it is made.

Independently of any statute, in accordance with this well settled principle, the courts of a state would not enforce a contract in behalf of a vendor to recover the purchase price of goods sold by him to a vendee, if the vendor

not only had knowledge of the illegal purpose of the purchaser to sell them in violation of the laws of the state to which they were to be transported but, as well, did some act in furtherance of this illegal purpose. A person should not be allowed to resort to the courts of the state to enforce a contract which he had made for the purpose of violating or evading the laws of that state, or by aiding another to violate such laws.

But the question raised by the plaintiffs' exceptions is as to the constitutionality of the statute in question which does not make a participation by the vendor in the purchaser's illegal purpose, or even his knowledge of such purpose, necessary to prevent his resorting to our courts.

The courts recognize the laws of other states and countries pertaining to contracts, and give them force and effect upon the principle of comity, which is the voluntary act of the state or nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests. The comity of nations, rightly understood, cannot violate, because it is a part of, the law of this and every other civilized country.

It being then, upon the principle of the voluntary act of comity, that contracts valid where made, but invalid in the state of the forum, will be in force in the latter state, if not contrary to the established policy or a positive statute of that state, it is within the discretion of the law making power of the state of the forum to limit the extent to which the principle of comity shall be applicable. And the legislature of the state has the power to say that this principle of comity shall not be extended to a contract the result of which is to give one of the parties thereto the means of violating the laws of the state and its established policy in relation to the sale therein of commodities believed to be prejudicial to the interests of its citizens.

In furtherance of the established policy of this state, as clearly shown by its constitution and the history of its legislation, to prohibit the sale of intoxicating liquors within its limits, this statute was enacted forbidding a remedy in our courts to certain suitors, under the conditions named, even if they were innocent in making the contract of sale which placed in the possession of the purchaser the means of violating our laws. The legal effect of this enactment was simply to limit the application of the principle of comity, and to extend the well established principle that courts will not enforce a contract made by both parties with the view and for the purpose of violating the laws of the state of the forum, to the case of a contract where one of the parties only to it, the purchaser, had that purpose in view. This enactment was within the discretion of the law making power of the state, and is not in violation of the interstate commerce of the Federal Constitution.

The statute in question would undoubtedly have the effect of impairing the obligation of contracts, if it were retroactive in its effect, but it is not. The contract in suit was made in February, 1896, while the statute had been in existence for many years prior to that date. A statute cannot

impair the obligation of a contract, within the meaning of the Constitution, that was made subsequent to the enactment of the statute.

Nor is it in violation of this clause of the Fourteenth Amendment: "Nor shall any state deny any person within its jurisdiction the equal protection of the laws," since by this statute all persons are treated alike. It forbids the maintenance of a suit in the courts of this state, under the conditions named, both by residents and non-residents of the state alike.

Knowlton v. *Doherty*, 87 Maine, 518, affirmed.

On exceptions by plaintiffs. Overruled.

Assumpsit on account annexed, brought in the Superior Court, Kennebec County, to recover a balance of $256.85, and interest thereon, alleged to be due for intoxicating liquors sold March 19, 1896, by the plaintiffs, then residents of Cincinnati, Ohio, to the defendant then residing in Gardiner, Maine, and shipped the same day by the plaintiffs from their place of business in Cincinnati by rail with continuous waybill to the defendant at Gardiner, where they were received by the defendant from the common carrier in the original packages in which they were shipped. The goods thus sold and shipped consisted of twenty cases of bottled whiskey and five barrels of whiskey in bulk, each case and each barrel constituting a separate package.

Defendant plead the general issue and a brief statement alleging "that the account or claim on which this action is founded is for intoxicating liquor sold in violation of chapter 27 of the Revised Statutes of Maine, or for intoxicating liquor purchased out of the state with intention to sell the same or a part of the same in violation of said chapter."

The case was tried to a jury at the April term, 1902, of said Superior Court. After the evidence was closed, the presiding Justice directed the jury to return a verdict for the defendant which was done.

The plaintiffs excepted to certain rulings made by the presiding Justice during the trial and also to the instructions directing the jury to return a verdict for the defendant.

The material part of the case is sufficiently stated in the opinion.

A. M. Goddard, for plaintiffs.

Beane & Beane, for defendant.

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

WISWELL, C. J. In this action, brought by citizens of the state of Ohio against a citizen of this state, in the Superior Court for Kennebec County, the plaintiffs seek to recover the unpaid balance of a bill of over six hundred dollars for a large quantity of intoxicating liquor in barrels and cases, sold by them to the defendant. The order for this liquor was taken by the plaintiffs' representative at the defendant's place of business, sent to the plaintiffs in Ohio, where, after making certain inquiries in regard to the financial responsibility of the defendant, the order was accepted by the plaintiffs and the liquors shipped as directed. The contract for the sale and purchase of these liquors was not finally completed until the order was accepted by the plaintiffs in the state of Ohio, so that it may be assumed that the contract of sale was made in the latter state, where such sale was legal. These liquors were bought by the plaintiffs for the purpose and with the intention of selling them in this state in violation of the laws of the state, and they were subsequently so sold by him, and the plaintiffs when they accepted the order, and thereby completed the contract, not only knew that they were intended for illegal sale, as practically admitted by one of the plaintiffs in his testimony, but also materially aided the defendant in his attempt, apparently successful, to prevent their seizure, by marking the goods, in accordance with a direction of the purchaser contained in the order, in the name of a person other than the purchaser, which name was adopted by him for this purpose, and it was known by the plaintiffs' agent that the name in which the liquors were to be shipped was fictitious and adopted by the defendant for the purpose of avoiding their seizure.

At the trial the defendant interposed the defense that these liquors were bought by the defendant out of the state with the intention of selling them in the state, contrary to our laws, and relied upon the statute, R. S., chap. 29, sec. 64: "No action shall be maintained upon any claim or demand, promissory note or other security, contracted or given for intoxicating liquors sold in violation of this

chapter, or for any such liquors purchased out of the state with intention to sell the same or any part thereof in violation thereof." There being no question as to the fact that the liquors were purchased by the defendant for the purpose of selling them in this state in violation of the provisions of the chapter referred to, the court ordered a verdict for the defendant and the case comes here upon the plaintiffs' exceptions, which it is not necessary to quote, but in which the point is raised that this statute is in violation of the interstate commerce clause of the federal constitution.

The contention of plaintiffs' counsel is that the statute, "is in conflict with the commerce clause of the federal constitution and inoperative, because its obvious purpose and necessary and direct tendency and effect are to regulate, hinder, obstruct, burden, discourage and prevent interstate commerce and interstate commerce contracts which are lawful under the constitution and laws of the United States." His argument, briefly stated, is that this sale of liquors in the state of Ohio was legal, that intoxicating liquors are recognized by federal authority as a legitimate subject of interstate commerce, that one of the essential elements of interstate commerce is the sale of goods in one state to be transported into another, that the very purpose and motive of that branch of commerce which consists in transportation is that other act of commerce which consists in the sale or exchange of the commodities to be transported, and that the effect of the statute under consideration is to regulate, obstruct, burden and discourage such interstate commerce transactions.

There can of course be no question as to the truth of many of the propositions relied upon by counsel for plaintiffs in his argument. Intoxicating liquor is recognized by the federal authority as a legitimate subject of interstate commerce. Commerce among the several states includes not only the transportation of commodities from one state to another, but as well the sale of such commodities in one state to be transported into another. The regulation of commerce between states having been delegated to the federal Congress, no state can interfere therewith, or impose any condition, restrictions or burdens thereon. The state cannot tax interstate purchases or sales, nor the means or instruments of such commerce. The state cannot

make it a criminal offense for any person to solicit or take orders in one state for the sale of liquors in another state, with reason to believe that they are to be illegally sold in the state into which they are to be transported; nor can it prohibit the importation of liquors into the state even if they are intended for illegal sale therein, and such liquors cannot be seized or otherwise interfered with by state authority until the transportation has been entirely concluded. In a word the state can do nothing which will directly interfere with or regulate commerce between the several states of the Union. All of these limitations upon the power of the states are familar, having been declared in the decisions of the Supreme Court of the United States whose interpretation of the meaning of the federal constitution is final.

But we cannot see that these various inhibitions upon the power of the state are especially applicable to a solution of the question here presented, and we do not think that it necessarily follows from them, and from the fact that a state can do nothing to directly interfere with commerce between the states, that its legislature cannot, in the exercise of its police power, or any other of its sovereign powers, in its discretion, enact a law, the practical operation of which may indirectly affect the extent of commercial transactions between the states.

The precise question here is, is it in violation of this clause of the federal constitution, for the legislature of a state to say by enactment that the courts of the state shall not be open to suitors, whether resident or non-resident of the state, to enforce certain contracts which are in violation of the settled policy of the state, or by means of which one of the parties to the contract is to be given the means of violating the laws of the state.

It is a fundamental and elementary rule of the common law that courts will not enforce illegal contracts, or contracts which are contrary to public policy, or which are in contravention of the positive legislation of the state. The general rule undoubtedly is that the validity of the contract, that is, the question whether it is a legal or illegal one, is judged by the law of the state or country in which it was made, and that a contract good where made is good everywhere.

But this rule is subject to some exceptions, one of the most important of which is that where the contract violates the positive legislation of the established public policy of the state of the forum, it will not be enforced in that state, although perfectly valid and legal according to the laws of the state or country where it is made. This principle is thus stated in Cooley's Constitutional Limitations, page 178: "In the making of contracts, the local law enters into and forms a part of the obligation; and if the contract is valid in the state where it is made, any other state will give remedies for its enforcement, unless according to the standard of such latter state, it is bad for immorality, or is opposed in its provisions to some accepted principles of public policy, or unless its enforcement would be prejudicial to the state or its people." The same principle was thus clearly stated in *Banchor* v. *Mansel*, 47 Maine, 58: "It is a general principle of law that the validity of a contract is to be determined by the law of the place where it is entered into. But to this rule there are exceptions. No nation is bound to enforce contracts injurious to its interests or in fraud of its laws, though made without its jurisdiction and valid when and where made. . . . No state can be justified in requiring its tribunals to enforce obligations which it holds to be founded in wrong, or which are made elsewhere for the express purpose of evading a prohibition decreed by the law of the country where they are to be performed." Authorities in support of this principle may be found in the decisions of almost every state in the Union. They are too numerous to be cited here but some of them will be later herein considered.

Independently of any statute, according to this well settled principle, the courts of a state would not enforce a contract in behalf of a vendor to recover the purchase price of goods sold by him to a vendee, if the vendor not only had knowledge of the illegal purpose of the purchaser to sell them in violation of the laws of the state to which they were to be transported, but as well did some act in furtherance of this illegal purpose. A person should not and would not be allowed to resort to the courts of a state to enforce a contract which he had made for the purpose of violating or evading the laws of that state, or of aiding another to violate, even if the contract was

recognized as valid by the laws of the state where it was actually entered into. There has been much discussion in the decided cases as to whether mere knowledge upon the part of a vendor of the illegal intention of the vendee, with respect to the use of the goods purchased is sufficient to prevent him from obtaining a remedy in the courts of the state, whose laws the vendee intended to violate by an illegal use of the goods purchased, or whether it was necessary, in order to prevent him from being entitled to a remedy in such courts, that he should have participated in the illegal purpose by aiding and facilitating the purchaser in some way. For a very full discussion of this question, see *Hill* v. *Spear*, 50 N. H. 253, 9 Am. R. 205, wherein the court, after a very full review of many authorities upon the question, decided that it was not sufficient that a vendor living in another state who there sold and delivered intoxicating liquors to a vendee, who resold them in the state of New Hampshire in violation of the laws of that state, had reasonable cause to believe, and did believe, that they were purchased by the vendee with the intention of there reselling them contrary to law, to prevent a recovery of the purchase price in the latter state. See also *Webster* v. *Munger*, 8 Gray, 587. But all courts, so far as we are aware, agree that when the vendor not only had knowledge of the illegal use to which the vendee intended to put the goods purchased, but also in making such sale did some act in furtherance of this illegal purpose, that he cannot resort to the courts of the state which were intended to be violated, to enforce the collection of the purchase price for the goods sold for this illegal purpose.

And the principle goes even further than this; not only will the courts of the state whose laws were to be violated refuse to enforce a contract made under these circumstances, but the courts of the state where the contract was made, and under the laws of which it was a valid and legal one, will not give a remedy to enforce such a contract if it was made with a view to a violation of the laws of another state, and the parties seeking a remedy participated in the illegal purpose of the other party to the contract and did some act in its furtherance. In *Graves* v. *Johnson*, 156 Mass. 211, it was decided that the sale and delivery of liquors in Massachusetts, where such

sale was legal, with a view to their being resold by the purchaser in Maine, in violation of the laws of the latter state, will not sustain an action to recover the purchase price thereof even in the state where the contract of sale was made. In the opinion in that case it is said: "The courts are agreed on the invalidity of a sale when the contract contemplates a design on the part of the purchaser to resell contrary to the laws of a neighboring state, and requires an act on the part of the seller in furtherance of the scheme."

So far, we have considered only the fundamental proposition that, independently of any statute upon the subject forbidding resort to our courts, and upon common law principles, the courts of a state will not enforce a contract made in another state, and valid where made, provided the purpose of both parties to the contract was to violate the laws of the state of the forum, and if the vendor did some act in furtherance of such purpose. In accordance with this principle it might well be held in this case that the plaintiffs would not be entitled to a remedy in our courts, since they not only knew of the illegal design of the purchaser but furthered that design by having the liquors marked in the name of a fictitious consignee to aid the purchaser in the evasion of our laws. But the question presented here by the plaintiff's exceptions is as to the constitutionality of the statute in question which does not make a participation by the vendor in the purchaser's illegal purpose, or even his knowledge of the purchaser's illegal purpose, necessary to prevent his resorting to our courts.

It must be remembered that it is not for us to consider the wisdom, propriety or justice of the act. Upon this question it might be argued that it was unjust and inequitable to prohibit a recovery by a vendor in such a case if he neither participated in the illegal intent of the purchaser nor had any knowledge of such intent. But the only question here is whether this statute is in conflict with the interstate commerce clause of the federal constitution. We do not think that it is. It does not regulate or interfere with interstate commerce. It does not, and of course could not, affect the validity of the contract of sale made in a place where such sale is valid. It does not prohibit or interfere with the importation of liquors from another state into

this, although they were intended for illegal sale here. It in no way directly interferes with or attempts to regulate commercial transactions between citizens of different states. It is of course true that it may indirectly have a tendency to interfere with, or to diminish the number and extent of contracts of sale between a resident of another state and of this, upon credit, since a dealer in liquors in another state might, because of this statute, decline to sell to a purchaser here upon credit and to depend for his chance of obtaining payment upon the voluntary act of the purchaser.

But even the prohibitory laws of this state, intended to prevent the sale within the state of liquors, might just as seriously interfere with transactions of this kind, since if liquors cannot be sold in the state they will not presumably be bought for the purpose of reselling here, and the effect of this prohibition might greatly diminish the effect of such transactions. So too, the principle of law which we have above stated, and which is so well recognized by all authorities, would equally have a tendency in its practical operation to interfere with and to diminish the number and quantity of sales which are included within the meaning of the term interstate commerce. But, however much the enforcement of our prohibitory laws, and the principle just stated, may affect the extent of sales of goods in one state to be imported into another state, it has never been suggested, so far as we are aware, that because of this indirect effect, these statutory enactments and this common law principle must yield to the interstate commerce clause of the federal constitution.

The limitations upon the power of the state, which we have already referred to, have been established and are recognized, because, except for them, the enactments of a state legislature might have a direct effect upon and interference with commercial transactions between the citizens of different states, the regulation of which was delegated by the states to the national government for the obvious reason that such transactions should be subject to but one system of laws and regulations. But the question here presented is as to the power of the states over their own courts.

Courts recognize the laws of other states and countries, pertaining to contracts, and give them force and effect upon the principle of

comity. Cooley on Constitutional Limitations, 178. Chief Justice Taney, in speaking of comity, said in *Bank of Augusta* v. *Earle*, 13 Pet. 519: "It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests. But it contributes so largely to promote justice between individuals and to produce a friendly intercourse between the sovereignties to which they belong, the courts of justice have continually acted upon it as a part of the voluntary law of nations." Chief Justice Appleton of our court said in *Banchor* v. *Mansel*, supra: "The comity of nations, rightly understood, cannot violate, because it is a part of, the law of this and every other civilized country." It being, then, upon the principle of the voluntary act of comity, that contracts valid where made, but invalid in the state of the forum, will be enforced in the latter state, if not contrary to the established policy or a positive statute of that state it must be within the discretion of the law making power of the state of the forum to limit the extent to which the principle of comity shall be applicable, and the legislature of the state must have the power to say that this principle of comity shall not be extended to a contract the result of which is to give one of the parties thereto the means of violating the laws of the state and its established policy in relation to the sale therein of commodities believed to be prejudicial to the interests of its citizens.

This is in accordance with numerous decisions of courts of the highest authority. In *Emery* v. *Burbank*, 163 Mass. 326, the court said: "A contract valid where made is valid everywhere, but is not necessarily enforcible everywhere." In that case it was attempted to enforce an oral agreement made in Maine, upon a sufficient consideration, in regard to the disposition of a person's property at her death, and valid according to the laws of this state. But the court held that the statute of Massachusetts which declared that no agreement to make a will should be binding unless in writing, embodied a fundamental policy and prevented the enforcement of the contract in the state where such a statute existed, although the contract was valid in the state where made.

In *Heaton* v. *Eldridge*, 56 Ohio St. 87, 60 Am. St. 737, the court in speaking of the principle of comity said: "But it does not extend so far that the remedial system and methods of procedure established by one state or country will yield to those of another, nor that either will recognize and enforce those of the other. Each provides and alters at will its own rules and regulations in the administration of justice, to which those seeking redress in its courts must conform." In that case it was held by the court that a contract binding in the place where made could not be enforced in the courts of Ohio because of a statute of the latter state which forbade the enforcement of such a contract unless in writing.

In *People* v. *Martin*, 175 N. Y. 315, 96 Am. St. R. 628, it was said: "This principle of comity is not, however, unlimited, as cases sometimes arise where the observance of such laws (of other states or countries) would be neither convenient nor answer the purpose of justice. Where foreign laws are in conflict with our own regulations, or our local policy, or do violence to our views of religion or public morals, or may do injustice to our citizens, they are not to be regarded in this state. Whatever force and obligation the laws of one state have upon another depends upon the laws and regulations of the latter—that is to say, upon its own proper jurisprudence or policy, or upon its own express or tacit consent." In another case in the same state, *Marshall* v. *Sherman*, 148 N. Y., 51 Am. St. R. 654, this language was used by the court: "The enforcement in our courts of some positive law or regulation of another state depends upon our own express or tacit consent. The consent is given only by virtue of the adoption of the doctrine of comity as part of our municipal law. That doctrine has many limitations and qualifications, and generally, each sovereignty has the right to determine for itself its true scope and extent. . . . It belongs exclusively to each sovereignty to determine for itself whether it can enforce a foreign law without, at the same time, neglecting the duty that it owes to its own citizens or subjects.

In *Thompson* v. *Taylor*, 66 N. J. L. 253, 88 Am. St. R. 485, the court recognized the doctrine that a contract valid elsewhere will not be enforced if it is inconsistent with the public policy of the

jurisdiction, the aid of whose tribunals is invoked for the purpose of giving it effect. But in that case the court called attention to the distinction between merely regulative legislation which did not embody a fundamental policy, and the adoption of a principle of public policy, and held that the action could be maintained because the statute under consideration belonged to the former class of legislation. In an extended note to *Gist* v. *Western Union Telegraph Company*, 45 S. C. 344, contained in 55 Am. St. R. 763, a great number of cases are cited in support of this principle thus stated: "The only general rule that can be laid down, then, is that contracts and liabilities recognized as valid by the laws of the state or country where made or established may be enforced in the courts of another state or country where the action is brought, unless contrary to morals, public policy, or the positive law of the latter, in which event they will generally not be enforced."

A case much relied upon by the plaintiffs is *Corbin* v. *McConnell*, 71 N. H. 350, 52 Atl. R. 447. But we do not regard that case at all in conflict with the result which we have reached. In that case there was no statute under consideration which prevented recourse to the state courts to recover compensation for liquors sold in another state, but there was a statute which made it a penal offense for one to solicit or take orders in that state for the delivery of liquors in another state, with knowledge or reasonable cause to believe that they were to be brought there and there sold in violation of law. This statute was held unconstitutional as it had the effect to prevent, discourage and restrict commerce between citizens of that and other states, we have no doubt as to the propriety of that decision, but it is obvious that the question there presented was entirely different from the one that we have here considered. The power of a state to limit by express legislative enactment the extent of the application of the doctrine of comity was not there involved.

The established policy of this state, so clearly shown by our constitution and the history of our legislation, is to prohibit the sale of intoxicating liquors within our territorial limits. In furtherance of this policy this statute was enacted and has been in force for many years forbidding a remedy in our courts to certain suitors, under the

conditions named, even if they were innocent in making the contract of sale which placed in the possession of the purchaser the means of violating our laws and established policy. The legal effect of this enactment was simply to limit the application of the principle of comity, and to extend the well established principle that courts will not enforce a contract made by both parties with the view and for the purpose of violating the laws of the state of the forum, to the case of a contract where one of the parties only to the contract, the purchaser, had that purpose in view. This enactment, in our opinion, was within the discretion of the law making power of the state, and is not in violation of that clause of the federal constitution which we have considered. The case of *Knowlton* v. *Doherty*, 87 Maine, 518, where the same objection to this statute was raised, but not very much argued by counsel or discussed by the court, is therefore affirmed.

The counsel for the plaintiffs suggests that the statute is in contravention of the federal constitution in two other respects. That is, in his requests for instructions he asked the court to rule that this statute impaired the obligation of a contract, but he does not argue this point in his brief. In his brief he suggests that the state of Maine cannot prohibit the plaintiffs' right of action in the courts of this state because of the Fourteenth Amendment, although he does not argue his position in this respect or even call attention to which clause of this amendment he claims was violated by the statute. We do not know that he now relies upon either of these positions, but they can be readily disposed of.

The statute in question would undoubtedly have the effect of impairing the obligation of contracts, if it was retroactive in its effect, but it is not. The contract in suit was made in February, 1896, while the statute has been in existence for many years. A statute cannot impair the obligation of a contract, within the meaning of the constitution, that was made subsequent to the enactment of the statute.

If reliance is had upon this clause of the Fourteenth Amendment: "Nor shall any state deny any person within its jurisdiction the equal protection of the laws," the answer is, that by this statute all

persons are treated alike. It forbids the maintenance of a suit in the courts of this state, under the conditions which we have considered, both by residents and non-residents of a state alike. This clause merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and the liabilities imposed. *Leavitt* v. *Canadian Pacific Railway Company*, 90 Maine, 153.

Exceptions overruled.

GEORGE KEELEY *vs.* CITY OF PORTLAND.

Cumberland. Opinion June 19, 1905.

Municipal Corporations. Defective Sewers. Liability for Damage. Judicial Powers. Discretionary Powers. Failure to Repair. Stat. 1854, c. 77. R. S., c. 21, § § 2, 18.

A municipal corporation is not responsible in damages for injuries caused to a person's property by the flowing back of water and sewage from a public sewer with which the property is connected, where this injury results entirely from some fault in the location or plan of construction of the sewer, or in the general design of the sewer system, and not at all because of any want of repair or failure of the municipality to maintain the sewer to the standard of efficiency of its original plan of construction.

There is no difference in principle upon this question, whether the sewer was originally located and planned by the municipal officers of the city, acting under the authority of the general statutes, as they now exist and have existed for a long time, or by the city council of the city, acting under the authority of a special statute which conferred that power upon the city council.

In either case the duty to be performed is one of a judicial character, involving the exercise of large discretion, with which there is necessarily a broad latitude for the judicial determination of these officers, whoever they may be.

The distinguishing test which will determine the question as to the liability or non-liability of a municipality is to be found in the nature of the duties imposed or authorized by the legislature and to be performed, rather than in the tribunal which is, or the persons who are, authorized and required to perform these duties.

A municipal corporation is not liable to an action for damages either for the non-exercise of, or for the manner in which it exercises in good faith, discretionary powers of a public or legislative character.

For failure upon the part of the city to maintain and keep in repair the sewer which caused the injury to the plaintiff's property, the defendant would have been liable by the express provisions of the special act under which it was located and planned, as well as by those of the general statute. But the evidence does not disclose any failure upon the part of the city in this respect. Upon the contrary, it appears that the injury to the plaintiff's property resulted entirely from the insufficient size of the sewer and of its outlet, a fault in the original plan of construction, for which the city is not liable.

On report. Judgment for defendant.

Action on the case, brought in the Superior Court, Cumberland County, to recover damages caused by the alleged negligent construction and maintenance of a sewer by the defendant, whereby water and sewage flowed back into the plaintiff's cellar. After the evidence had been taken out, it was agreed that the case should be reported and that "upon so much of the foregoing evidence as is competent and legally admissible, the Law Court is to render such judgment as the legal rights of the parties may require. If the Law Court holds the city to be liable, the case is to come back to this court (Superior) for the assessment of damages."

The case is sufficiently stated in the opinion.

George M. Seiders and Frank D. Marshall, for plaintiff.

Scott Wilson, City Solicitor, for defendant.

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

WISWELL, C. J. This case comes to the law court from the Superior Court of Cumberland County, upon a report of the evidence, for this court to determine whether or not the action is maintainable. The plaintiff is the owner of property upon India Street in the city of Portland which is connected with a public sewer in that street, and seeks to recover of the city damages for injuries sustained by him caused by the flowing back of water and sewage from this sewer into the cellar of his premises.

The evidence shows that upon numerous occasions, especially during and after heavy rainstorms, the water and sewage in the sewer flowed back into the plaintiff's cellar and caused him more or less injury. But the case does not disclose that there has been any failure upon the part of the city to properly maintain and keep in repair this India Street sewer, or the sewer into which it emptied, and it is fairly to be inferred from the evidence that the injury to the plaintiff was entirely caused by reason of the insufficient size of the sewer, and of its outlet, to take care of the drainage and surface water upon these occasions.

In other words, so far as the case shows, the injury of which the plaintiff complained is wholly attributable to the plan of construction of the sewer, and the general design of the system, and not at all to any fault upon the part of the city to maintain the same in good repair as originally laid out and constructed. The question presented, then, is whether or not a municipality is responsible in damages for injuries of this nature resulting entirely from some fault in the location or plan of construction of a sewer, and not at all because it has not been maintained to the standard of efficiency of its original location and plan of construction.

If this sewer had been located, designed and built under the public statutes as they now exist, and have for a long time existed, there could be, in view of the numerous decisions of this court, no doubt that this question would have to be answered in the negative. As to the determination of the question of the necessity of a public sewer, and as to its location, size and plan of construction, a town in its corporate capacity has no voice, duty or responsibility. These duties are imposed by statute R. S., c. 21, sec. 2, upon the municipal officers of a city or town, that is, in the case of a city, the mayor and aldermen. And in the performance of all of these duties of locating sewers, determining as to their size, grades, connections and outlets, the municipal officers do not act as representatives or agents of the municipality by which they were chosen, but as public officers of the general state government, entrusted with discretionary powers which are to be exercised by them in a quasi judicial capacity.

This view as to the capacity in which municipal officers act under

the sewer statutes, and as to the responsibility of a city or town for their acts, has been frequently stated by this court in its previous decisions. *Estes* v. *China*, 56 Maine, 409; *Darling* v. *Bangor*, 68 Maine, 108; *Bulger* v. *Eden*, 82 Maine, 352; *Gilpatrick* v. *Biddeford*, 86 Maine, 534; *Brunswick Gas Light Company* v. *Brunswick Village Corporation*, 92 Maine, 493. And it has recently been reaffirmed in two decisions by this court which appear in the last volume of our published reports. *Atwood* v. *Biddeford*, 99 Maine, 78; and *Kidson* v. *Bangor*, 99 Maine, 139. In the latter case in enumerating the various propositions necessary for a plaintiff to establish in order to entitle him to a judgment for damages against the city, the court gave this among others: "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."

This liability of a municipality for failure to keep a public drain in repair, after its construction, is imposed upon it by R. S., c. 21, sec. 18, as follows: "After a public drain has been constructed and any person has paid for connecting with it, it shall be constantly maintained and kept in repair by the town, so as to afford sufficient and suitable flow for all drainage entitled to pass through it; but its course may be altered or other sufficient and suitable drains may be substituted therefor. 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."

The case of *Blood* v. *Bangor*, 66 Maine, 154, somewhat relied upon by the plaintiff, is not an authority to the contrary, but is entirely in harmony with the long line of cases which we have cited. As stated in the opinion in that case, it was admitted that the city had not maintained and kept in repair the sewer so as to afford sufficient and suitable flow for all drainage entitled to pass through it. That fact, in and of itself, unquestionably made the city liable

under the express provisions of the statute which we have already quoted.

But the sewer complained of in this case was not located, designed or constructed under the provisions of the public statutes now existing, but under chapter 77 of the Public Laws of 1854. And it is argued that the rule as to the liability of the city for faulty location and design of the sewerage system, or for insufficiency and inadequacy in the plan of construction adopted, may be different under the Act of 1854 from that of cities and towns under the general statute, this act being a special statute applicable to the city of Portland alone, and because by that act the authority to construct public drains or sewers was vested in the city council of the city of Portland, consisting of the mayor, the board of aldermen and the common council, instead of in the municipal officers of a city or town as provided by the general statute. It is therefore suggested that under this Act the duty and authority of locating and designing a sewerage system is not vested in an independent tribunal, as at present under the general statutes, but was imposed as a corporate duty upon the city itself, of which the members of its city council were its agents and representatives.

We can perceive no difference in principle. The general statutes authorize the municipal officers of a town, at the expense of the town, to construct public drains or sewers along or across any public way therein, and through the private lands of individuals, when they deem it necessary for public convenience or health. The act in question simply imposed this same duty upon and gave the same authority to the city council of the city of Portland. The distinguishing test which will determine the question as to the liability or non-liability of a municipality is to be found in the nature of the duties imposed or authorized by the legislature and to be performed, rather than in the tribunal which is, or the persons who are, authorized and required to perform these duties. In this case, there can be no difference in principle as to the liability of the city, whether the duty of determining as to the necessity of a sewer and as to the plan of construction of such sewer is imposed by law upon the municipal officers, or upon the city council, in either case the duty to be performed is one of a

judicial character, involving the exercise of large discretion, and within which there is necessarily a broad latitude for the judicial determination of these officers, whoever they may be.

"A municipal corporation is not liable to an action for damages either for the non-exercise of, or for the manner in which in good faith it exercises, discretionary powers of a public or legislative character." Dillon's Municipal Corporations, sec. 949. Although the learned author in the same section says that there may be an implied liability for the negligent or unskilful manner in which strictly corporate powers, as distinguished from public powers are carried into execution, he goes on to say: "But the liability in such cases attaches only when the duties cease to be judicial in their nature, and become purely ministerial."

The general rule is that municipal corporations are not liable to a private action for their neglect to perform or their negligent performance of corporate duties imposed upon it by the legislature, unless such a liability to action has been imposed by statute. As long ago said in the Massachusetts court in *Mower* v. *Leicester*, 9 Mass. 247, when this state was a part of that Commonwealth: "Quasi corporations created by the legislature for purposes of public policy, are subject, by the common law, to an indictment for the neglect of duties enjoined on them; but are not liable to an action for such neglect, unless the action be given by some statute." This principle has been repeatedly affirmed, and this case cited, in the decisions of this court. *Adams* v. *Wiscasset Bank*, 1 Greenl. 361; *Reed* v. *Belfast*, 20 Maine, 246; *Brown* v. *Vinalhaven*, 65 Maine, 402; *Woodcock* v. *Calais*, 66 Maine, 234.

It is true that there are limitations to this rule, or conditions to which it is not applicable, the most important perhaps of which is this: a municipal corporation lawfully owning and controlling property, not in the performance of a public duty enjoined upon it by law, but wholly or partially for its own profit or gain, is liable for negligence in the management of such property to the same extent as business corporations or individuals would be. *Moulton* v. *Scarborough*, 71 Maine, 267; *Bulger* v. *Eden*, supra. Another limitation may be the one referred to by the author of Dillon's Municipal

Corporations in the section above referred to, where the acts complained of were purely ministerial, a distinction noticed by this court in *Stone* v. *Augusta*, 46 Maine, 127. A very exhaustive examination and review of the authorities, both English and American, upon this question of the liability of municipal corporations to a private action for tort, may be found in *Hill* v. *Boston*, 122 Mass. 344.

Upon this ground of ownership for profit, and upon the further ground that the actual work of the construction and subsequent maintenance of a sewer is ministerial it has been held in numerous Massachusetts cases, that independently of any statute a municipality, while not responsible for any defect or want of efficiency in the design and plan of construction of a sewerage system, is responsible for negligently suffering a sewer to become a nuisance to the property of those whose private drains enter into it, if the nuisance did not result from the original plan of construction, and could be avoided by keeping the sewers in proper condition. *Child* v. *Boston*, 4 Allen, 41; *Emery* v. *Lowell*, 104 Mass. 13; *Tindley* v. *Salem*, 137 Mass. 171; *Hill* v. *Boston*, supra. And this is in accordance with the principle as thus stated in Dillon's Municipal Corporations, sec. 1048: "But where the duty as respects drains and sewers ceases to be legislative or judicial or quasi judicial, and becomes ministerial, then, although there being no statute giving the action, a municipal corporation is liable for the negligent discharge or the negligent omission to discharge such duty, resulting in an injury to others." As we have seen by express provision of the public statutes of this state such a liability is imposed upon municipal corporations for a failure to keep drains in repair, after construction, to the injury of any person entitled to connect with them, and the Act of 1854 contained an almost precisely similar provision as to the liability of the city, "after any such public drains shall be constructed."

It may be true that in accordance with these principles, independently of the statutory provisions as to liability, the city of Portland would be responsible for any neglect upon its part or upon the part of its servants to perform the ministerial duty of maintaining and keeping in repair to a reasonable degree of efficiency this sewer, since by the Act abutters and others who had the right to connect

their drains with the sewer were required to pay for this privilege the sums determined upon by the mayor and aldermen. But if this is true, which we need not decide, this liability would be no greater and no different from that imposed upon the city by the express terms of the Act of 1854, or from that imposed upon cities and towns generally by the provisions of the public statutes.

And this is not at all the question here under consideration. As we have seen, the injury to the plaintiff's premises was the result of fault and insufficiency of size in the original plan of construction. This injury is the result of a failure to properly perform duties of a discretionary and judicial character, and not at all from the negligent performance of duties of a ministerial nature. The city is made liable by statute for a failure to perform its ministerial duty of maintaining and keeping in repair the sewer after its construction, and might be liable for this same neglect without this provision of statute, but for fault in design or plan of construction it is not made liable by statute, although the legislature might impose such a liability upon any municipality, and in the absence of such a statute it is not liable according to the generally, and almost universally, accepted doctrine of the decisions in this state, Massachusetts and elsewhere.

For these reasons the action cannot be maintained, and, in accordance with the stipulation, the entry will be,

Judgment for defendant.

AUGUSTA WATER DISTRICT, PETITIONER.

vs.

AUGUSTA WATER COMPANY, et als.

Kennebec. Opinion June 19, 1905.

Appeal. Review. Judicial Discretion. Eminent Domain. Appraisement. Costs. Private Laws, 1903, c. 334. Same, § 14.

The act to incorporate the Augusta Water District, Chapter 334, Private Laws of 1903, which authorized the Water District to take all of the property and franchises of the Augusta Water Company, and which contained provisions in relation to the determination by appraisers of the value of the property taken, contained this provision in relation to the payment of the expenses incurred in such determination: "All costs and expenses arising under the provisions of this act shall be paid and borne as directed by the court in the final decree provided by section seven."

It was also therein provided, that the justice of this court, to whom the appraisers should make their report, upon confirmation of the same should make a final decree upon the entire matter; that at the request of either party he should make separate findings of fact and of law; that the findings of fact should be final, but that either party might except to any ruling of law.

After confirmation of the report of the appraisers, the justice directed that the costs and expenses of the appraisers at the hearing should be borne equally by the Water Company and the Water District, to which direction the Water Company took exception.

Held: That this direction was not a ruling upon a question of law, but the exercise of the sitting justice of the judicial discretion that was especially vested in him by the section of the Act above quoted. That the exercise of a judicial discretion by a justice who is given by law authority to determine questions in his discretion cannot be reviewed by an appellate court, unless it is made to appear that the decision was clearly wrong or that it was based upon some error in law; and that the case fails to show that the decision of the justice was wrong or that it was based upon any error in law.

On exceptions by defendant. Overruled.

The case is fully stated in the opinion.

Heath & Andrews, and A. M. Goddard, for plaintiff.

Orville Dewey Baker, for defendants.

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

WISWELL, C. J. Chapter 334 of the Private Laws of 1903, entitled "An Act to Incorporate the Augusta Water District," authorized the Water District to acquire by purchase, or to take by the exercise of the right of eminent domain, the plant, property and franchises of the Augusta Water Company within such district and elsewhere. It contained a provision for the appointment by the court, in case the Trustees of the Water District and the Water Company should fail to agree upon the terms of the purchase of the latter's property, of three disinterested appraisers, for the purpose of fixing the valuation of such property. It provided that these appraisers should make their report to a justice of this court, who, after notice and hearing might confirm, reject or recommit the same as justice might require, and who, upon confirmation of the report, should make a final decree upon the entire matter. It was provided that the justice should make separate findings of fact and of law, at the request of either party; that the findings of fact should be final, but that either party might except to any rulings of law so made, and in case of any such exceptions so much of the case as was necessary for a clear understanding of the question raised should accompany the exceptions. Section 14 of this Act is as follows: "All costs and expenses arising under the provisions of this Act shall be paid and borne as directed by the court in the final decree provided by section seven."

In accordance with the provisions of the Act, appraisers were duly appointed, who, after hearing, made their report to the justice by whom they were appointed, and, among other things, reported the amount of the costs and expenses of the appraisers in the performance of their duty. After notice and hearing this report was duly accepted and confirmed by the justice, and a final decree was made by him upon the entire matter, except that, by a stipulation of the parties, it was agreed "that the adjudication as to the costs and expenses under the special act may be made by supplementary decree, subject to exceptions by either party, the same as if embraced in this

decree." Subsequently, at a hearing before the justice upon the matter of the costs and expenses of the appraisers, it was contended by the Water Company that all of these costs and expenses should be borne by the Water District, but the justice ruled otherwise and directed that the same should be paid and borne equally by the Water Company and the Water District, to which ruling and direction the Water Company seasonably excepted, and upon this bill of exceptions presents to the law court the question as to the propriety of this order.

But this ruling was not upon a question of law, and no question of law is presented by the exceptions; only rulings upon questions of law were made subject to exception by the Act which alone authorized any of the proceedings. Even if it is possible that the ruling excepted to involved a question of law, the justice was not requested to make separate findings of law and of fact so that a ruling upon a question of law might be presented to the law court. This ruling and direction in relation to the apportionment of the expenses was rather the exercise by the sitting justice of the judicial discretion that was expressly vested in him by the section of the Act above quoted, to determine how these expenses should be borne and paid by the parties.

The exercise of a judicial discretion by a justice who is given by law authority to determine questions in his discretion cannot be reviewed by an appellate court, unless it is made to appear that the decision was clearly wrong or that it was based upon some error in law. *Marston* v. *Dingley*, 88 Maine, 546; *Conley* v. *Portland Gas Light Company*, 99 Maine, 57. "When the determination of any questions rests in the judicial discretion of a court, no other court can dictate how that discretion shall be exercised, nor what decree shall be made under it. There are in such cases no established legal principles or rules by which the law court can measure the action of the sitting justice unless indeed he has plainly and unmistakably done an injustice so apparent as to be instantly visible without argument." *Goodwin* v. *Prime*, 92 Maine, 355.

In this case the excepting party has absolutely failed to bring its case within the exceptions to this well settled rule. Its bill of

exceptions contains no portions of the evidence and no statements of facts from which we can determine that this apportionment of costs was manifestly unjust or erroneous, or that it was based upon some error in law. Upon the contrary, so far as we can perceive from the case, it was eminently equitable and just that the considerable amount of expenses and costs of the appraisers incurred during a long hearing in the determination of the value of the property of the Water Company taken by the Water District should be equally borne by the parties.

Exceptions overruled.

STENOGRAPHER CASES.

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1. JOSEPH MORIN *vs.* FULLER CLAFLIN, et al.
2. CHARLOTTE A. NEAL *vs.* DANIEL H. RENDALL.
3. JOSEPH YOKEL *vs.* INTERNATIONAL PAPER COMPANY & Tr.
4. MARY A. DOWNING *vs.* LEROY S. SEAVEY.
5. JOHN S. WILLIAMS in Equity, *vs.* COLUMBUS W. ELLIS, et als.
6. MOSES CANTER in Equity, *vs.* PHILIP ADELSON.

Nos. 1, 2, 3 and 6, Androscoggin. No. 4, Somerset. No. 5, Piscataquis.

Opinion June 27, 1905.

Jurisdiction of Law Court. Report of Evidence. Death of Official Court Stenographer. R. S., c. 79, § § 32, 46; c. 84, § § 53, 161.

1. When by reason of the death of an official court stenographer, a party who has filed a motion for a new trial at law, or has taken an appeal in equity is unable to procure a report of the evidence, the law court has no authority to remand the case for a new trial, but must overrule the motion, or dismiss the appeal, for want of prosecution.
2. The law court is a creature of the statute, and has no powers except such as are given it by statute.
3. The statutory right of a hearing upon a motion for a new trial is conditional upon the furnishing the law court with a report of the evidence. This condition cannot be waived or dispensed with by the law court.

The first four of the above entitled cases are actions at law which were tried before juries and brought to the Law Court by the parties against whom the verdicts were rendered, on motions for new trials. The last two cases are equity causes and brought to the Law Court on appeals by the parties against whom the decrees were made.

The evidence in all these cases was taken by the same official court stenographer, the late Charles W. Small, who died before he had transcribed his shorthand notes of the evidence in any of the cases. Efforts were made to have his stenographic notes transcribed and translated into longhand, but it was found impossible to do this. For these reasons, no report of the evidence in any of these cases could be furnished.

The case is fully stated in the opinion.

1. *McGillicuddy & Morey*, for plaintiff.
   Newell & Skelton, for defendants.
2. *W. H. Judkins*, for plaintiff.
   Oakes, Pulsifer & Ludden, for defendant.
3. *McGillicuddy & Morey*, for plaintiff.
   Oakes, Pulsifer & Ludden, for defendant.
4. *L. B. Waldron*, for plaintiff.
   Geo. W. Gower, for defendant.
5. *John S. Williams*, pro se.
   Henry Hudson, for defendants.
6. *H. E. Holmes*, for plaintiff.
   McGillicuddy & Morey, for defendant.

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

SAVAGE, J. The first four of these cases are actions at law which have been tried before juries and brought to the law court by the parties against whom verdicts were rendered, upon motions for new trials based upon the usual grounds, that the verdict in each of the several cases was against the law and the evidence and the weight of evidence. The last two of the six cases are equity causes which were heard by a single justice and are brought here upon appeals by the

parties against whom the decrees were made. The evidence in all these cases was taken by the same official court stenographer, the late Charles W. Small, who died before he had transcribed his notes of the evidence in any of the cases, and, although efforts have been made to have his stenographic notes transcribed and translated into long hand by others, it is said that it has been found impossible to do this, and we assume that this is true.

It is provided by statute that: "When a motion is made in the Supreme Judicial Court to have a verdict set aside as against law or evidence, a report of the whole evidence shall be signed by the presiding justice, "R. S., c. 84, sec. 53; also in equity cases that "all evidence in the court below, or an abstract thereof approved by the justice hearing the case, shall on appeal be reported," R. S., c. 79, sec. 32. It is also provided that the official stenographer, who is appointed by a justice of the court, and who is, by statute, an officer of the court, " shall take full notes of all oral testimony, and other proceedings in the trial of causes . . . . and furnish for the use of the court, or any party interested, a fair legible long hand copy of so much of his notes as shall be required. He shall also furnish a copy of so much of the evidence and other proceedings taken by him, as either party to the trial requests, on payment therefor . . . R. S., c. 84, sec. 161.

The duty of having prepared a report of the evidence in support of a motion for a new trial, of presenting it to the presiding justice for his signature, and of producing it at the law court, is of course imposed upon the party who seeks to have the verdict of the jury set aside; and the duty of securing and presenting a report of the evidence in equity cases, or an abstract thereof approved by the justice hearing the case, is imposed upon the party who appeals from a decree. No report of the testimony of any kind has been presented in any of the cases, and this cannot now be done because of the death of the stenographer and the inability of any one else to read his shorthand notes. The moving parties in these cases, therefore, are unable to comply with the requirements of the statute; and we assume that there was no fault or laches on the part of any of them, in not procuring a copy of the evidence before the stenographer's

death. They have been placed in a position where they cannot prosecute their motions or appeals, because they are unable to show to the court, by reports of the evidence, that the verdicts and decrees appealed from were erroneous. These parties contend that they are entitled by statute to such a review, and having been deprived of it by misfortune, indeed, by an act of Providence, without their fault, they urge that the law court shall remand the cases for new trials below. They say that in view of the statute which gives the losing party the right, without limitation, of having his cause reviewed on motion or appeal, they ought not to be held to have lost that right, because, by reason of the death of an officer of the court, they are unable to produce reports of the testimony, that the administration of justice should not depend upon chance, and that a litigant's right of appeal, given him by law, should not be taken away from him by any occurrence, which can in no way be attributed to him, and which is beyond his control. And such views have been entertained by some courts, particularly in North Carolina, South Carolina, Louisiana and Texas, but whether under statutes like ours, we do not deem it necessary to inquire, for reasons to be stated later.

On the other hand, it is urged that if the law court possesses the power to remand these cases for new trials, it ought not to exercise it in these cases, either as a matter of right or of discretion, that while the parties prevailing below may not have any vested property rights in their verdicts, they have legitimately obtained certain advantages which they are entitled to keep, until it is shown affirmatively that they should be deprived of them for cause on the merits, that the verdicts must be presumed to be right until shown in the regular statutory manner to be wrong, that they themselves, being without fault, are entitled to retain the benefit of the presumption. They say we should not set aside a verdict presumably right, at the instance of a party presumptively wrong, merely because of the latter's misfortune, that to deny judgment upon a verdict presumably right and not shown to be wrong or improperly obtained is a denial of right, and hence an injustice, that if we set aside these verdicts because of possible injustice to their adversaries, we are quite as likely as not to do injustice to the parties prevailing below, and that they ought not

to be subjected to the contingencies and hazards of new trials, exposed as they will be, to the risk of the loss of evidence, of the death of witnesses or parties whose former evidence cannot be reproduced.

These various suggestions on both sides would be forceful arguments if the question were one addressed to our discretion. But we do not think it is. Such questions are not open for our consideration, for we think we have no authority to set these verdicts and decrees aside, under the conditions stated.

The law court in this state is not a constitutional court. It is not a court of original, or of common law jurisdiction. The court is created by statute, and has that jurisdiction only which the statute has conferred upon it, and that is a limited jurisdiction. It has no other authority. The state has the right in creating the law court to limit its powers, and to determine upon what conditions they shall be exercised. The court cannot properly exceed its statutory powers, nor dispense with the conditions imposed. While the statute grants the right to defeated litigants to bring their grievances to the law court for review, that is not a constitutional, nor even a common law right. The legislature has authority to repeal that statute, and withhold the right of appeal or motion, and compel suitors to be content with results reached in the trial courts. Or the right may be granted subject to such restrictions, limitations and conditions as the legislature may annex. "All the requirements of the statute for taking and perfecting an appeal are deemed jurisdictional, and must be strictly complied with, whatever be the method named." "The conditions required by statute as precedent to taking and perfecting an appeal cannot be modified or extended by any judge or court, without express statutory authority." 2 Ency. of Pleading & Practice, 16, 17, and note, and numerous cases there cited.

The statute, creating and fixing the general limits to the jurisdiction of the law court, declares that "the following cases *only* come before the law court as a court of law: Cases in which there are motions for new trials *upon evidence reported by the justice.*" . . . "All questions arising in equity cases." R. S., c. 79, sec. 46. When the parties have complied with the statutory conditions, then the law court has jurisdiction; it has no jurisdiction otherwise. It can then

decide. It can then sustain or overrule the motion or appeal. To sustain or overrule a motion involves a decision. If we set aside these verdicts as urged, what do we decide? Not that they were wrong, but that they were possibly wrong, and that we can never know certainly whether they were wrong or right. The statute has not vested us with authority to make such a decision. The presumption that a verdict is right until shown to be wrong should protect it at least, until the defeated party brings himself within the statute. That he cannot bring himself within the statute is the party's misfortune, and it may be to his injury. But however grievous it may seem to him, we think the statute has not confided to us the power to relieve him from his misfortune, any more than it has in other instances to relieve litigants of their many other misfortunes. The statute might have done so. The statutes do provide expressly in many cases for relief when parties have lost their rights by accident or mistake. In other instances parties are left to suffer the chances of litigious war, and the hardships, if any, must be borne by those upon whom they accidentally fall.

We feel compelled to place the foregoing construction upon the language of our own statute, whatever may be the conclusions reached by other courts, under other statutes of varying forms of expression. The court in Connecticut, however, in the recent case of *Etchells* v. *Wainwright*, 76 Conn. 534, a case analogous to these, reached the same conclusion that we have. In Connecticut the statute authorized the court to grant a rehearing, or new trial, for various specified causes, "or for other reasonable cause," but it also provided that the appeal should be accompanied by a finding of facts made by the trial judge. In the case cited the appealing party was unable, by reason of the death of the trial judge, before making a finding of facts, to perfect her appeal. She thereupon filed a motion in the Common Pleas Court for a new trial upon that ground, claiming it to be a "reasonable cause." The case was then reserved for the opinion of the Supreme Court. That court denied the motion, saying: "Except as we retain the common law remedy of writ of error, the entire system of appellate procedure, and generally the proceedings for procuring new trials, are in this state governed by statute. Here, as

generally in other jurisdictions, the conditions upon which appeals to courts of review may be taken and perfected, as well as the powers of different courts to grant new trials, are expressly defined and limited by statute, and the conditions required by statute as precedent to the taking and perfecting an appeal cannot therefore be modified or extended by any judge or court without express statutory authority," citing *Sholty* v. *McIntyre*, 136 Ill. 33; 2 Ency. of Pl. & Pr. 17. The court also said: "It would seem to be unfair to these defendants who have obtained a favorable judgment to impose upon them the burden and expense of a second trial, until it could be shown either that the first trial was in some way unfair or that some erroneous rulings were made at that trial." See *Lidgerwood Mfg. Co.* v. *Rogers*, 56 N. Y. Superior Court, 350, a case in which a stenographer had died without transcribing his notes, but in which, nevertheless, a new trial was denied. See also *Collins* v. *State* (*Kan.*) 60 L. R. A. 572.

These parties have had their constitutional day in court. They have been overtaken by a misfortune from which we have no authority to grant them relief. They must abide the result. Inasmuch as their motions and appeals cannot be prosecuted, they must be overruled for want of prosecution. In each of the cases of *Morin* v. *Claflin*, *Yokel* v. *International Paper Co.* and *Downing* v. *Seavey*, the entry will be "Motion overruled for want of prosecution," and the cases will be remanded for judgments on the verdicts below. The same entry will be made in the case of *Neal* v. *Rendall*, but the case will be retained upon the docket of the law court for argument and decision upon the defendant's exceptions. In the two equity cases the entry will be in each, "Appeal dismissed for want of prosecution, decree below affirmed," and the cases will be remanded for final decree accordingly below.

So ordered.

STATE OF MAINE *vs.* BOSTON AND PORTLAND EXPRESS COMPANY.

Cumberland. Opinion June 23, 1905.

Express Company. Taxation. Franchise Tax. Determination of Valuation. Rule Therefor. Stat. 1880, c. 249, § 1. Stat. 1891, c. 103, § 6. R. S. 1883, c. 6, § § 55, 56, 57. (R. S. 1903, c. 8, § § 42, 43, 44.)

Under section 55, chap. 6, R. S. 1883, as amended, providing for the assessment of taxes upon express companies, it is *held:*

1. That the statute simply fixes the mode of determining the valuation upon which the tax is to be assessed.
2. That the tax therein prescribed is clearly a franchise tax and was so intended by the legislature.
3. That by the phraseology of the statute, the pro rata part of the gross receipts, to be used as a basis for taxation, should be found by a rule analogous to that employed in determining the gross receipts of railroads as the basis for the assessment of the railroad tax; that is, in the proportion that the number of miles of the express haul in the state bears to the whole number of miles of the route from which the entire gross receipts are derived.
4. If the "return under oath" made by the defendant company conforms with all the requirements of the statute, it cannot be arbitrarily disregarded by the state assessors in determining the amount of business done by the defendant.

On agreed statement. Judgment for the state.

Action of debt brought by the state of Maine to recover from the defendant company two taxes assessed against the defendant company by the State Board of Assessors, one for the year ending April 1, 1898, and one for the year ending April 1, 1899.

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

George M. Seiders, Attorney General, for the state.

Symonds, Snow, Cook & Hutchinson, for defendant.

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

SPEAR, J. This case comes up on the following agreed statement of facts.

(1) The Defendant, Boston and Portland Express Company is a corporation organized under the general laws of the State of Maine, and located at Portland in said state.

(2) The Defendant Company does no business between any two points in the State of Maine, but its whole business is between said Portland and the City of Boston, Massachusetts.

(3) The express business of the Defendant Company between said Portland and Boston is done principally upon Steamships running between said cities; occasional business, however, is done over the Boston and Maine Railroad between the same points.

There are several other items in the statement but it is unnecessary to quote them in full as they will be disposed of as they are reached in the opinion.

The question here raised is the legality of the tax assessed by the state against the Company for the years 1898 and 1899. The statutes under which the taxes in question were undertaken to be assessed and recovery sought by this suit, are as follows: Section 55, Chapter 6, R. S. 1883, as amended, provides; "Every Corporation, Company or person doing express business on any railroad, steamboat or vessel in the state, shall, annually, before the first day of May, apply to the treasurer of state for a license authorizing the carrying on of said business; and every such corporation, company or person shall annually pay to the treasurer of state, one and one-half per cent of the gross receipts of said business for the year ending on the first day of April preceding. Said one and one-half per cent shall be on all of said business done in the state, including a pro rata part on all express business coming from other states or countries into this state, and on all going from this state to other states or countries, provided, however, that nothing herein applies to goods or merchandise in transit through the state."

Section 56, as amended, requires the corporation, by its properly

authorized agent or officer, annually, on the 15th day of May, to make a return under oath to the state assessors, stating the amount of said receipts for all express matter carried within the state, as specified in the preceding section, and upon this return the assessors are to assess the tax therein provided.

Section 57 as amended, provides "that the tax assessed upon express corporations, companies and persons, as aforesaid, is in place of all local taxation," and then further provides that the tax upon all real estate owned by such corporation, taxed by the municipality in which the same is situated, shall be deducted by the state assessors from the tax herein provided. We have but little doubt that the legislature intended that the payment required of express companies should be considered as an excise or franchise tax. The rules that govern such a taxation were raised and fully discussed in *State* v. *M. C. R. R. Co.*, 74 Maine, 376 in 1883. The statute, Chapter 249, section 1, laws 1880, construed in this case was as follows: "It shall be the duty of the governor and council, between the first day of April and the first day of May in each year, to appraise the several railroads in the state, with their franchises, rolling stock and fixtures, at their cash value, and upon this valuation to levy a tax of one per centum so as to make said tax equal as near as may be to the taxes of all kinds upon other property, through which said roads may extend." This statute does not pretend to give a name to the tax imposed by it. It simply states the way of determining the valuation upon which the tax is to be assessed. But Mr. Justice Walton, who drew the opinion says: "We think it is clearly a franchise tax and was so intended by the legislature . . . . "Possessing the power to impose a franchise tax to any amount it deems proper, the legislature may measure the amount by any standard it pleases. It may fix the amount at a specified sum, as a poll tax is imposed upon an individual, and without regard to the amount of business the corporation does, or the amount of property it possesses, or it may graduate and measure the amount by an appraisal of the whole or any portion of its property, or by the amount of its business."

Maine v. *Grand Trunk Railway Co.*, 142 U. S. 217, decided in 1891, involved the construction of our statute relating to the taxation

of railroads, which was substantially as it is now, and denominated the tax as an excise tax. As a mode of ascertaining the amount of this tax, the laws of 1881 provided that if the road was wholly within the state the average gross receipts per mile should be made the basis of the assessment. If the road was partly within and partly without the state, then the average gross receipts per mile of the whole line operated multiplied by the number of miles operated within the state, were made the basis.

In this case precisely the same objection was invoked against the constitutionality of the statute that is now raised in the case at bar, namely, that it was an infringement of the rights of interstate commerce. Mr. Justice Field after having fully upheld the power of the state to impose a franchise tax in any manner and to any extent which it saw fit, on page 228 of the case, defined the contention of the defendant and stated the conclusion of the court thereupon as follows: "The court below held that the imposition of the taxes was a regulation of commerce, interstate and foreign, and therefore, in conflict with the exclusive power of congress in that respect; and on that ground alone it ordered judgment for the defendant. The ruling was founded upon the assumption that a reference by the statute to the transportation receipts, and to a certain percentage of the same in determining the amount of the excise tax, was in effect the imposition of the tax upon such receipts, and therefore an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation. If the amount ascertained were specifically imposed as the tax, no objections as to its validity would be pretended." He also distinguished the case of *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, relied upon by the defendants in this case, and asserts that it "in no way conflicts with this decision."

Home Insurance Company v. *New York*, 134 U. S. 594, is another case in point, involving a franchise tax in which the court lay down this principle with respect to the manner of assessing the tax. "The validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for a franchise. No constitutional objection lies in the way of the legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows." We think that the statute involved in the case at bar is analogous in principle to the one construed in *State* v. *Grand Trunk Ry.*, and, like the insurance case, prescribed only the mode by which the state undertook to fix the standard upon which it was disposed to impose a franchise tax upon the defendant company. An analysis of the statute by the process of exclusion also tends to establish the fact that it was intended to provide for a franchise tax. Otherwise as it will appear it imposed no tax at all and the whole statute became inoperative and void.

It certainly did not impose a tax upon real or personal property, as the tax prescribed "is in place of all local taxation," and the state tax assessed upon real estate is also deducted, thus leaving no state tax upon any tangible property; nor upon any goods or articles transported by the company; nor is it a license tax, as that is provided for in another section of the statute; nor a tax upon the receipts of the company as such, but upon "the business done in the state;" the very ground upon which a franchise tax may be imposed, as stated by Mr. Justice Walton, supra, and in the Grand Trunk and the insurance cases above cited. A fair construction of the statute under the decisions above referred to fully excludes all the elements of any other tax than those of an excise or franchise tax, and clearly shows that it was the intention of the legislature to impose such a tax and no other. And it is apparent that this tax is a franchise tax or no tax. Another important reason for concluding that it was the intention of the legislature to impose an excise or franchise tax is found in the fact that they are not only presumed to have had knowledge of the rights of interstate commerce with respect to the matter of taxation, but that they gave actual expression

to such knowledge by excluding from the operation of the law the subject matter of interstate commerce by a proviso "that nothing herein applies to goods or merchandise in transit through the state," and by confining the tax provided for solely to the business done in the state.

This brings us to the second proposition involved in the case, and that is the rule for determining the amount of express business done in this state upon which the tax should be assessed. And it should be here observed that all the business done by the defendant is interstate. The statute provides "that said one and one-half per cent shall be on all business done in the state including a pro rata part on all express business coming from other states or countries into this state, and on all going from this state to other states or countries." Under this clause the defendant contends, assuming that the state could legally impose the tax in question, that it could only be upon the theory that the tax was upon earnings in the state of Maine alone, and that such proportion of earnings could only be determined by a pro rating according to the miles of haul within and without the state. In other words, that the tax could only be upon such proportion of the gross earnings of the company as the miles of haul within the state bears to the whole haul for which the receipts are had. On the other hand, the state contends that the pro rating is not to be made by any fixed standard but is to be determined wholly upon an equitable division of the gross receipts from business carried on between this and other jurisdictions. Upon this point we think the defendant's contention must be sustained.

In *Brombacher* v. *Berking*, 56 N. J. Eq. 253, it is said, "pro rating means according to the measure which fixes proportions. It has no meaning unless referable to some rule or standard." We fail to see how the equity method suggested by the state could be referable to any standard.

Under our statute it will be seen that the state assessors are to do the pro rating, and assess the tax upon the return made by the company. Hence, if the contention is right, it must be left to their judgment to determine the standard upon which should be made an equitable division of the business done within and without the state. If

this be true, the standard would simply be the arbitary will of the board of state assessors. By a change in the personnel or in the minds of the board, a new standard might be fixed from year to year. But such a rule as this could not have been contemplated by the legislature. If they had intended to establish such a method of pro rating, they would have made their purpose clear. We have no doubt that they intended by the phraseology of the statute that the pro rata part of the gross receipts, to be used as a basis for taxation, should be found by a rule analogous to that employed in determining the gross receipts of railroads as the basis for the assessment of the railroad tax; that is, in the proportion that the number of miles of the express haul in the state bears to the whole number of miles of the route from which the entire gross receipts are derived. Although the legislature as we have seen could have prescribed any standard they might have deemed proper for the assessment of an excise tax, yet having established one the state assessors must abide by it.

Another question raised in the case is whether the express company or the state assessors shall determine the validity of the return upon which the tax is to be assessed. The statute upon this point appears to be clear and unambiguous. Section 56, as amended, provided for a return under oath by the defendant and that upon this return the state assessors should assess the tax provided for. Section 58 fixed a forfeiture of $25.00 for every day's neglect to make the return as required by section 55. Section 68, in case of failure on the part of an express company to make the return required by the other sections of the statute, authorized the governor and council to make an assessment of the tax upon such company "on such valuation or such gross receipts thereof," as they might think just. This authority by virtue of section 6 chapter 103 of the laws of 1891 was conferred upon the state assessors. This latter section is the only one which authorizes the state assessors to assess a tax upon any basis except that of the "return under oath" made by the defendant company. And such return, if it conforms with all the requirements of the statute, as it is conceded to have done in this case, cannot be arbitrarily disregarded by the state assessors in determining the amount of business done by the defendant company in

this state. Otherwise, the assessors would, if they saw fit to exercise the power, become the sole judges and final arbiters of the amount of business upon which they would impose the franchise tax herein provided for. It may be said that upon the suspicion or the detection of an error, the return might be sent back for correction, but finally it is the sworn return of the company that must control the action of the assessors. If upon suspicion and investigation it should be discovered that the agent of any corporation had intentionally made a false return, the state would be amply protected against the repetition of the offense by a conviction and punishment of the offender under the administration of the criminal law.

Our conclusion therefore is that the tax of 1899 should be assessed upon the return made by the company for that year and in the ratio of 14 to 116 for the business done upon the water, and of 50 to 114 for the business done by railroad. The gross receipts by water according to the return were $6482.42 and by railroad $420.10. Upon this basis, the tax should be computed upon 14-116 of $6,842.42 and 50-114 of $420.10 making a total of $1009.72. One and one-half per cent on this amount is $15.14.

By the agreed statement it is admitted that the defendant in its return of 1898, by an error, reported as the amount of business done in this state $7432.01, the total amount received from its whole line of business, whereas, in fact, the gross receipts for the business done in the state for that year under the pro rata rule already laid down were $935.05. The tax was assessed upon the erroneous return instead of the amended one. Under the stipulation that the court "is to determine the pro rata part of the gross earnings for the two said years upon which said company was legally subject to pay a tax "the tax for this year must be 1½% of $935.05 or $14.03. Upon a further stipulation relating to costs, the entry must be

Judgment for the state, for $29.17 without costs.

CHARLES C. BURRILL *vs.* HOWARD F. WHITCOMB.

Hancock. Opinion June 27, 1905.

Chattel Mortgage. After-acquired Property. Possession taken by Mortgagee. Attaching Creditor. "New Act." R. S., c. 93, § 1.

1. A mortgage of chattels including all stock in trade, furniture and fixtures that may thereafter be acquired, contained the further provision that the mortgagee should have the right to take possession of the mortgaged property and of any additions that might be made thereto, whenever he should deem it for his interest to do so.
2. The plaintiff as mortgagee, took possession of the mortgaged property including the after-acquired stock in question for the purpose of enforcing his rights under the mortgage, and sought to retain possession of it as against an attaching creditor, who attached after possession had been taken by the mortgagee. The attached property had not been purchased with the proceeds of any of the mortgaged stock previously sold by the mortgagors.
3. There was no act of delivery of such after-acquired stock on the part of the mortgagor at any time after it was purchased by him, and possession of it was taken by the mortgagee without any other consent of the mortgagor than that contained in the agreement found in the mortgage.
4. *Held:* That such mortgage is valid as to the after-acquired property and that the mortgagee had a lawful right to take possession of the same under the mortgage and that his claim to the after-acquired property is superior to that of the attaching creditor.

On exceptions by plaintiff. Sustained.

Trover against the defendant as sheriff to recover the value of a quantity of tea attached by him on a writ in favor of M. M. Gallert and against Melvin M. Davis and Effie E. Davis, copartners under the name and style of M. M. & E. E. Davis.

The case is fully stated in the opinion.

F. C. Burrill and L. B. Deasy, for plaintiff.

A. W. King, for defendant.

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

WHITEHOUSE, J. This is an action of trover brought against the defendant as sheriff of Hancock County, to recover the value of a quantity of tea attached by him on a writ in favor of M. Gallert and against M. M. and E. E. Davis.

The plaintiff claims title to the attached property by virtue of a mortgage from the Davises to him, duly recorded, in which the property is described as follows:

"All the stock in trade consisting principally of teas, coffees, spices, crockery and small wares, store furnishings and fixtures, present and future book accounts, now contained in the store situated on the north side of Main St., in Ellsworth, Maine, occupied by us and where we now carry on business and also all stock in trade, furniture and fixtures that may be hereafter acquired."

The mortgage also contains the following provisions and agreements: "Provided, however, that it shall and may be lawful for the said grantors, said M. M. & E. E. Davis, to continue in possession of the property herein mortgaged until such time as said Burrill . . . . shall consider it for his or their interest to take possession under this mortgage for the enforcement of any and all rights given to said Burrill under this mortgage, the said grantee, said Burrill, by the acceptance of this conveyance, hereby expressly constituting the said grantors, said M. M. & E. E. Davis, his trustees, to continue in possession of the property herein mortgaged until such time as said grantee shall deem it for his interest to take possession of the same for any of the purposes in this mortgage specified, or for the purpose of enforcing his legal or equitable rights hereunder.

And the said grantors, said M. M. and E. E. Davis, further hereby agree and declare that all stock in trade, general merchandise, book accounts, and debts due, of every name and description which they may from time to time hereafter during the continuance of this mortgage add or supplement, or incorporate with stock in trade, general merchandise, book accounts and debts due, and personal property herein mortgaged, for the purpose of carrying on the said business

shall be subject to and included in this mortgage, and the provisions herein contained be applicable to them also.

And the said grantors hereby further agree that if at any time during the continuance of this mortgage, the said Charles C. Burrill, his executors, administrators or assigns, shall deem it for their interest to take possession of the property herein mortgaged or of any additions thereto that may be made, the said Burrill, his executors, administrators or assigns shall thereupon have the right to take such possession, peaceably and quietly, and that thereupon and so soon as said Burrill, his executors, administrators and assigns take such possession, the whole debt secured by this mortgage shall be due and payable whether the time for its payment has elapsed or not, anything in this mortgage to the contrary notwithstanding, and the said Burrill, his executors, administrators or assigns, shall thereupon have the right to foreclose this mortgage by any of the methods provided by the law of the State of Maine for the foreclosure of mortgage of personal property. . . . Said Burrill may also have the right to move the goods to any place that he may deem for his best interest."

At the time of the execution and delivery of the mortgage, the tea, for the conversion of which this suit is brought, had not been bought by the mortgagors, and was not in their possession. Between the date of the mortgage and February 19th, 1904, the tea was bought by the mortgagors and placed in their store as a part of their stock for the purpose of carrying on their business. It was not paid for by the proceeds of any of the mortgaged stock.

On February 19, 1904, the plaintiff, deeming it for his interest so to do, took possession of all the stock in the store, including the tea, for the purpose of enforcing his rights under the mortgage, and removed the same to another store and retained possession of it until February 20th, 1904, when the tea was attached and taken away by the defendant, as sheriff of Hancock County as above stated.

There was no act of delivery of the tea in question on the part of the mortgagors at any time after it was purchased by them, and the taking possession of the tea by the plaintiff with the rest of the stock

was without any other consent of the mortgagors than that contained in the agreement found in the mortgage.

By agreement of the parties the case was heard by the presiding judge, without the aid of a jury with leave to except in matters of law. The court found as matters of fact that the mortgage had been foreclosed and the foreclosure completed more than forty-eight hours before the bringing of this action and also that the written notice provided by R. S., chap. 83, sec. 45, had been seasonably given by the plaintiff to the defendant.

But the presiding judge also ruled as a matter of law that the mortgage of future acquired chattels was void against attaching creditors without some new act on the part of the mortgagor and that possession taken without the consent of the mortgagor and retained by the mortgagee before and until the attachment was not sufficient to make the mortgage good. Judgment was accordingly rendered for the defendant, and the case comes to this court on exceptions to this ruling.

The case thus stated presents for the determination of the court the single question of law whether a mortgagee in a chattel mortgage duly recorded, who has taken and retained possession of after-acquired stock in trade as a part of the property described in the mortgage, by virtue of an explicit agreement in the mortgage authorizing him so to do, is entitled to hold such after-acquired property not purchased with the proceeds of any of the stock sold, as against a creditor who attaches it after possession taken by the mortagee.

The defendant contends that inasmuch as the tea in question was not owned or possessed by the mortgagors at the date of the mortgage, the mortgage itself was not operative to transfer the title to the plaintiff; and as there was no subsequent act of delivery on their part and no voluntary transfer of it to the plaintiffs or consent that the plaintiff should take possession of it, given after they acquired title to it, the possession taken and retained by the plaintiff by virtue of the consent in the mortgage was not sufficient to entitle him to hold it even against a creditor who did not attach it until after possession taken by the mortgagee.

The plaintiff does not controvert the well settled general rule

that a mortgagee of after-acquired chattels, obtains no title or right to them as against a creditor of the mortagor, who attaches them in the hands of a mortgagor before the mortgagee has taken possession. The exceptions to this rule respecting chattels of which the mortgagor had potential ownership at the time the mortgage was given, and chattels purchased with the proceeds of those sold and substituted for them in accordance with the term of the mortgage, as already seen, are not involved in the present case. It is not questioned that the defendant's attachment would have been good if it had been made while the tea was in possession of the mortgagor. But the plaintiff contends that in case of mortgages like the one at bar, the executory agreement of the mortgagor is a continuing agreement, and that the taking of possession by the mortgagee of after-acquired property by virtue of the previous consent of the mortgagor given in the mortgage, is equivalent to a delivery of possession by the mortgagor, and that the mortgagee's equitable lien is thereby made good without any new act or consent on the part of the mortgagor.

The respective rights of mortgagee and attaching creditors or other third parties in regard to after-acquired property claimed under chattel mortgages upon facts analogous to those at bar, have frequently received the attention of this court, and obiter dicta may be found and some early authorities are cited in several Maine cases, tending to support the defendant's position; and on the other hand, recent decisions from other states have been cited with approval tending to support the plaintiff's contention; but the precise question now presented does not appear to have been necessarily involved and directly determined in any reported case in this state. It has often been decided, however, in other jurisdictions by courts of great respectability and high authority, and this court is now at liberty to adopt the view which is most in accord with the principles of equity and sound reason and at the same time best supported by the weight of judicial opinion in other American states.

It is a well settled principle in equity requiring no citation of authorities in its support that "an agreement to give security upon property not yet in existence or in the ownership of the party making the contract, or property to be acquired by him in the future,

although, with the exception of chattels, having "potential existence it creates no legal estate in the things when they afterwards come into existence or are acquired by the promisor, does constitute an equitable lien upon the property so existing or acquired at a subsequent time, which is enforced in the same manner and against the same parties as a lien upon specific things existing and owned by the contracting party at the date of the contract." 3 Pom. Eq. sec. 1236. So in *Mitchell* v. *Winslow*, 2 Story, 630, it is said by Judge Story, "that whenever parties, by their contract, intend to create a positive lien or charge either upon real or personal property, whether then owned by the assignor or contractor or not, or if personal property, whether it is then in esse or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily or with notice or in bankruptcy."

In *Griffith* v. *Douglas*, 73 Maine, 532, relied upon by the defendant as an authority to support his contention, this doctrine of equitable lien is recognized by our court. In the opinion the court say: "While at common law the mortgage covers the existent property of the mortgagor and does not transfer any right to after-acquired property, it is otherwise in equity. Though that court recognizes the rule of the common law, yet it holds such conveyance operative as an executory agreement binding on the property when acquired. The mortgagor holds the property as trustee and equity enforces the trust. In some cases the decision rests upon the grounds of an equitable lien;" and *Mitchell* v. *Winslow*, 2 Story, 630, is cited in support of this principle.

In *Griffith* v. *Douglas*, supra, the mortgaged property consisted of hotel furniture and the mortgage contained a provision that it should be lawful for the mortgagors to continue in the possession of the property "without denial or interruption" by the mortgagee until condition broken. There was a formal delivery of the subsequently purchased goods to the mortgagee but possession of them was not retained by him. The mortgagee's possession was only instantaneous. It was immediately resumed by the mortgagor. This was the decisive fact in that case. The court say, "the authorities are uniform

in requiring not merely delivery but retention of the property delivered as indispensable to the perfection of the mortgagee's title."

The question now before the court was not raised by the facts disclosed in that case, and consequently it was not there adjudicated. The elaborate discussion, in the opinion, of the rights of mortagees in chattel mortgages covering after-acquired property, must be understood to apply only to the facts of that case. The early cases of *Head* v. *Goodwin*, 37 Maine, 181, and *Jones* v. *Richardson*, 10 Met. 481, cited by the defendant, are there adopted by the court as leading authorities upon the question discussed in the opinion. In *Jones* v. *Richardson*, it is true, evidence that the mortgagee had taken possession of after-acquired property for the purpose of foreclosure was said to be immaterial and some new act on the part of the mortgagor was held to be necessary, thus apparently supporting the defendant's contention. But in that case the mortgage contained no express agreement that the mortgagee should take possession. Furthermore the doctrine in that case has been repudiated in four subsequent cases in that state, and thus the authority upon which the decision in *Head* v. *Goodwin*, supra, is founded, is seen to have been denied by the court from which it emanated. Besides, the facts in *Head* v. *Goodwin* differ toto coelo from those in the case at bar and the decision is in no respect an authority for the defendant. There a vendor sold one-half of a chaise to which he had no title, and afterwards purchased the chaise and delivered it at a certain stable into the custody of the person to whom he had sold one-half of it; but the court found no satisfactory evidence that this delivery was made for the purpose of effectuating the former sale, and held that it was not such a new act as to transfer the property.

In *Sawyer* v. *Long*, 86 Maine, 542, possession of the stock was not taken by the mortgagee, but was retained by the mortgagor, and the property passed to the assignee who transferred it to the defendant as purchaser of the assignee's interest. In *Dexter* v. *Curtis*, 91 Maine, 505, it was held that while the mortgagor, by the terms of the mortgage had the right to sell or exchange any portion of his stock, he did not have the right to sell those goods to his creditors in

payment of past indebtedness. The question now before the court was not involved in either of these cases.

On the other hand, in *Deering* v. *Cobb*, 74 Maine, 332, the facts more clearly resemble those in the case at bar, except that the rights of an attaching creditor were not involved. In the opinion the court say:

"It seems, also, that when as in this case, a mortgage is effective between the parties as a transfer of title to property to be subsequently acquired by the use of the proceeds of the original stock and the mortgage contains a power to the mortgagee to enter and take possession of such future property when acquired, possession taken and retained in the exercise of that power makes the mortgage effective, without any new act of the mortgagor, against third persons claiming under him by later attachment or conveyance."

"A proposition at least as strong as this is sustained in Jones' Chat. Mort. § § 160, 167, by a full citation of authorities, English and American, which there is no occasion here to examine more minutely. *Hope* v. *Hayley*, 5 El. and Bl. 830; *Moody* v. *Wright*, 13 Met. 17, 32; *Cook* v. *Corthell*, 11 R. I. 483; *Walker* v. *Vaughn*, 33 Conn. 577, 583.

"But in a more recent case in Massachusetts, which has been one of the states to hold most closely to common law doctrines in regard to mortgages of this kind, it has been held that "if the after-acquired property is taken by the mortgagee into his possession before the intervention of any rights of third persons, he holds it under a valid lien by the operation of the provision of the mortgage in regard to it. . . . Such taking of possession, though effected immediately before insolvency proceedings were instituted, and with full knowledge of the insolvency of the mortgagor, would not be the acceptance of a preference, but the assertion of a right which had been previously acquired by the mortgagee under an instrument in writing made when the parties to it were both competent to contract, and when there was no qualification of the right of either to deal with the other." *Chase* v. *Denny*, 130 Mass. 566.

In this case our court plainly recognizes the progressive development of the law upon this subject, although the precise question

under discussion was not then presented for decision. It shows a strong tendency to reject the narrow interpretation of the common law rule found in some of the earlier decisions, and a readiness to adopt the more reasonable and equitable doctrine which simply requires the mortgagor to observe the obligation of his express agreement in the mortgage. The common law dogma which is said to require some new act on the part of the mortgagor to protect the mortgagee's lien, appears to have been founded mainly upon one of Lord Bacon's Latin maxims which declares that "though the grant of a future interest is invalid, yet a declaration may be made which will take effect on the intervention of some new act;"—"interveniente novo actu." As one of the first instances stated by Lord Bacon to illustrate the maxim had reference to a "new act" on the part of a grantor, it appears to have been assumed by some of the courts that no other act would suffice to effectuate the prior agreement. But such a restricted meaning was not required by the text of the maxim, and it was explicitly repudiated in *Congreve* v. *Evetts*, 10 Exch. 298. In the bill of sale in that case it was agreed that the plaintiff might take possession of the crops and other effects which might from time to time be substituted in lieu of the crops, or which should be found on the farm. The plaintiff seized and took possession of some of the crops which had been *sown after* the indenture was made. In delivery the judgment of the court Parke B. said; "If the authority given by the bill of sale had not been executed, it would have been of no avail against the execution; . . . . but when executed to the extent of taking possession of the growing crops, it is the same in our judgment, as if the debtor himself had put the plaintiff in actual possession of those crops." See also *Carr* v. *Allatt*, 3 Hurl. & Norm. 964.

But it is suggested that by sect. 1, of chap. 93, R. S., "No mortgage of personal property is valid against any other person than the parties thereto unless, possession of such property is delivered to and retained by the mortgagee, or the mortgage is recorded, etc." In this case, it has been seen the mortgage was duly recorded, and possession of the goods therein described, including the after-acquired property, was rightfully taken and retained by the mortgagee by virtue of the consent of the mortgagor previously granted on the

stipulation of the mortgage. It is universally conceded, as before stated, that possession taken by the mortgagee, by virtue of the mortgagor's consent given after the property is acquired, is to be deemed equivalent to a voluntary delivery by the mortgagor, and such a "new act" as will effectuate the previous agreement. It has now been shown by a uniform current of modern decisions that the law has advanced another step, and now holds that actual possession of such property taken by the mortgagee in the exercise of an authority expressly granted in the mortgage, is also equivalent to a voluntary delivery by the mortgagor, and if such possession is retained, it makes good the mortgagee's lien as against an attaching creditor. Statutory provisions for the registration of chattel mortgages in effect precisely like our own, existed in all the states from which the foregoing decisions have been cited, but in no case directly involving the question now before the court, have they been held to be in conflict with the equitable doctrine above stated.

It is uniformly conceded that if the mortgagee takes possession of after-acquired property, in accordance with an express agreement in the mortgage, with the consent of the mortgagor given after he acquired title, it will be sufficient to perfect the mortgagee's lien. But a stipulation in the mortgage authorizing the mortgagee to take possession at any time, is not a mere license revocable at the pleasure of the mortgagor, but a valid and binding contract which continues in force until performed. It is therefore difficult to understand upon what principle of justice or conception of common right, a mortgagor can be permitted to defeat the acknowledged equitable rights of the mortgagee by simply withholding his consent in violation of his express stipulation in the mortgage. According to this doctrine, if the mortgagee seeks to exercise his right to take possession of the property under the mortgage, and the mortgagor gives an express assent, not required by the terms of the mortgage, the mortgagee's equitable rights are preserved. On the other hand, if the mortgagor objects, in violation of his agreement or stands mute, the mortgagee's possession, though expressly authorized by the contract of the parties, will not suffice and his rights are lost. Such a rule cannot be founded on principles of right and justice.

And it will now be seen that such a rule has no stronger support in authority than it has in reason and equity.

In *Wright* v. *Moody*, 13 Met. 17, the reasons for the contrary rule are thus stated: "A stipulation that future acquired property shall be holden as security for some present engagement is an executory agreement, of such a character, that the creditor with whom it is made may, under it, take the property into his possession, when it comes into existence, and is the subject of transfer by his debtor, and hold it for his security; and whenever he does so take it into his possession, before any attachment has been made of the same, or any alienation thereof, such creditor, under his executory agreement, may hold the same; but, until such an act done by him, he has no title to the same; and that, such act being done and the possession thus acquired, the executory agreement of the debtor authorizing it, it will then become holden by virtue of a valid lien or pledge. The executory agreement of the owner, in such case, is a continuing agreement, so that when the creditor does take possession under it, he acts lawfully under the agreement of one then having the disposing power, and this makes the lien good."

Although the reasoning was not essential to the conclusion in that case, it has been accepted by that court as the law of that state and applied in all subsequent cases. A copious extract from the opinion in *Chase* v. *Denney*, 130 Mass. 568, was made by this court in *Deering* v. *Cobb*, 74 Maine, supra.

In *Blanchard* v. *Cooke*, 144 Mass. 207, the court say: "The only apparent change in our decisions is, that by the recent cases possession of after-acquired chattels rightfully taken by a mortgagee under the power contained in the mortgage, if the possession is retained, vests the title in the mortgagee as against third persons, and a delivery by the mortgagor is no longer held to be essential." . . . . "Our recent decisions have therefore proceeded upon the theory, which by a dictum in *Jones* v. *Richardson*, was denied, that when the chattels are acquired, and are identified by the terms of the mortgage, the title passes as between the parties, and a possession rightfully obtained by the mortgagee, and retained by him, vests the title in him as against third persons whose rights have not attached

before the possession is taken, and that delivery by the mortgagor is not necessary.

In *Bennett* v. *Bailey*, 150 Mass. 259, it was ruled at the trial that the taking of possession of such after-acquired property by the defendant without any delivery to him by the plaintiff, was insufficient, but exceptions to this ruling were sustained. In the opinion the court say: "It was settled in *Blanchard* v. *Cooke*, 144 Mass. 207, after a careful review and a full consideration of the authorities, that possession of after-acquired personal property, rightfully taken and maintained by a mortgagee, under a mortgage purporting to cover it, gives him a title good not only against the mortgagor, but even against an assignee in insolvency or an attaching creditor. That principle is applicable to the present case."

In *Rowan* v. *Man'f. Co.*, 29 Conn. 283, where a mortgage of a factory and its equipments embraced in its terms such machinery and stock as should be afterwards purchased and placed upon the premises, and the mortgagee had afterwards taken possession of the factory with such after-acquired property, it was held that whatever effect was to be given to the provision in itself, it became operative upon possession being taken by the mortgagee. This was re-affirmed in *Walker* v. *Vaughn*, 33 Conn. 577.

See also *Williams* v. *Briggs*, 11 R. I. 476; *McLoud* v. *Wakefield*, 70 Vt. 560; *McCaffrey* v. *Woodin*, 65 N. Y. 459; *Lamson* v. *Moffatt*, 61 Wis. 153, and *Fisher* v. *Syfers*, 109 Ind. 514.

It may be deemed worthy of observation that the rights of attaching creditors were not directly involved in any of the cases hereinbefore cited from other states; but if any authority is required to establish the proposition, that an attaching creditor cannot acquire any rights either statutory or equitable, superior to those of a mortgagee who has taken and retained possession of the property by virtue of an express contract in the mortgage authorizing him so to do, it will be furnished by the following well reasoned decisions from courts of eminent respectability.

In *Francisco* v. *Ryan*, 54 Ohio St. 307, the mortgage contained a stipulation like that in the case at bar authorizing the mortgagee to take possession of the property and the court thus discussed the

question in the opinion: "The contention of the plaintiffs in error on this point is, that it is essential to the acquisition of a valid lien on the after-acquired property under such a mortgage that the mortgagor voluntarily deliver the property to the mortgagee, or give his consent to the mortgagee's possession when taken; and that the lien does not arise if, as in this case, the mortgagee of his own accord take the possession. . . . . Acting under this contractual authority in obtaining possession of the property, the consent of the mortgagor thereto at the time can neither be necessary to the legality of the possession, nor can it in any way add to the rights of the mortgagee. Certainly, after possession so taken, the mortgagor could not successfully assert any claim to the property, for his contract would prevent him; and, as whatever title he theretofore had to the property is thereby extinguished, nothing remains to be reached by his attaching or other creditors, unless it be such surplus as should remain after satisfying the mortagee's debt."

In *Barton* v. *Sitlington*, 128 Mo. 164, a chattel mortgage contained an agreement that it should cover all merchandise that might subsequently be added to the mortgagor's stock and it was held that the mortgagee acquired a valid lien by taking possession under the mortgage before the rights of other creditors intervened. In the opinion, the court say: "By the express terms of the mortgages it was provided, that if the mortgagees should consider themselves unsecure, they might take possession of any part or all of said merchandise and the taking possession under an order of delivery, issued in the action of replevin instituted by the plaintiffs to obtain possession under the mortgages, was but a taking by and with an agreement entered into by the mortgagor, and was all that was necessary. . . . . The taking possession of such property by the mortgagees under the authority given in the mortgages before the rights of other creditors had intervened, created a valid lien on such property. Jones on Chattel Mortgages, secs. 164-168; *Keating* v. *Hanenkamp*, 100 Mo. 161; *Moody* v. *Wright*, 13 Met. 17."

So also in *Tennis* v. *Midkiff*, 55 Ill. App. 642, and *Quiriaque* v. *Dennis*, 24 Cal. 154, it was held "that where a mortgage provides that it shall cover after-acquired property, and the mortgagee takes

possession of such property, his claim is prior to that of a subsequent attaching creditor."

In 6 Cyc. of Law & Proc. 1051, the result of all the authorities is stated as a settled and unquestioned rule that with respect to after-acquired property, "an actual transfer of possession to the mortgagee, either by voluntary delivery from the mortgagor, or by the exercise of a power to take possession contained in the mortgage, is such a new act as will constitute a ratification of the mortgage." To the same effect is the rule formulated in 5 A. & E. Encyc. of Law, 980.

Nor is it apparent that such a contract respecting after-acquired property is in contravention of any established rules of public policy. Indeed it would seem to be more in obedience to the principles of sound morality and consideration of public duty to sanction the act of the mortgagee in taking and holding the property in accordance with the express terms of the contract, rather than the act of the mortgagor or an attaching creditor in taking it away from him in violation of the agreement.

It is accordingly the opinion of the court that the action is maintainable and that the entry must be

Exceptions sustained.

JOHN FRED SNOWDALE

vs.

THE UNITED BOX BOARD AND PAPER COMPANY.

Somerset. Opinion June 27, 1905.

Master and Servant. Negligence. Degree of Care to be Exercised by Master. Master not an Insurer against Injury.

The legal standard governing a master's duty is that of ordinary care with respect to the exigencies of the situation. What precautions and safeguards, what degree of vigilance and foresight would meet the requirements of ordinary care in a given case, must be determined by reference to the conduct of ordinarily prudent and careful men under like circumstances. In all situations the degree of care exercised must be equal to the emergency.

The relation of master and servant does not impose upon the master the obligation to guarantee that the servant will never sustain any injury in discharging the duties of his employment. The master does not undertake to insure the servant against all liability to accident.

On motion by defendant. Sustained.

Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant. At the trial in the court of the first instance, the plaintiff recovered a verdict of $990.00, and thereupon the defendant filed a general motion to have the verdict set aside.

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

Forrest Goodwin, for plaintiff.

Harvey D. Eaton, for defendant.

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

WHITEHOUSE, J. In this case the plaintiff recovered a verdict of $990. for injuries sustained in the defendant's boiler room, August 29, 1903, by reason of the falling of a quantity of brick from the top

of the brick wall on the north side of the building. The case comes to this court on a motion to set aside the verdict as against the law and the evidence.

The brick wall in question formed the north side of the defendant's mill at Fairfield. At the time of the accident, it was 198 feet long, 22 feet high and one foot thick. In this wall was an archway with an opening 11 feet and 10 inches wide, through the center of which, a carrier was constructed for the purpose of conveying waste fuel from railroad cars outside to the furnaces in the boiler room. The remaining space under the arch, not occupied by the carrier was closed up with boards and two doors, one on each side of the carrier.

The building was constructed in 1881, and was originally provided with a wooden roof, but in 1895, the walls were raised about three feet to their present height, the old roof removed and a new one of corrugated iron, with steel frame, substituted for the wooden one. The frame work of the new roof was composed of beams and rafters extending over and across the building with purlins or ribs running lengthwise. One of these steel purlins was laid in the top of the wall as a plate for the support of the ends of the rafters, and it was so embedded in the brick and mortar, and the wall so built up under the roof, that the top of it came in contact with the corrugated iron covering. The bricks were properly laid in cement mortar by skilled laborers, working under competent supervision, and the wall when originally built had every appearance of being a structure of solid and enduring masonry. It was not in controversy that two cracks or seams afterwards appeared above the archway, each starting about a foot from the end of the arch and intersecting the other at a point nearly over the center of it, about five feet from the top of the wall. The existence of these seams in the old wall was accounted for by the suggestion that the wooden support upon which the arch was originally constructed, was probably removed before the mortar became firmly set in the joints of the brick work thus causing a slight contraction and consequent settling of the arch. But the courses of brick above these seams, excepting those which fell from the top, were in regular line, solid and unmoved; and in view of the undisputed facts relating to the conditions existing at the time

the brick fell, considered in connection with the reasonable testimony of expert builders, the inference is justified that these cracks or seams above the archway, had no connection whatever with the accident caused by the falling of the brick from the top courses. The explanation of the loosening and falling of those brick which seems to have been accepted by both parties as the only rational and probable one, was that the steam in the boiler room condensed and the water ran down on the under side of the iron roof in the winter time and coming in contact with the steel purlin on the top of the wall, worked its way into the brick work; and that the action of the frost was then such as to heave the brick gradually out of place, so that the slight vibration resulting from the operation of the carrier or the railroad car, caused them to topple over.

The accident occurred, it has been noted, on the 29th of August, 1903, and the plaintiff insists that inasmuch as the destructive agency of the frosts, must have been progressing every winter after the iron roof was put on, and in any event, several months had elapsed after the frosts of the last winter had ceased to act, there had been abundant opportunity for the defendant to discover the dislodged and dangerous condition of those brick, if the walls of the building had from time to time been properly inspected and examined.

On the other hand, the defendant says, in the first place, that the top of the brick wall under the eaves of the building, was not exposed to ordinary observation at the point in question for the reason that it was remote and dimly lighted, that smoke and soot had still further obscured it, and a ten inch water pipe suspended under the beams only twelve inches from the wall, formed another obstruction to a clear view of it. Hence, as an outward movement of only two inches was required to cause the upper courses to topple and fall, the actual condition of the brick was not in fact discovered by any inspection made in behalf of the defendant prior to the accident, and was not in fact known to or suspected by any agent of the company. It is furthermore confidently argued that as no similar accident had ever before happened either on this mill or any other, to the knowledge of any of the parties or witnesses in this case, and as the scene of it was in a boiler room where it would not occur to the mind of

even the most thoughtful and prudent man to look for frost or its effects, the defendant had no warning of the possibility of such a defective condition of the wall, no reasonable ground to anticipate such a result or the existence of such a cause, or to suspect that there was any necessity for an examination of that part of the wall. It is earnestly contended therefore that the defective condition complained of was not only unknown to the defendant in fact, but that it could not have been ascertained by the exercise of such reasonable care, diligence and foresight as ordinarily prudent men usually exercise under like circumstances.

The plaintiff sought to establish the defendant's liability on the ground of negligence. He claimed that there was a breach of duty on the part of the defendant in failing to exercise ordinary care to provide a reasonably safe and suitable place in which, by the exercise of due care on his own part, he could perform the service required of him without liability to other injuries than those resulting from simple and unavoidable accidents. There was no substantial controversy in relation to material facts. It was the duty of the jury, guided by the well settled rules of law applicable to the situation to draw the appropriate inference from essentially undisputed facts. The existence of the relation of master and servant between the parties did not impose upon the defendant the obligation to guarantee that the plaintiff would never sustain any injury in discharging the duties of his employment. The defendant did not undertake to insure the plaintiff against all liability to accident. The legal standard governing the defendant's duty was that of ordinary care with respect to the exigencies of that situation. What precautions and safeguards, what degree of vigilance and foresight would meet the requirements of ordinary care in a given case, must be determined by reference to the conduct of ordinarily prudent and careful men under like circumstances. In all situations the degree of care exercised must be equal to the emergency.

When the conduct of the defendant is examined in the light of the situation as it existed at that time, and tested by the amount of care usually bestowed by the ordinarily prudent man, under the same circumstances and conditions, unaided by the knowledge which comes

after the event, it is difficult to specify in what particular there was a failure of duty on the part of the defendant towards this plaintiff. In the original construction as well as in the subsequent repair and improvement of the building, the defendant's managers, acting under the ordinary influence of the motives of self interest which stimulate men of affairs to erect suitable and permanent structures and avoid liability to the payment of damages, appear to have employed intelligent contractors and builders of large experience, under whose supervision, the labor of competent and skillful workmen was performed. Those who built the mill as well as those who subsequently raised the walls and placed the iron roof upon them, testify without reservation to the thoroughness of the entire work. One of the most experienced and competent of contractors and builders in the state, testified that with the knowledge of steel roofs then possessed by builders in this climate, the structure "was as good as could be;" and all of the expert builders who testified upon this branch of the case declare in effect that it never would have occurred to them that there would have been sufficient water and frost on the top of that wall in the boiler room to produce the result found in this case. Numerous and familiar instances may be recalled of substantial brick buildings, the control of which has been exercised for half a century by careful and prudent managers, not only without any critical inspection of the top of the brick walls, but without the occurrence of any incident calculated to put a prudent man upon inquiry respecting their safety. In the case at bar, nothing had transpired to awaken any suspicion of the source of danger found to exist in this case, or to suggest the necessity of an examination of the top courses of brick in walls apparently solid and substantial. The conclusion is irresistible that the care exercised by the defendant in the management of its mill was such as is usually exercised by ordinarily prudent people under like circumstances, and that there was no breach of duty on its part towards the plaintiff with respect to the accident in question. It is accordingly the opinion of the court that the conclusions drawn by the jury were not warranted by the facts, and that their verdict must be set aside as against the law and the evidence.

Motion sustained. Verdict set aside.

ALEXANDER C. HAGERTHY et al., *vs.* JOHN P. WEBBER.

Hancock. Opinion June 27, 1905.

Mortgage. Redemption. Books of Deceased Surveyor. Evidence. R. S. (1883), c. 90, § 22; 1903, c. 92, § 23.

1. It is provided by section 23 of chapter 92, R. S. 1903, relating to mortgages of real estate, that "the person to whom money is tendered to redeem such lands, if he receives a larger sum than he is entitled to retain, shall refund the excess."

2. November 17, 1881, Henry M. Hall and Barlow Hall, Jr., in consideration of $12,000, conveyed to Fayette Shaw, William Shaw and Brackley Shaw by deed of warranty "the hemlock trees standing on and growing upon" the south half of township No. 2, in the county of Penobscot with certain exceptions therein named "with the right to enter and cut down the trees and peel the bark from them" . . . . "reserving however, to said Hall & Hall, the right to carry away all of said hemlock trees after the same are cut down and the bark peeled therefrom."

3. The next day, November 18, 1881, the Shaws gave to Hall & Hall a mortgage deed of "the same hemlock trees standing and growing which the said Hall & Hall conveyed to us by deed dated November 17, 1881" conditioned that not more than 12,000 cords of bark should be peeled and removed by the Shaws from the land described, that no bark should be peeled and removed by them after the first day of May, 1897, and that within a reasonable time thereafter they would convey to Hall & Hall by quitclaim deed the hemlock trees standing and growing on the land at that date.

4. On the same day, November 18, 1881, Hall & Hall gave to the Shaws a mortgage of the land upon which the hemlock trees were standing, to secure the payment of $2000, with interest from the ——— day of ——— 1881, "according to a certain agreement between the parties dated November 17, 1881, . . . "which will explain the terms and conditions upon which the two thousand dollars and interest is to be paid by said Hall & Hall to said Shaws." The plaintiffs succeeded to the rights of Hall & Hall and the defendant to the rights of the Shaws.

5. The written agreement referred to in the mortgage of the land was never recorded, and although executed in duplicate, neither party was able to produce a copy of it as evidence at the trial. But it was satisfactorily shown that "it limited or explained the mortgage for $2000, and provided in substance that if the bark on this tract fell short of the 12,000 cords mentioned in the deed, this mortgage should be good for the deficiency

up to the amount of $2000.00 or 2000 cords, which would be the same thing, with interest on the $2000.00 from the date when the Shaws paid the money to the Halls up to the time of the return of the money."

6. The defendant received from the plaintiffs the sum of $2795.96 to redeem from this mortgage the lands in question, but the jury evidently found that the defendant was not entitled to retain any part of that sum, and accordingly rendered a verdict for the plaintiffs for the entire amount.

7. The presiding Justice instructed the jury "that if there were 12,000 cords of bark upon this tract of land during the period of fifteen years, which it was practicable for the Shaws to have taken off, or the Shaws or their successors to have taken off within the period of fifteen years up to May 1, 1897, that then that would be the end of this case, and nothing would be due upon the mortgage, and the plaintiffs would be entitled to recover." *Held:* that this instruction was correct.

8. The scale books of William Watts, a deceased scaler, were admitted in evidence. *Held:* that these books were competent evidence for the consideration of the jury as tending to prove the quantity of bark taken off the tract in question. This was the important purpose for which the books were kept, and the entries in them are original evidence and the best evidence obtainable to prove the facts therein stated.

On motion and exceptions by defendant. Overruled.

Assumpsit brought under R. S. 1883, chapter 90, section 22, — now R. S. 1903, chapter 92, section 23, — to recover money alleged to have been paid by the plaintiffs to redeem from a certain real estate mortgage, held by the defendant, in excess of the amount actually due on said mortgage. The verdict was for the plaintiffs, and the defendant filed a general motion for a new trial. The defendant also took exceptions to the admission of the scale books of William Watts, a deceased surveyor.

The case is sufficiently stated in the opinion.

A. W. King and John A. Peters, Jr., for plaintiffs.

L. B. Deasy and Appleton & Chaplin, for defendant.

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

WHITEHOUSE, J. It is provided by sect. 23, of ch. 92, R. S., relating to mortgages of real estate, that "the person to whom money is tendered to redeem such lands, if he receives a larger sum than he is entitled to retain, shall refund the excess."

The defendant received from the plaintiffs the sum of $2795.96 to redeem from mortgage the lands in question in this case, but the jury evidently found that the defendant was not entitled to retain any part of that sum, and accordingly rendered a verdict for the plaintiffs for the entire amount. The case comes to this court on motion and exceptions.

November 17, 1881, Henry M. Hall and Barlow Hall, Jr., in consideration of $12,000, conveyed to Fayette Shaw, William Shaw and Brackley Shaw by deed of warranty "the hemlock trees standing on and growing upon" the south half of township No. 2, in the county of Penobscot with certain exceptions therein named "with the right to enter and cut down the trees and peel the bark from them" . . . . "reserving, however, to said Hall and Hall, the right to carry away all of said Hemlock trees after the same are cut down and the bark peeled therefrom."

The next day, November 18, 1881, the Shaws gave to Hall & Hall a mortgage deed of "the same hemlock trees standing and growing which the said Hall & Hall conveyed to us by deed dated November 17, 1881," conditioned that not more than 12,000 cords of bark should be peeled and removed by the Shaws from the land described, that no bark should be peeled and removed by them after the first day of May, 1897, and that within a reasonable time thereafter they would convey to Hall & Hall by quitclaim deed the hemlock trees standing and growing on the land at that date.

On the same day, November 18, 1881, Hall & Hall gave to the Shaws a mortgage of the land upon which the hemlock trees were standing, to secure the payment of $2000, with interest from the ——— day of ——— 1881, "according to a certain agreement between the parties dated November 17, 1881, . . . "which will explain the terms and conditions upon which the two thousand dollars and interest is to be paid by said Hall & Hall to said Shaws." The plaintiffs succeeded to the rights of Hall & Hall and the defendant to the rights of the Shaws.

The written agreement thus referred to in the mortgage of the land was never recorded, and although it appears to have been executed in duplicate, each party made unavailing search for it, and no copy of

it was produced as evidence at the trial. The substance of it, however, is satisfactorily shown by the deposition of C. W. Clement, a witness for the plaintiffs and by the testimony of the defendant John P. Webber. Mr. Clement says, "it limited or explained the mortgage for $2000, and provided in substance that if the bark on this tract fell short of the 12,000 cords mentioned in the deed, this mortgage should be good for the deficiency up to the amount of $2000.00, or 2000 cords which would be the same thing, with interest on the $2000.00 from the date when the Shaws paid the money to the Halls up to the time of the return of the money." In answer to special interrogatories, Mr. Clement further deposed as follows:

Q. Referring to the substance of this agreement and its terms, suppose there were 12,000 cords of bark on the Town or the Hall strip we have referred to at the time of the sale by the Halls to the Shaws, what, if anything, would be due and payable under this mortgage.

A. Nothing.

Q. Referring again to the terms of this agreement what would have been due and payable under this agreement if there had been say only 11,000 cords of bark on the town at the time of the sale from the Halls to the Shaws?

A. The amount secured by the mortgage in that case would be One Thousand Dollars and interest, and the amount due and payable under the agreement would have been $1000 and interest.

Q. Referring to this agreement what would have been due under the mortgage, by the terms of the agreement, if there had been found to be less than 10,000 cords of bark on the strip?

A. The mortgage would have secured to the Shaws the return of $2000 and interest thereon, and no more.

Q. Did any difference of opinion between you and Mr. Webber occur when you and he were reading and discussing the terms and meaning of this contract or paper?

A. None that I recollect.

The testimony of John P. Webber upon this point is as follows:

Q. You saw the agreement referred to in this mortgage at the time you bought the mortgage, as you say, of Mr. Clement?

A. Yes, I did.

Q. You and Mr. Clement had the agreement?

A. Yes.

Q. And looked it over?

A. Yes.

Q. And considered its terms and provisions?

A. Yes.

Q. At your office?

A. Yes.

Q. Substantially as he has testified in his deposition?

A. I think so; yes sir.

Q. You understood, did you not, that if they had taken off or should take off 12,000 cords of bark within the period of fifteen years provided in the agreement, that that would end the mortgage?

A. Yes, I did; I understood it so.

Q. You also understood, did you not, that if there was bark enough on the town so that they could have it taken off within the fifteen years it would have ended the mortgage?

A. Yes, if they could have done it. If they could have got the bark.

Q. You understood that at the time you bought?

A. Yes, sir.

Upon this state of the evidence, the presiding Justice instructed the jury as follows:

"The defendant's counsel claims that it is incumbent upon the plaintiffs to show that there was 12,000 cords of merchantable bark practicable to be taken in 1881 when this agreement was made. I shall not give you exactly that rule. Under the deed and the mortgages and the agreement, as it has been testified to before you, I instruct you that if there were 12,000 cords of bark upon this tract of land during the period of fifteen years, which it was practicable for the Shaws to have taken off, or the Shaws or their successors to have taken off during the period of fifteen years up to May 1, 1897, that then that would be the end of this case, and nothing would be due upon the mortgage, and the plaintiffs would be entitled to recover. That is if the hemlock which was upon this lot in November, 1881,

had grown from year to year so that more bark had become merchantable from year to year or suitable to take off for tanning purposes, and it was practicable for the Shaws or their successors to have taken this bark off during this period, 12,000 cords of it, then that would satisfy the conditions of this mortgage, and nothing would be due upon the mortgage, and the mortgage would be fully paid, and the plaintiffs would be entitled to recover."

This instruction was undoubtedly correct. It simply sustained and enforced the agreement of the parties according to the manifest intention disclosed by the terms of the mortgage of the hemlock trees from the Shaws to the Halls, the terms of the $2000 mortgage of the land from the Halls to the Shaws, and the unrecorded agreement therein referred to and described. The defendant frankly admits that at the time he made the purchase he understood that if 12,000 cords of bark could have been taken off of the land during the period of fifteen years provided in the agreement, "that fact would have ended the mortgage;" and it is evident that Mr. Clement, the plaintiff's witness did not intend to give any different view of it. In response to the counsel's general request to state the substance of the agreement he says: "It provided in substance that if the bark on this tract fell short of the 12,000 cords mentioned in the deed, this mortgage would be good for the deficiency up to the amount of $2000 or 2000 cords." But the only "deed" in which "the 12,000 cords are mentioned" is the mortgage deed which allows fifteen years for the growth and removal of the "12,000 cords mentioned." It is true that in one of the subsequent inquiries put by counsel for the purpose of emphasizing and illustrating the fact that this agreement contained no stipulation for the payment of any sum of money "absolutely, and at all events," this special phase of the subject does not appear to have been present to the mind of counsel in framing the question and no express reference is made either in the question or answer to the period of fifteen years within which the bark could be removed; but when all parts of Clement's deposition are considered together, in view of the fact that after fully discussing all of the terms of the agreement, he and the defendant were in perfect accord upon the proposition that if 12,000 cords of bark could have been peeled

and removed before May 1, 1897, the mortgage would have been satisfied, it is evident that reference in this interrogatory to the "11,000 cords of bark on the town at the time of the sale from the Halls to the Shaws" meant the bark then on the town and its natural growth and increase during the period allowed for its removal. See *Donworth* v. *Sawyer*, 94 Maine, 242. It appears from the testimony of both Clement and the defendant that the agreement examined and discussed by them was plain and easily understood, and their prompt concurrence as to the substance and effect of its terms is more satisfactory evidence of the contents of the paper than any inadvertent forms of expression employed by counsel in preparing the interrogatories for Clement's deposition. It is inconceivable that the defendant Webber, would have been so readily convinced of the effect of the agreement if it had spoken upon this point with any uncertain sound.

With respect to the motion it is earnestly contended in the first place that the verdict is not warranted by the evidence for the reason that the money received by the defendant, which the plaintiffs seek to recover in this action, is clearly shown by the evidence to have been paid by the plaintiffs for the purpose of compromising and finally settling a disputed mortgage debt, and that the defendant is therefore entitled to retain all that he received, although it might subsequently appear to be more than was actually due. It is said that there appeared to be a deficiency of much more than 2000 cords of bark, that according to the face of the mortgage, the amount due the defendant with interest from November, 1881, was forty-five hundred dollars and that there was no apparent reason for accepting $1700 less than the amount claimed to be due, except to avoid litigation by means of a compromise settlement.

It is urged that the correspondence between the parties and all the circumstances conclusively show that both the defendant and his son, Charles P. Webber, understood that they were making a final settlement by discounting the interest prior to Nov. 6, 1896, and agreeing to accept $2000 and interest after that date. It is also insisted that there is a preponderance of evidence in favor of the defendant's contention that at the time the money was delivered to Chas. P. Webber, the defendant's son, there was no intimation by plaintiffs' counsel

of any purpose to bring suit to recover the money thus paid.

On the other hand, the plaintiffs' counsel calls attention to the significant fact that instead of remitting the sum of $2795.96, by check, as he was authorized to do by the defendant's letter, the plaintiff, Giles, went to Bangor with his attorney, Mr. King, and paid the defendant the full sum of $2795.96 in bank bills which he carried from Ellsworth in a satchel for that purpose. It is insisted that this extraordinary proceeding was entirely irreconcilable with the defendant's theory that the parties had previously agreed upon a definite sum to be accepted by the defendant as a final settlement by way of compromise. Attention is also called to the positive testimony of Mr. Giles that at the time of the delivery of the bank bills to the defendant's agent, Chas. P. Webber, it was distinctly stated to Mr. Webber by Mr. King, the plaintiff's attorney, that according to their claim there was nothing due under the mortgage, that the money was paid under protest, and that an action would be commenced to recover it back. Mr. C. P. Webber, and his stenographer, it is true, testified that no such statements were made by Mr. King, but the jury saw the witnesses and doubtless considered their testimony in connection with the improbability that Mr. King would thus deliberately participate in such a compromise adjustment and immediately thereafter repudiate the settlement and commence an action to recover the money. But no useful purpose can be subserved by reviewing in detail the forty-four pages of testimony relating to this branch of the case. It is only necessary to say that there was sufficient evidence to warrant the finding of the jury and that the court would not be justified in disturbing the verdict on this ground.

But it is further contended in behalf of the defendant that if the scale books of William Watts, a deceased surveyor, were admissible evidence, it does not satisfactorily appear from the books themselves or any other testimony in the case, that the bark surveyed according to those records was taken from that part of the south half of lot No. 2, included in the mortgage, and that without this testimony there was not sufficient evidence as to the quantity of the bark to sustain the verdict.

These books were undoubtedly admissible evidence. *Kennedy* v.

Doyle, 10 Allen, 167; *Dow* v. *Sawyer*, 29 Maine, 117; *Pike* v. *Crehore*, 40 Maine, 503; 1 Green Ev. (15 Ed.), sects. 115 & 116.

It also satisfactorily appears from the testimony that the Halls did not own any other land in township No. 2, except the tract from which the bark was sold to the Shaws, that during this period the Halls did not have any other bark operation except upon this tract, nor any other bark contract connected with this tract except this one with the Shaws, and that Watts was the scaler and measurer of bark for the Halls. The entries also contain the name of the Shaws' surveyor, thus tending to show that the bark was taken off in connection with the Shaw contract. The books were competent evidence for the consideration of the jury as tending to prove the quantity of bark taken off of the track in question. This was the important purpose for which these books were kept, and the entries in them are original evidence and the best evidence obtainable to prove the facts therein stated.

It is accordingly the opinion of the court that the entry must be

Motion and exceptions overruled.

S. E. & H. L. SHEPHERD CO. *vs.* JOHN W. SHIBLES et als.

SAME *vs.* SAME.

Knox. Opinion June 23, 1905.

Deed. Construction. Reservation.

1. A deed of warranty containing all the covenants usually found in such a deed, states that it gives, grants, bargains, sells and conveys to the grantees, their heirs and assigns forever, a certain parcel of land therein described, with all the privileges and appurtenances thereof, and then further says "meaning to convey only a right of way across the same; and reserving the right to take limerock from the same." *Held:* that this deed conveyed the fee to the premises therein described with a reservation of the right to take limerock therefrom.
2. It is a well settled rule of law that in construing a deed, general words are not restrained by restrictive words added, where such words do not clearly indicate the intention and designate the grant; also that a grant shall be taken most forcibly against the grantor.
3. The modern doctrine with respect to the construction of deeds is that they shall be made to carry out the intention of the parties, if practicable, when no principle of law is thereby violated. This intention is to be ascertained by taking into consideration all the provisions of the deed as well as the situation of the parties to it.

On report.

In the first suit, judgment for plaintiff against defendants, Edward Bryant and Edward B. Kent, and judgment for the other defendant, John W. Shibles.

In the second suit, judgment for the defendants.

Two actions based upon precisely the same facts. The first is trespass quare clausum wherein the defendants are charged with breaking and entering, with force and arms, the plaintiff's close situate in Rockport in the County of Knox, and committing certain acts of trespass thereon. The second is an action on the cases and charges the defendants with the acts specified in the declaration in the first action. The evidence was taken out at the September term, 1903,

of the Supreme Judicial Court, Knox County. After the evidence on both sides was concluded, it was agreed that the case be reported to the Law Court "for that court to pass upon and decide all questions of law and fact involved."

The case is sufficiently stated in the opinion.

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

D. N. Mortland, for defendants.

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

SPEAR, J. This case involves two actions both based upon precisely the same state of facts. The first is trespass quare clausum, wherein the defendants are charged in the usual form with entering the plaintiff's close situated at Rockport, in the county of Knox, and with erecting upon said premises spars and posts for the support of derrick guys and digging up said close and planting anchorages for guys therein, and running guys over and securing them in said close, and thereby greatly encumbering and damaging the same and preventing the plaintiff from having full and free use thereof.

The second is an action on the case and charges the defendants with the acts specified in the first count, upon the premises of the plaintiff located at Rockport and bounded and described as follows: Beginning on the road leading from Simonton's Corner to the late Alexander Harrington's at the line formerly dividing the land of Abel Merriam et als., from the land of S. E. Shepherd et als., at the northwest corner of the present quarry lot; thence N. about 70 deg. E. by said Thorndyke Quarry lot 75 feet to a stake and stones; thence westerly 152 feet to the road first mentioned, passing through a point 110 feet on the easterly line of said road to the place of beginning; thence S. by said road 110 feet more or less to the place of beginning, whereby the owner of said premises was deprived of their use and benefit.

The declaration in the first writ describes that portion of the Thorndyke farm owned by S. E. & H. L. Shepherd Co., and included within its limits the premises described in the declaration of the second

writ. The latter premises, alluded to in the testimony and upon the plans as the triangular piece, is the locus of the real controversy in this case, the trespass, if any, set out in the first writ being technical, the right to stretch and hitch the derrick guys on some portion of the premises therein described being unauthorized. The foundation for the derrick and the erection thereof and the depositing of the debris complained of, were all done within the limits of the triangular piece. The defendants claim that they have a right to occupy and use the triangular piece and land therein described, for the purposes for which they were using it, by virtue of the following deed from Abel and Wilson A. Merriam, to John H. Eells, John W. Shibles and Wilson A. Merriam, without date but acknowledged July 2, 1887, described in the premises therein conveyed as follows: A certain lot or parcel of land situated in said Camden and described as follows to wit: Beginning on the road leading from Simonton's Corner to the late Alexander Harrington's on land formerly S. E. and H. L. Shepherd's; thence by said Shepherd's land N. 70 deg. E. 75 feet to a stake and stone; thence westerly 152 feet to the road first mentioned at a point 110 feet on line of said road from place of beginning; thence southwesterly 22 deg. 40 min. E. by said road 110 feet to place of beginning, meaning to convey only a right of way across the same; and reserving the right to take limerock from the same. This was a warranty deed containing all the convenants usually found in such a deed.

The plaintiffs assert title to this same piece of land by virtue of a deed from Abel and Wilson A. Merriam the same grantors under whom the defendants claim title under the above described deed. It is conceded that at the date of the defendants' deed title to this lot was in Abel and Wilson A. Merriam. On the 23d day of October, 1895, the S. E. & H. L. Shepherd Co., the plaintiff, purchased of Abel and Wilson A. Merriam lot 2, as delineated upon a plan used in evidence, and within the boundaries of that lot is situated the triangular piece in question. By virtue of this deed the plaintiff also claim a title by fee in the triangular piece, excepting, as its deed specifies, "the right of way across the triangular piece." Admitting

without deciding that an action on the case will lie in favor of the plaintiff for consequential damages and injuries to its freehold, then the question of the liability of the defendants depends upon the construction of their deed. If it conveyed to them in fee, if for only a right of way, they are not liable; if it conveyed to them simply the right of way, then they had no right to encumber it as they did, and would be liable. As will be seen from an examination of the deeds cited above, Abel and Wilson A. Merriam in 1887, long prior to the date of the plaintiffs' deed, by their warranty deed conveyed to Eells, Shibles and Merriam, the defendants' lessors, this identical piece of land now under contention, by metes and bounds, and as their deed says, it gives, grants, bargains, sells and conveys to the grantees, their heirs and assigns forever, the parcel of land described, with all the privileges and appurtenances thereof, and then further says, "meaning to convey only a right of way across the same; and reserving the right to take limerock from the same." Does this deed convey a fee or a right of way, an easement? Are the grantors bound by what they actually in express and unambiguous words conveyed or by what they said they *meant* to convey? Under the circumstances of this case we are of the opinion that the deed conveyed a fee.

A reservation is of a thing not in being but newly created out of the lands and tenements devised. "A reservation is said to vest in the grantor some new right or interest not before in him, operating by way of an implied grant." *Engel* v. *Ayer*, 85 Maine, 453. A reservation does not necessarily mean that "something not in being and newly derived from the thing granted" must be some right that the grantor did not before possess in connection with the use of the land granted.

"A right of way over land conveyed may be reserved; and yet the grantor had the same right to pass over the land before the conveyance, but it would not have existed as a separate thing; and when the land is granted and the right of way reserved, that right becomes in the sense of the law a new thing derived from the land." *Gay* v. *Walker*, 36 Maine, 54. The same rule will apply to the reservation of light, although the grantor may have had a free flow of light before the grant. Such reservation may be good as something,

not in the sense of the law before existing, but derived from the thing granted. The clause in the deed of the grantors under which the defendants claim, "and reserving the right to take limerock from the same" must be regarded, under the rules of law, as a reservation, although of course the grantors could have taken limerock from the premises before the grant.

The grantors in this deed did three things which we may consider as important not only in determining the legal construction of the deed, but also the intention of the parties, provided the terms of the deed will, without a violation of well settled principles of law, permit of the latter consideration. First, the grantors made an absolute conveyance of the land in question, by warranty deed, by metes and bounds, in express and unambiguous words; second, they said they meant to convey only a right of way; third, they reserved the right to take limerock from the same. The first is in terms an express grant of the premises. The third is a reservation, a new right or interest, "operating by way of an implied grant," *Engel* v. *Ayer*, supra. The implied grant must necessarily be from the grantees of this deed. Now, going back to the definition of a reservation, we find the first and third things which the grantors did, in conveying this piece of land, are entirely consistent with each other. The first was an absolute grant and the third could not exist without such a grant, being some new thing growing out of the grant. But the second thing they did is entirely inconsistent with each of the others separately and to both of them combined. A right of way is an easement. An easement is an entirely different thing from the fee. "The fee in the land is to be regarded as distinct from an easement in the same. The fee may be in one, the easement in another. The demandant having the fee, is entitled to recover, notwithstanding the tenant may have an easement in the passageway for the use of the mill." "The owner of fee in land may maintain a writ of entry to establish his title against the owner of a perpetual right to use it for a passageway." *Bank* v. *Morrison*, 88 Maine, 163.

If this is the law it would seem absurd for the grantors to attempt to create a reservation to take limerock when they had conveyed no limerock, upon which such a reservation could be based. Besides if

they had conveyed only a right of way, the right to take limerock would be inconsistent with the grant, for the taking of limerock might at any time completely destroy the right of way. The express grant and the clear reservation which the grantors inserted in their deed are entirely inconsistent with and repugnant to the words restricting the grant to an easement. If the grantors had reserved a right of way it would have been consistent with their grant, as before noted. But to say that they conveyed only a right of way, by the limiting words used in their deed, in contradiction of their own express language, making a grant, and in defeasance of a clause creating a reservation, depending upon the grant, would, we think, give to these words conveying only an easement, an interpretation repugnant to the express grant going before, and contradictory to the express reservation coming after, the words creating such easement; and also in violation of the well settled rules of law that general words are not restrained by restrictive words added, when such words do not clearly indicate the intention and designate the grant; and that every man's grant shall be taken most forcibly against himself. *Field* v. *Huston*, 21 Maine, 69. It is clear that if the easement stands the grant and the reservation must both fall.

Our conclusion is that under the rules of construction the grant and the reservation should stand and the grantors should be held to have conveyed to the grantees by their deed of July 2, 1887, the fee in the triangular piece of land described therein.

The modern doctrine with respect to the construction of deeds is that they shall be made to carry out the intentions of the parties if practicable when no principle of law is thereby violated. This intention is to be ascertained by taking into consideration all the provisions of the deed as well as the situation of the parties to it. *Pike* v. *Munroe*, 36 Maine, 309; *Esty* v. *Baker*, 50 Maine, 331; *Bates* v. *Foster*, 59 Maine, 157; The rule, that in a question of doubt the deed must be construed more favorably to the grantee, is too familiar to need citation.

While the conclusion already reached renders it unnecessary to further discuss the question of intention, it may be said in passing, that from the terms of the deed itself, the inference is irresistible that

the grantors thought they had conveyed the fee from the fact that they reserved, not the limerock, but the right to take it. We think the grantors intended to deed the triangular piece to the grantees for a right of way, reserving the right to take the limerock which, we may infer from all the circumstances of the case, was the only thing of value to them or which they cared anything about. They were not particular what they conveyed as long as they retained the right to take the only thing of real value to them, the limerock. At the time of this conveyance no conflicting interests were involved and as long as the substance of the conveyance was preserved but little attention was paid to the language employed in the deed to secure it. Without discussing the evidence further, it seems quite clear that the grantors intended to convey the fee.

This disposes of the second suit, the action on the case, in favor of the defendants. But the first suit, trespass quare clausum stands upon a different ground. The locus described in this writ embraces not only the triangular piece but considerable territory around it, the title and possession of which were unquestionably in the plaintiffs. It is also proven beyond controversy that some of the anchorages and one guy rope of the derrick set upon the triangular piece, and the spar over which another guy rope runs, were upon the land of the plaintiff outside the triangular piece, which the defendant had no right to occupy. We do not understand that the defendants, Edward Bryant and Edward B. Kent deny their guilt for technical trespass for the acts above specified, but John W. Shibles the other defendant strenuously controverts the charge of liability against himself. He testifies without contradiction, except in a general way, that he had nothing whatever to do with the setting of the derricks, or where the guys should be placed, but that this matter was in the hands of another person, and was no part of his duty, which was simply to quarry the rock. On cross examination he is not even asked if he either directed the setting of the derrick and guys or personally aided in the work. George A. Arey the superintendent of Bryant and Kent also says that Shibles had nothing whatever to do with the setting of the derricks, either by way of direction or personal assistance, but that they were set up under the instructions of Mr.

Kent and the actual labor done by a Mr. Sweetland of Rockland. He says emphatically that Mr. Shibles had nothing to do with it. Now we find no evidence in this case that connects the defendant Shibles with any trespass with respect to the derricks and guys, except by inference based upon the fact that he had charge of quarrying the limerock. No witness pretends to have seen Shibles doing anything by way of direction or work in connection with any of the acts of trespass complained of outside of the triangular piece of land. When the question of Shibles' liability was being asserted by counsel for the plaintiff and strenuously denied by counsel for the defendant, at the trial, Mr. Shepherd in answer to a question as to who had control, answered, "from my observations Mr. Shibles had absolute control of the operations of the quarry, Mr. John W. Shibles." Upon cross examination Mr. Shepherd is unable to recall a single specific instruction he had heard Shibles give to the men. Nor does he testify to any act of trespass outside the triangular piece on the part of Shibles. The burden of proof is upon the plaintiff to show by a fair preponderance of the evidence that Shibles had something to do with the erection of the derricks and guys, outside the triangular piece in controversy, but it seems to us that upon this point the evidence preponderates the other way.

In the first suit judgment for the plaintiff against the defendants, Edward Bryant and Edward B. Kent for damages in the sum of one dollar. Judgment for the other defendant, John W. Shibles. In the second suit judgment for the defendants.

CHARLES RUSH *vs.* DANIEL L. BUCKLEY, et al.

SAME *vs.* HERBERT W. FAIRFIELD, et al.

Kennebec. Opinion June 19, 1905.

Augusta Municipal Court. False Imprisonment. Immunity of Judges, Magistrates, Officers and Complainants in Criminal Proceedings. Jurisdiction of Judges and Magistrates in Criminal Proceedings. When Judges, Officers and Complainants will be Protected.—City Ordinances. Pleading. Practice. Waiver. R. S. 1903, c. 4, § 93, Par. IX.

The plaintiff had been arrested upon two occasions, brought before the Augusta Municipal Court, tried, convicted, sentenced to pay a fine in each case and committed to jail in default of such payment, upon warrants issued by that court. The offense alleged in the complaint and warrant in each case was the violation of an ordinance of the city of Augusta regulating public carriages therein, and prohibiting all persons from driving such a carriage in the city of Augusta without a license therefor, under a penalty therein provided. In these two cases, reported and argued together, the plaintiff sues the judge of the municipal court who issued the warrants, the officer who served them and the persons who made the two complaints, for false imprisonment, upon the ground that the ordinance had never gone into effect, and was void, because it had never been published in some newspaper printed in Augusta, as required by the statute authorizing such ordinances. Assuming that the ordinance never became effective because of this failure to publish it, the question presented by the two cases is, whether the judge who issued the warrants, the officer who served them, and the persons who made the complaints upon which they were issued, or either of them, are liable in damages to the plaintiff for this alleged false imprisonment.

As to the liability of the defendants who made the original complaints upon which the warrants were issued: Where a person does no more than to prefer a complaint to a magistrate, in a matter over which the latter has a general jurisdiction, he is not liable in trespass for false imprisonment for the acts done under the warrant which the magistrate thereupon issues, even though the magistrate has no jurisdiction over the particular complaint. In order for a complainant to be liable in this form of action, whether his motives were malicious or not, he must do something more than merely to make such a complaint before a magistrate having jurisdiction of the party and over the general subject matter, by interfering and instigating the officer to enforce the warrant. If he takes upon himself

to direct or aid in the service of a bad warrant, or interposes and sets the officer to do execution, he must take care to find a record that will support the process, or he cannot set up and maintain his justification.

In these cases, neither of these complainants aided or in any way participated in the arrest of the plaintiff upon the warrants or in his commitment to jail. They took no part in the plaintiff's arrest or commitment, nor did they officiously interfere therewith by giving directions to the officer, or otherwise. They are consequently not liable in damages to the plaintiff in these actions.

As to the liability of the officer: For reasons founded on public policy, and in order to secure a prompt and effective service of legal process, the law protects its officers in the performance of their duties, if there is no defect or want of jurisdiction apparent on the face of the writ or warrant under which they act.. The officer is not bound to look beyond his warrant. He is not to exercise his judgment touching the validity of the process in point of law; but if it is in due form, and is issued by a court or magistrate apparently having jurisdiction of the case or subject matter, he is to obey its commands. In such case he may justify under it, although in fact it may have been issued without authority, and therefore be wholly void.

The ministerial officer is bound to know the jurisdiction of the court which issues process to him, he is bound to know whether, from constitutional or other reasons, the court has jurisdiction over offenses of that nature, but he is not bound to inquire into the question of fact as to whether or not a city ordinance in relation to a subject matter, concerning which the city is by statute authorized to pass ordinances, has been published as required by the statute.

The warrants in these cases were issued by the judge of the municipal court of the city of Augusta, which court had general jurisdiction over the subject matter of the violation of city ordinances, by which we mean, the power to hear and determine cases of the general class to which the proceedings in question belongs. The city had power to pass such an ordinance as the one in question by express authority of the statute. This ordinance was duly passed by the city government and only claimed to be invalid or ineffective because it was never published in a newspaper as required by the statute. The warrants contained nothing upon their face to indicate that the court which issued them, and which had general jurisdiction over the subject matter, did not have jurisdiction over the particular offense alleged, or that the facts stated in the complaints did not constitute an offense because of this failure to comply with the preliminary requisite as to publication. Under these circumstances, the officer is not liable in damages in these actions.

As to the liability of the judge who issued the warrants, and before whom the plaintiff was tried and convicted: It is a well established rule that judges of courts of superior jurisdiction are not liable to civil actions for their judicial acts, even where such acts are in excess of their jurisdiction,

Whether this immunity from civil liability is equally applicable to a judge of an inferior court, or to a magistrate of limited jurisdiction, is a question about which the authorities are not in entire accord. This court favors the doctrine, towards which there is a strong tendency in more recent judicial opinions, that where a judge of an inferior court, or a magistrate, is invested by law with jurisdiction over the general subject matter of an alleged offense, that is, has the power to hear and determine cases of the general class to which the proceeding in question belongs, and decides, although erroneously, that he has jurisdiction over the particular offense of which complaint is made to him, or that the facts charged in the complaint constitute an offense, and acts accordingly, in entire good faith, such erroneous decision is a judicial one for which he should not be, and is not liable in damages to a party who has been thereby injured. In accordance with this doctrine, and under the facts already stated, this defendant, the judge, is not liable in damages to the plaintiff.

Where a case comes to the Law Court upon a report of the evidence, the necessity for a compliance with the rules of pleading must be considered as waived and the Law Court will consider the questions presented by the report.

EMERY, J., DISSENTING.

On report. Judgment for defendants.

Two actions for false imprisonment heard together. Each writ dated Jan. 15, 1904. Plea, in each case, the general issue. After all the evidence had been taken out in the court of the first instance, it was agreed that the same should be reported to the Law Court, and that "upon so much thereof as is legally admissible the Court to render such judgment in each case as the law and evidence require."

The defendants are *Daniel C. Buckley*, *Herbert W. Fairfield*, *Albert G. Andrews*, Judge of the Municipal Court of the City of Augusta, and *Henry N. Breen*, City Marshal of said City.

Said defendants, Buckley and Fairfield, had each made a complaint against the plaintiff for violation of an ordinance of the City of Augusta regulating public carriages therein, and which prohibits all persons from driving such a carriage in said city without a license therefor, under a penalty therein provided. On these complaints, warrants for the arrest of the plaintiff were duly issued by said Judge, and the plaintiff was arrested on said warrants by said City Marshal and brought before said Judge for trial, who found the plaintiff guilty as charged in said complaints and fined the plaintiff

ten dollars in each case. A mittimus was issued in each case and by virtue thereof the plaintiff was committed to jail where he remained for four hours and was then released on bail. The plaintiff then brought these two actions for false imprisonment upon the ground that the aforesaid ordinance had never gone into effect and was void, because it had never been published in some newspaper printed in Augusta as required by Revised Statutes, chapter 4, section 93, paragraph IX.

All the material facts are fully stated in the opinion.

Williamson & Burleigh, for plaintiff.

E. M. Thompson, for defendants.

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

WISWELL, C. J. The plaintiff had been arrested upon two occasions, brought before the Augusta Municipal Court, tried, convicted, sentenced to pay a fine in each case and committed to jail in default of such payment, upon warrants issued by that court. The offense alleged in the complaint and warrant in each case was the violation of an ordinance of the City of Augusta regulating public carriages therein, and which prohibited all persons from driving such a carriage in the City of Augusta without a license therefor, under a penalty therein provided. In these two cases, reported and argued together, the plaintiff sues the judge of the municipal court who issued the warrants, the officer who served them and the persons who made the two complaints, for false imprisonment, upon the ground that the ordinance had never gone into effect, and was void, because it never had been published in some newspaper printed in Augusta as required by the statute authorizing such ordinances. R. S., c. 4, sec. 93, paragraph IX.

Assuming that the ordinance never became effective because of this failure to publish it, the question presented by the two cases is, whether the judge who issued the warrants, the officer who served them, and the persons who made the complaints upon which they were issued, or either of them, are liable in damages to the

plaintiff for this alleged false imprisonment. The plaintiff makes the preliminary point that it is not open to the defendants to justify under these proceedings, since no such justification was set up in the pleadings, but where a case comes to the law court, as did this, upon a report of the evidence, the necessity for a compliance with the rules of pleading must be considered as waived, and we will therefore proceed to consider the questions presented by the report.

As to the liability of the defendants who made the original complaints upon which the warrants were issued: It is settled by an almost unbroken line of authorities, that where a person does no more than to prefer a complaint to a magistrate, in a matter over which the latter has a general jurisdiction, he is not liable in trespass for false imprisonment for the acts done under the warrant which the magistrate thereupon issues, even though the magistrate has no jurisdiction over the particular complaint. *Barker* v. *Stetson*, 7 Gray, 53; *Langford* v. *Boston & Albany R. R. Co.*, 144 Mass. 431; *Gifford* v. *Wiggins*, 50 Minn. 401, 52 N. W. 904; *Murphy* v. *Walters*, 34 Mich. 180; *Teal* v. *Fissel*, 28 Fed. R. 351. If the complaint is malicious, and without probable cause, the complainant would be answerable in another form of action, and it would be no defense that the facts stated to the magistrate, upon which the warrant was issued, did not constitute a criminal offense. *Finn* v. *Frink*, 84 Maine, 261. In order for a complainant to be liable in this form of action, whether his motives were malicious or not, he must do something more than merely to make complaint before a magistrate having jurisdiction of the party and over the general subject matter, by interfering and instigating the officer to enforce the warrant. "The rule is, that if a stranger voluntarily takes upon himself to direct or aid in the service of a bad warrant, or interposes and sets the officer to do execution, he must take care to find a record that will support the process, or he cannot set up and maintain his justification." *Emery* v. *Hapgood*, 7 Gray, 55.

There is no evidence in this case sufficient to take it out of the general rule as to the liability of the complainants. Neither of these complainants aided or in any way participated in the arrest of the plaintiff upon the warrants or in his commitment to jail after the

hearing in default of the payment of the fine imposed. They did not in any way take part in the plaintiff's arrest or commitment, nor did they officiously interfere therewith by giving directions to the officer, or otherwise. It is true, that one of the complainants, when asked by the judge, after the imposition of the fine, as to whether or not he wanted the sentence enforced, replied in the affirmative, but this was no such interference with the service of the warrant of arrest, or of commitment as should make him liable therefor, and amounted to no more than the making of the original complaint.

As to the liability of the officer: For reasons founded on public policy, and in order to secure a prompt and effective service of legal process, the law protects its officers in the performance of their duties, if there is no defect or want of jurisdiction apparent on the face of the writ or warrant under which they act. The officer is not bound to look beyond his warrant. He is not to exercise his judgment touching the validity of the process in point of law; but if it is in due form, and is issued by a court or magistrate apparently having jurisdiction of the case or subject matter, he is to obey its commands. In such case, he may justify under it although in fact it may have been issued without authority, and therefore be wholly void. *Emery* v. *Hapgood*, 7 Gray, 55. The theory of the law is to protect an officer in his acts of official duty so far as it reasonably can without injustice to others. The rule should be liberally interpreted in the officer's behalf. *Elsemore* v. *Longfellow*, 76 Maine, 128. Where the process is in due form and comes from a court of general jurisdiction over the subject matter, the officer is justified in acting according to its tenor, even if irregularities making the process voidable have previously occurred. *Tellefsen* v. *Fee*, 168 Mass. 188, wherein numerous cases are cited and considered. Where, however, the process is void on its face, or where the court or magistrate issuing the warrant has no general jurisdiction over the subject matter, the officer is not protected by his process.

We have had numerous illustrations of this latter rule in the reported decisions of this court, some of which may be referred to for the purpose of showing the ground upon which all of these decisions have been based. In *Warren* v. *Kelley*, 80 Maine, 512, the

process commanded the officer to seize a vessel for the purpose of enforcing a lien created by a state statute for repairs upon a vessel. The statute authorizing the enforcement of such a lien by a proceeding in the state court was unconstitutional. The court had no jurisdiction over the subject matter, which, by the constitution of the United States, was vested in the federal courts. It was therefore held by this court that the officer was not protected by the process, because the process was absolutely void inasmuch as the state court had no jurisdiction over the subject matter, and, "sufficient appeared upon its face (the process) to show that it was not from a court of competent jurisdiction in reference to the subject matter."

In *Stilphen* v. *Ulmer*, 88 Maine, 211, the plaintiff resided and was arrested in Kennebec County upon a warrant issued by a trial justice of Knox County for violating the fish and game laws in Lincoln County; the trial justice clearly had no jurisdiction over the subject matter of the offense, or over the offender, and these facts were apparent upon the face of the warrant, so that the officer who served the process was not protected by it. In *Brown* v. *Howard*, 86 Maine, 342, the writ under which the officer justified, in an action of trover against him, was void, and the defect was apparent upon the face of the writ and disclosed to the officer a want of jurisdiction. It was therefore held that it afforded him no protection. In *Elsemore* v. *Longfellow*, 76 Maine, 128, where the court said: "The officer is protected unless the process is void, and unless he can see from the face of the process itself that it is void," the court held that the absolute want of jurisdiction in the magistrate was apparent upon the face of the papers and therefore afforded no protection to the officer who justified thereunder. In *Jacques* v. *Parks*, 96 Maine, 268, the tax warrant upon which the officer arrested the plaintiff was "upon its face invalid and void." It was therefore held to afford the officer no protection.

It is apparent that in all of these decisions of our own court, some of which are cited and relied upon by counsel for the plaintiff, the officer was held liable because of the fact that the process under which he attempted to justify was void upon its face, or because the court or magistrate by whom the process was issued had no jurisdiction

over the subject matter, and the process itself clearly showed the want of jurisdiction. None of these cases are authority for the proposition that a warrant, fair upon its face, which discloses no defect or want of jurisdiction, and which was in fact issued by a court having general jurisdiction of offenses of like nature, does not afford protection to the officer. Upon the other hand, the doctrine that an officer is protected under such circumstances is abundantly supported by the authorities.

In *Nowell* v. *Tripp*, 61 Maine, 426, wherein this court held that a collector of taxes was protected by the warrant delivered to him by the assessors, in arresting the plaintiff who had removed to and become a citizen of another town, the court quotes with approval the following language from *Erskine* v. *Hohnbach*, 14 Wall. 613: "Whatever may have been the conflict at one time in the adjudged cases, as to the extent of protection afforded to ministerial officers acting in obedience to process, or orders issued to them by tribunals or officers invested by law with authority to pass upon and determine particular facts, and render judgment thereon, it is well settled now, that if the officer or tribunal possesses jurisdiction over the subject matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any prosecution which the party aggrieved thereby may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued."

The case of *Hofschulte* v. *Doe*, 78 Fed. R. 436, is very much in point and contains a full discussion of this question. It was there decided that when a court which, though of inferior and local jurisdiction, has general jurisdiction with respect to the violation of the ordinances of the town, entertains a complaint under such an ordinance, and thereupon issues process, fair on its face, to an officer, the process is a justification to the officer in doing the acts thereby

required, notwithstanding the ordinance under which the court acts is invalid, and that no action lies against an officer for the acts done by him pursuant to such process.

In accordance with these general principles it is clear that the officer who served these warrants upon the plaintiff is not liable in damages to him, even if the ordinance upon which the complaints and warrants were based had never gone into effect for the reason before stated. The warrants were issued by the judge of the municipal court of the city of Augusta, which court had general jurisdiction over the subject matter of the violation of city ordinances. When we speak of a court as having jurisdiction over the subject matter, we mean, as said in *State* v. *Neville*, 110 Mo. 345, 19 S. W. 491, "the power to hear and determine cases of the general class to which the proceeding in question belongs." The complaints were for the violation of a city ordinance in regard to the regulation of public carriages. The city had power to pass such an ordinance, express authority therefor being given by the statute R. S., c. 4, sec. 93, paragraph 9. This ordinance was duly passed by the city government, and only claimed to be invalid or ineffective because it was never published in some newspaper printed in the city as required by the statute referred to. The warrants contained nothing upon their face to indicate that the court which issued them, and which had general jurisdiction over the subject matter, did not have jurisdiction over this particular offense, or that the facts stated in the complaint did not constitute an offense because of this failure to comply with the preliminary requisite as to publication. If it were necessary for an officer, before serving a warrant issued by such a court, having general jurisdiction of offenses of this nature, and over the alleged offender, to first make inquiries as to whether all of the necessary preliminaries necessary to make a city ordinance effective had been complied with, it would cause intolerable delay and very seriously interfere with the efficient administration of the criminal laws. The ministerial officer is bound to know the jurisdiction of the court which issues process to him, he is bound to know whether, from constitutional or other reasons, the court has jurisdiction over offenses of that nature, but he is not bound to inquire into the question of fact

as to whether or not a city ordinance in relation to a subject matter, concerning which the city is by statute authorized to pass ordinances, has been published as required by the statute.

We finally come to a consideration of the question as to whether, under the circumstances which have already been stated, the judge of the municipal court is liable in damages to the plaintiff for any of the acts done by him. The rule is well established that judges of courts of superior jurisdiction are not liable to civil actions for their judicial acts, even where such acts are in excess of their jurisdiction. As to whether this immunity from civil liability is equally applicable to a judge of an inferior court, or to a magistrate of limited jurisdiction, is a question about which the authorities are not in entire accord. We favor the doctrine, towards which, we think, there is a strong tendency in more recent judicial opinion, that where a judge of an inferior court, or a magistrate, is invested by law with jurisdiction over the general subject matter of an alleged offense, that is, has the power to hear and determine cases of the general class to which the proceeding in question belongs, and decides, although erroneously, that he has jurisdiction over the particular offense of which complaint is made to him, or that the facts charged in the complaint, constitute an offense, and acts accordingly in entire good faith, such erroneous decision is a judicial one for which he should not be, and is not, liable in damages to a party who has been thereby injured. We can perceive of no good reason why the judge of general local, but inferior, jurisdiction should not be as fully protected against the consequences of his erroneous judicial decision, concerning a matter within the limits of his general jurisdiction over offenses of the same general nature, as should judges of superior courts for their judicial mistakes.

In the application of this doctrine, the distinction must be observed between mere excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. This distinction was very clearly pointed out in the case of *Bradley* v. *Fisher*, 13 Wall. 335, a leading case upon the question of judicial liability. In illustration of this distinction, the court in that case said: "Thus, if a probate court, invested only with authority over wills and the settlement of

estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by law made an offense, and proceed to the arrest and trial of a party charged with such acts, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject matter is invoked. Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle for exemption from liability which obtains for errors committed in the ordinary prosecution of a suit, where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons." The particular appropriateness of this language above quoted to this case is apparent.

Numerous well considered decisions of courts of high authority may be cited in support of the doctrine which we have already stated. In *Brooks* v. *Mangan*, 86 Mich. 576, 24 Am. St. R. 137, it was held that a justice of the peace, who acted in good faith, and who had jurisdiction of the person and of the subject matter, was not civilly liable in damages to the person injured for holding an unconstitutional ordinance valid and enforcing it by imprisoning the person charged with the violation of it. In that case it is said: "The constitution guarantees no man immunity from arrest. It guarantees him a fair and impartial trial. It has provided him with appellate courts, to which he may resort for the correction of errors committed by the inferior courts. With this he must be content. These

inferior tribunals should be left to the exercise of their honest judgment, and when they have so exercised it, they are exempt from civil liability for errors. This is the only rule which can secure a proper administration of our criminal laws. The interests of the individual must in such case yield to the interests of the public."

In *Robertson* v. *Parker*, 99 Wis. 652, 67 Am. St. R. 889, it was held that where a judge of limited or inferior jurisdiction secures jurisdiction of a person or cause, but in the progress of his investigation or proceeding decides that he has greater powers than he actually possessed, and therefore pronounces a judgment or sentence in excess of his powers and void, he is not personally answerable to a person subjected to imprisonment under such judgment. In *Grove* v. *Van Duyn*, 44 N. J. L. 654, where this question is considerably discussed, the court said in its opinion: "The assertion, I think, may be safely made, that the great weight of judicial opinion is in opposition to the theory that if a judge, as a matter of law and fact, has not jurisdiction over the particular case, thereby, in all cases, he incurs a liability to be sued by any one injuriously affected by his assumption of cognizance over it. The doctrine that an officer, having general powers of adjudication, must at his peril pass upon the question, which is often one difficult of solution, whether the facts before him place the given case under his cognizance, is as unreasonable as it is impolitic." And again: "Where the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a judicial one, and such officer is not liable in a suit to the person affected by his decision, whether such decision be right or wrong, but when no facts are present, or only such facts as have neither legal value nor color of legal value in the affairs, then in that event, for the magistrate to take jurisdiction is not in any manner the performance of a judicial act, but simply the commission of an official wrong. This criterion seems a reasonable one, it protects a judge against the consequences of every error of judgment, but it leaves him answerable for the commission of wrong that is practically wilful. Such protection is necessary to the independence and usefulness of the judicial officer and such responsibility is important to guard the citizen against official oppression."

In *Calhoun* v. *Little*, 106 Ga. 336, 71 Am. St. R. 254, the court held that a judicial officer of an inferior court was not liable in a civil action to the plaintiff for inflicting a punishment upon him under a void ordinance. In that case the court discusses the question of the distinction between the immunity of a judge of a superior and of an inferior court, and, after citing many cases herein referred to, as well as others, lays down this rule: "But all judicial officers stand upon the same footing and must be governed by the same rules. It follows from what has been said that, where the court has jurisdiction of the subject matter of the offense and the presiding officer erroneously decides that the court has jurisdiction of the person committing it, or commits an act in excess of his jurisdiction, he will not be liable in a civil action for damages."

In *Henke* v. *McCord*, 55 Iowa, 378, it was decided that a justice of the peace who enforces an ordinance which is void for want of power in the city to enact it, cannot be held liable therefor in a civil action for damages. In *Thompson* v. *Jackson*, 93 Iowa, 376, it was decided that a justice of the peace, like judges of the superior courts, is protected from personal liability for judicial acts in excess of his jurisdiction, if he acted in good faith believing that he had jurisdiction. The court there said: "The current of legal thought is that the distinction (between judges of superior and of inferior courts) is unreasonable, unjust, illogical, and ought not to obtain." In *Bell* v. *McKinney*, 63 Miss. 187, it was held that where a magistrate had authority to require a person brought before him to give bail for his appearance at a superior court, but, under an erroneous judgment as to the extent of his authority, and in good faith, tried such person, and, upon his conviction, sentenced him to pay a fine or be imprisoned, the magistrate was held not liable in damages to the person aggrieved.

We are aware of some decisions wherein a different conclusion has been reached, of which, perhaps, *Piper* v. *Pearson*, 2 Gray, 120, (68 Mass. 120) may be a leading case, but we prefer the more liberal doctrine already stated, which is so abundantly supported by the authorities already referred to, as well as by others. The facts already stated bring the case of the judge who acted upon the original

complaints entirely within this doctrine of immunity from civil liability for judicial errors. He was the judge of the Augusta Municipal Court, a court of record, having original jurisdiction over all offenses of this character, the violation of city ordinances, within the limits of his territorial jurisdiction.

His court had jurisdiction over the general subject matter, as we have already defined that expression, and as it is defined in *Hunt* v. *Hunt*, 72 N. Y. 217. As we have already seen, the city had express statutory authority to pass such an ordinance, and it had been duly passed by the city council and published among the ordinances of the city, although not published, as required by statute before taking effect, in a newspaper. The judge had every reason to believe that all of the preliminaries required by statute had been complied with and had no knowledge or reason to suppose that this particular ordinance had not been published in a newspaper as required. There is no suggestion that he did not act in entire good faith in the premises. He therefore, should not be held liable in damages to the plaintiff, whose rights were fully protected by the opportunity to appeal from an erroneous decision to an appellate court where the error might be corrected.

Suppose this objection to the validity of the ordinance had been raised at the hearing and the judge had then decided, although erroneously, that the ordinance, as a matter of fact had been published as the statute required, it would hardly be claimed that he was liable because of this erroneous decision upon the question of fact. Or suppose, the point being made, he had decided as a matter of law still erroneously perhaps, that the statute was merely directory and that the ordinance was valid and effective notwithstanding the fact that it never had been published in a newspaper, it could then hardly be claimed that he was liable in damages to a party aggrieved for his erroneous judicial decision of a question that arose and had to be passed upon by him in his judicial capacity during the course of the proceedings. He is no more liable in our opinion because of the fact that he had no knowledge of this failure as to one of the preliminary requisites and because the point was not made at the hearing before him.

For these reasons, none of these defendants are liable, and the entry will be,

Judgment for defendants.

DISSENTING OPINION.

EMERY, J. I think the majority opinion holds doctrines impairing the right of personal liberty and subversive of long established rules of law of this state. I wish to leave upon record my regret and dissent.

I. That under the law of this state an inferior court of limited jurisdiction has authority to issue a warrant for arrest upon a complaint which charges only an innocent act, one not in violation of any existing law:—

I pass over the cases cited in the opinion upon the subject of jurisdiction of courts generally, for the reason that I think they will be found upon examination (notably the case of *Bradley* v. *Fisher*, 13 Wall. 335, cited as the leading case) to relate mainly, if not wholly, to superior courts of general jurisdiction, which are presumed to have jurisdiction until the want of it affirmatively appears. The Augusta Municipal Court, however, is an inferior court of limited jurisdiction, which is presumed not to have jurisdiction until it affirmatively appears that jurisdiction has been expressly conferred. *Hersom's Case*, 39 Maine, 476; *Gurney* v. *Tufts*, 37 Maine, 130; *Thurston* v *Adams*, 41 Maine, 419, 423; *Wills* v. *Whittier*, 45 Maine, 544; *Inman* v. *Whiting*, 70 Maine, 445. It has jurisdiction expressly conferred by statute to entertain complaints "charging a person with the commission of an offense," R. S., ch. 133, sec. 6; but I find no statute nor other authority conferring upon it jurisdiction to entertain a complaint only charging an act which is not an "offense."

A complaint was made to this inferior court charging the plaintiff with nothing but driving a public carriage for hire in the streets of Augusta without having a license therefor from the municipal officers of Augusta. It is said in the opinion that the complaint was for

a violation of a city ordinance of Augusta, yet it is conceded in the opinion there was in force no ordinance nor other law requiring such a license. True, the city government began the ordaining such an ordinance but failed to complete it, to give it life. It was left a mere simulacrum, without life or force. There was in force no city ordinance nor other law to be violated by the act charged, and hence the complaint was not, and could not be, for violation of a city ordinance or other law. The complaint did not charge the plaintiff "with the commission of an offense," either against statute or ordinance. On the contrary, the act charged was, as to the law, an entirely innocent one, as much so as drinking pure water or breathing pure air. Therefore, in holding that the Municipal Court had jurisdiction of this complaint the opinion holds in effect, if not in terms, that an inferior court of limited jurisdiction has authority to issue a warrant for arrest upon a complaint charging only an innocent act, one not in violation of any existing law.

The logical result of this doctrine is that in this free state any person is legally subject to arrest and trial (and to imprisonment in jail if too poor to furnish the bail required) upon no other charge than drinking pure water or breathing pure air. This reductio ad absurdum alone should show the unsoundness of the doctrine. The test of the soundness of a legal doctrine is not what would be done, but what could be done under it.

I understand the argument of the opinion to be that even an inferior court or magistrate must necessarily decide whether the act charged in the complaint made to him is one forbidden by law, and hence if he decides that it is, that decision is a judicial one which should be held valid until reversed on appeal or writ of error. Even if that be the law as to superior courts of general jurisdiction, I submit it is not the law as to inferior courts of limited jurisdiction like the Augusta Municipal Court. It is axiomatic that no inferior court can acquire jurisdiction, or the semblance of jurisdiction, by deciding that it has jurisdiction. *Gurney* v. *Tufts*, 37 Maine, 130, (at p. 134); *Gregory* v. *Gregory*, 78 Maine, 187. If it be the law, then however evident that no offense is charged, that the act charged is not punishable but innocent,— the accused can have no relief upon

habeas corpus but must remain in custody and perhaps in jail for months and perhaps years until the judgment of the appellate court is rendered. It is common learning that the writ of habeas corpus cannot be used as a writ of error or appeal.

Can there be any doubt, however, that this plaintiff would have been entitled to an immediate, unconditional discharge upon habeas corpus, had he invoked that writ? As long ago as Bacon's Abridgment it was declared: "If the commitment be against law as being made by one who had no jurisdiction of the cause, or *for a matter for which by law no man ought to be punished*, the court are to discharge." Bac. Ab. Hab. Corp; B. 10 (quoted from *Ex parte Parks*, 93 U. S. 22). In *Ex parte Tong*, 108 U. S. 556, the court said: "The judicial proceeding under it (habeas corpus) is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act." In *Ex parte Siebold*, 100 U. S. 377, the court said: "Personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on habeas corpus." In *Ex parte Yarbrough*, 110 U. S. 651, at page 654, the court said: "If the law which defines the offense and prescribes its punishment is void, the court was without jurisdiction and the prisoners must be discharged." In *Ex parte Coy*, 127 U. S. 731, at page 758, the court said: "The validity of the statute under which a prisoner is held in custody may be inquired into under a writ of habeas corpus as affecting the jurisdiction of the court which ordered his imprisonment." These declarations of the law by the Supreme Court of the United States seem peculiarly applicable to this case.

The logical result of the authorities is stated by Spelling as follows: "Since no court has jurisdiction to punish a party who has violated no law, however reprehensible his conduct from a moral standpoint, it necessarily follows that one convicted or held under color of judicial authority for violating an unconstitutional statute or a void municipal ordinance is entitled to an unconditional discharge on habeas corpus." Spelling on Ex. Relief, sec. 1205. A great

number of cases in support of the above may be found cited in Spelling, sec. 1205, and in Church on Habeas Corpus, sec. 83.

This court, also, has hitherto been emphatic in asserting the right of personal liberty against arrest for what is not an offense. In *Gurney* v. *Tufts*, 37 Maine, 130, at p. 133, the court said: "If the magistrate issues precepts, or orders arrests for acts not known to law as offenses . . . he can, when thus transcending the bounds of his authority, afford no more protection to an officer than could one not a magistrate." In *State* v. *Learned*, 47 Maine, 431, the court declared that the legislature could not confer authority to thus abridge the constitutional right of personal liberty. It said (p. 433) "What we do decide is, that the legislature cannot dispense with the requirement of a distinct representation of an offense against the law. It cannot compel an accused person to answer to a complaint which contains no charge, either general or particular, of any offense." See also *Hersom's Case*, 39 Maine, 476, where this rule was applied.

Prior to the majority opinion in this case, it was to me unthinkable that any Justice could have refused to discharge this plaintiff upon habeas corpus. Even now I hope, and indeed believe, the Justices will disavow this doctrine of the opinion when confronted with a demand for his liberty by one arrested for an innocent act, or even under a supposed statute or ordinance having in fact no force.

II. That under the law of this state an inferior magistrate of limited jurisdiction is not liable in trespass for ordering an arrest of the person when he had no jurisdiction or authority to do so:—

I will not follow the majority opinion in its inquiry as to the law of other states, although the law is laid down in that standard law book of recognized authority, Cooley on Torts, as follows: "It is universally conceded that when inferior courts and judicial officers act without jurisdiction, the law can give them no protection whatever." (p. 489). Nor will I delay to discuss the reason of either rule. Whatever the rule in other states and whatever the reasons pro and con, I submit that it has hitherto been the accepted, unquestioned law of this state that an inferior magistrate is liable in trespass for ordering an arrest without jurisdiction, or in excess of jurisdiction. The case *Piper* v. *Pearson*, 2 Gray, 120, now condemned in the majority

opinion, has been repeatedly cited by this court with approval in support of this rule, (in 41 Maine, 419, 64 Maine, 321, 66 Maine, 350, and perhaps in other cases). The doctrine of that case was explicitly and vigorously affirmed as the settled law of this state in *Waterville* v. *Barton*, 64 Maine, 321, where the court said: "We start with the well settled rule that inferior courts of limited jurisdiction are responsible in trespass to those whom their acts affect, when they act without or in excess of their jurisdiction, and not otherwise." This rule has been made the rule of decision in the following cases, in each of which the official ordering the arrest or seizure believed and decided that he had jurisdiction to make the order and yet was held liable in trespass because in law and fact he did not have jurisdiction. *Mosher* v. *Robie*, 11 Maine, 135; *Spencer* v. *Perry*, 17 Maine, 413; *Herriman* v. *Stowers*, 43 Maine, 497; *Wills* v. *Whittier*, 45 Maine, 544; *Waterville* v. *Barton*, 64 Maine, 321; *Call* v. *Pike*, 66 Maine, 350. See also *Thurston* v. *Adams*, 41 Maine, 419. I find no case to the contrary.

Whatever may be said of a rule of law declared by a single decision only, it becomes settled beyond discussion when iterated by repeated decisions. *Wright* v. *Sill*, 67 U. S. (2 Black), 544. "We will not enter into an inquiry as to the reasons upon which it (a rule) is founded, with the purpose of vindicating its correctness. It has stood unquestioned for more than fifteen years, and doubtless has been often followed by nisi prius courts, and esteemed by the profession as a part of the body of the laws of the state. Stability in the laws is of the first importance to the people and to the courts," *Davidson* v. *Briggs*, 61 Iowa, 309.

The rule for this state has been settled by repeated decisions without dissent, and has stood as a part of the law of the state for three-fourths of a century. What rule of law in this state is more firmly or longer established? For the court now, without any change in circumstances or conditions, to disregard the rule because the present Justices do not like it or because some courts in other states do not regard it as the law of those states, seems to me a disobedience to the law of this state by its appointed conservators, and a fruitful cause of uncertainty where certainty is essential. "Stability in the laws

is of the first importance to the people and the courts." With an unstable court, however pure its Justices, the government is after all one of men and not of laws.

III. As to the officer serving the warrant:—He was bound to know what was law and what was not law, as much so as a private citizen. The difficulty of knowing the law no more excuses him than it excuses the private citizen. Being bound to know the law, however difficult the task, he could and should have known from the inspection of the warrant that the act charged was an innocent one, not in violation of any law, and hence did not authorize an arrest.

In *Elsemore* v. *Longfellow*, 76 Maine, 128, the officer was held liable because no statutory cause for arrest was alleged in the precept. In *Warren* v. *Kelley*, 80 Maine, 512, the officer was held liable because the supposed statute authorizing the seizure had no force, being unconstitutional. In the case at bar no statutory or other legal cause for arrest was alleged or appeared in the precept; the supposed ordinance supposed to authorize it admittedly had no force. The officer having been held liable in the cases cited for the reason therein given, I do not see why he should not be held liable in this case for the same reason. Despite the able argument in the opinion, I think it remains unrefuted and irrefutable that a lifeless ordinance and a lifeless statute are equally without force whatever the cause, and that the one can afford no more protection than the other.

THOMAS M. NICHOLSON

vs.

MAINE CENTRAL RAILROAD COMPANY.

Hancock. Opinion June 23, 1905.

Writ of Entry. Special Verdict. Same set aside for Indefiniteness.

1. A writ of entry to obtain possession of certain parcels of land included within the bounds of which was a strip of land six rods in width that was, in 1873, legally laid out by the Bucksport and Bangor Railroad Co., for a railroad location for all railroad purposes. In 1883 the Maine Central Railroad Company, the defendant, by proper mesne conveyances, succeeded to all the rights and privileges of said B. & B. Railroad Company, and have ever since been in the possession and exercise thereof.
2. The land described in the plaintiff's writ also covered a strip of land two rods in width to which the defendant claimed title by prescription. A disclaimer was filed as to all the rest of the premises described in the plaintiff's writ.
3. The defendant conceded the title in fee of the premises described in the plaintiff's writ to be in the plaintiff, but claimed that they are subject to an easement, in the defendant, both in the six rod strip and the two rod strip.
4. The plaintiff did not deny the legal existence in the beginning, of an easement in the six rod strip for a railroad location in the defendant's predecessor, but asserted that that part of the location which fell within the premises described in his writ was abandoned before the date of this action. As to the two rod strip, claimed by the defendant by prescription, the plaintiff made no concession.
5. The real issue in the case was whether the easements claimed by the defendant were abandoned in whole or in part. If not the defendant was entitled, by some form of verdict, to the enjoyment of them.
6. Upon this phase of the case the following question was submitted to the jury, and a special verdict was rendered thereon, to wit: "Is the plaintiff's title to and right to the possession of the demanded premises, subject to an easement belonging to the defendant to use any portion of the demanded premises for its railroad purposes?" Answer. "Yes."
7. The plaintiff moved to set aside this special verdict because it did not determine the rights of the parties. The fact asserted in this reason is true. The verdict does not determine the rights of the parties. It does

not determine what part of the demanded premises is subject to the easement to which the verdict finds the defendant entitled. It gives neither the length, the breath nor the location of the part so subject. But the special verdict is the only one that could settle the rights of the parties. The plaintiff was entitled to the general verdict, whether an easement existed or not. It was the extent of the easement, if one was found to exist, that was desired. If the question put to the jury had been answered "no" that, with the general verdict, would have settled all of the issues raised. Being answered "yes," it left the only question in issue so indefinite and uncertain that a judgment rendered upon the verdict could not be pleaded in bar to protect any part of the easement claimed under it, as no particular spot on the face of the earth could be pointed out as the place which the verdict was intended to cover.

8. This is not one of those cases in which through some irregularity a verdict may be set aside. This verdict was perfectly regular. Its form was submitted to and approved by counsel on both sides. Its only defect is its indefiniteness. It does not cover all the issues involved in the case and to this extent is defective. There seems to be no good reason why such a verdict should stand, unless to reverse it violates some rule of law. There is no statute nor decision in this state that forbids setting it aside, but on the other hand there are several decisions of other courts that warrant it. The doctrine seems to be established and universally held, wherever the question has arisen, that a verdict which will not support a judgment cannot stand.

9. A special verdict must find every material fact involved in the litigation, and should be of such a nature that nothing remains for the court but to draw from such facts the proper conclusions of law.

10. *Held:* That the special verdict in this case must be set aside for indefiniteness.

MR. JUSTICE EMERY being disqualified by reason of interest did not sit.

On motion by plaintiff. Sustained.

Real action to obtain possession of certain parcels of land situate in Bucksport in the County of Hancock, included within the bounds of which was a strip of land that in 1873 was legally laid out for a railroad location for all railroad purposes. Also the land described in the writ covered a strip of land two rods in width to which the defendant claimed title by prescription. A disclaimer was filed as to all the rest of the premises described in the plaintiff's writ. The defendant conceded the title in the fee of the premises described in the writ to be in the plaintiff, but claimed that the premises are subject to an easement in the defendant both in the six rod strip and the

two rod strip. At the trial of this action, the jury returned a general verdict "that the defendant did disseize in manner and form as the plaintiff has declared against it." Also the following question was submitted to the jury:—"Is the plaintiff's title to and right to the possession of the demanded premises subject to an easement belonging to the defendant to use any portion of the demanded premises for its railroad purposes?" This question was answered "yes." Thereupon the plaintiff filed a motion to have this special verdict set aside for the following reasons: "1st. Because the special verdict is against law. 2d. Because the special verdict is against evidence. 3d. Because the special verdict is against the weight of evidence. 4th. Because said special verdict does not determine the rights of the parties."

All the material facts sufficiently appear in the opinion.

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

Charles F. Woodard, for defendant.

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

SPEAR, J. A writ of entry to obtain possession of certain parcels of land included within the bounds of which, was a strip of land six rods in width, that was in 1873, legally laid out, by the Bucksport and Bangor Railroad Company, for a railroad location, for all railroad purposes. In 1883 the Maine Central Railroad Company, the defendant, by proper mesne conveyances, succeeded to all the rights and privileges of said B. & B. Railroad Company, and have ever since been in the possession and exercise thereof.

The land described in the plaintiff's writ also covered a strip of land two rods in width to which the defendant claimed title by prescription. A disclaimer was filed as to all the rest of the premises described in the plaintiff's writ. A more particular description of the locus in controversy is not now required in view of the question involved.

The defendant concedes the title in fee of the premises described in the plaintiff's writ to be in the plaintiff, but claims that they are subject to an easement, in the defendant, both in the six rod strip and the two rod strip.

The plaintiff does not deny the legal existence, in the beginning, of an easement in the six rod strip for a railroad location in the defendant's predecessor, but asserts that that part of the location which fell within the premises described in his writ was abandoned before the date of this action. As to the two rod strip, claimed by the defendant by prescription, the plaintiff made no concession.

The real issue in the case was whether the easements claimed by the defendant were abandoned in whole or in part. If not the defendant was entitled, by some form of verdict, to the enjoyment of them. But whether the defendant was entitled to the enjoyment of the easements which are claimed, or not, the plaintiff's right to a verdict in his favor upon the main question of disseizin, was not in the least affected. "The fee in the land is to be regarded as distinct from an easement in the same. The fee may be in one and the easement in another. The demandant having the fee is entitled to recover, notwithstanding the tenant may have an easement in the passageway for the use of the mill. The owner in fee of land may maintain a writ of entry to establish his title against the owner of a perpetual right to use it for a passageway." "It is no objection to a recovery in a real action that the tenant has an easement in the demanded premises." *Bank* v. *Morrison*, 88 Maine, 163. Exactly in point is *Ayer* v. *Phillips*, 69 Maine, 50. Therefore the general verdict that the defendant did disseize, is, in any phase of the case, a correct one.

As before stated the real issue was whether the defendant had abandoned the easement, which it once had by virtue of the original railroad location, or had obtained by prescription, if any, or whether it was still entitled to the use and enjoyment of a part or the whole of the easement thus acquired. Upon this phase of the case the following question was submitted to the jury and a special verdict was rendered thereon, to wit: "Is the plaintiff's title to and right to the possession of the demanded premises, subject to an easement belonging to the defendant to use any portion of the demanded premises for its railroad purposes?" Answer. "Yes." The plaintiff moves to set aside this special verdict because it is against the evidence, the law and the weight of evidence, and also because it does not determine the rights of the parties. A careful examination of the evidence

does not convince us that the jury so erred in this special finding as to warrant us in setting it aside as against the evidence, whatever our own views might be were we vested with jury powers.

This brings us to a consideration of the plaintiff's last reason why the verdict should be set aside, namely, that it does not determine the rights of the parties. The fact asserted in this reason must be admitted. The verdict does not determine the rights of the parties. It does not determine what part of the demanded premises is subject to the easement to which the verdict finds the defendant entitled. It gives neither the length, the breadth, nor the location of the part so subject. But the special verdict is the only one that could settle the rights of the parties. The plaintiff was entitled to the general verdict, whether an easement existed or not. It was the extent of the easement, if one was found to exist, that was desired. If the question put to the jury had been answered, "no," that, with the general verdict, would have settled all the issues raised. Being answered "yes," it left the only question in issue so indefinite and uncertain that a judgment, rendered upon the verdict, could not be pleaded in bar to protect any part of the easement claimed under it, as no particular spot on the face of the earth could be pointed out as the place which the verdict was intended to cover.

Should the verdict, which thus leaves the rights of the parties undetermined be allowed to stand? We find this to be a somewhat novel question. This is not one of the cases in which, through some irregularity the verdict may be set aside. This verdict was perfectly regular.

Its form was submitted to, and approved by, counsel on both sides. Its only defect is its indefiniteness. It does not cover all the issues involved in the case and to this extent is defective. There seems to be no good reason why such a verdict should stand unless, to reverse it, violates some rule of law. We find no statute nor decision in this state that forbids setting it aside, but on the other hand we find several decisions of other courts that warrant it. The doctrine seems to be established and universally held, wherever the question has arisen, that a verdict which will not support a judgment cannot stand.

"But nothing is better settled than that the verdict must find the very point in issue between the parties; or if it does not it will not support a judgment." 22 Ency. Pl. & Prac. 863, note 3. *Hall* v. *York*, 16 Texas, 18. "A special verdict must find every material fact involved in the litigation. The findings of the special verdict should be of such a nature that nothing remains for the court but to draw from such facts the proper conclusions of law. 22 Ency. Pl. & Prac. 981. "Where a special verdict is rendered in a civil action it must contain a finding of every material controverted fact necessary to support a judgment for the one party or the other." 22 Ency. Pl. & Prac. 984. "Where the special verdict is silent as to an essential fact necessary to judgment in favor of the party having the burden of proof, the adverse party may move for a new trial, or if the facts found warrant a judgment in his favor, for judgment on the verdict." 22 Ency. Pl. & Prac. 985, note. "Whether, then, we regard the verdict as a special one, not containing findings to support the judgment or as a general one rendered in pursuant of improper instructions, we reach the conclusion that the judgment of the court below must be reversed and cause remanded, with instructions to award a venire de novo." *Ward* v. *Cochran*, 150 U. S. 597.

"The general rule undoubtedly is, that the verdict must comprehend the whole issue or issues submitted to the jury in the particular cause; otherwise the judgment founded on it should be reversed." *Wood* v. *McGuire's Children*, 17 Ga. 361; 63 Am. Dec. 246. "Judgment is erroneous when predicated upon the finding of a jury sworn to try the issues joined between the parties, but instead of finding upon all the issues, they return a verdict, special in form and referring to but one issue. This is the head note in *Meighen* v. *Strong*, 6 Minn. 177; 80 Am. Dec. 441, and fairly states the point of the case. *Walker* v. *Dewing*, 8 Pick. 519, was one involving the scope of a special verdict which had been submitted to the jury by the court with the undoubted intention that it should cover all the questions in issue and form the basis of a judgment, but the court say, "no judgment can be rendered on this special verdict of the jury it being deficient in substance." The difficulty with this verdict was, that it did not show the identity of a will presented with the one to which the verdict

referred. At the end of the opinion the court add, "if the verdict is defective there can be no judgment." *Gerrish* v. *Train*, 3 Pick. 124, is a well considered case bearing upon the point here raised and holds "if the court are at a loss how to give judgment a repleader will be awarded on motion of either party." This same question was raised in *Brunswick* v. *McKean*, 4 Maine, 508, but the court held that the verdict in this case was consistent and in giving expression to their opinion use this language, "and a verdict if by fair intendment it may have a consistent construction is not to be set aside for uncertainties." A clear implication from this language is that on the contrary if a verdict is so uncertain that by a fair intendment of the language a judgment cannot be based upon it, it is to be set aside for uncertainty.

Courts are instituted for the purpose of finally settling legal controversies and determining forever litigated rights. The object of a trial in court upon an issue framed, is to so settle that issue that the judgment of the court based upon the finding thereof, can ever after be pleaded to show that the facts directly involved and material to the issue, have been fully and finally determined. This is the object of a trial, yet it is not always possible to attain such a result. But when it is perfectly apparent that the verdict, upon the issue presented, does not determine the rights of the parties, it seems clear that the case, if possible, should be put in such a position, that the parties, by means of the action already pending which has been brought for that express purpose, may be able to have all their rights decided, instead of being left in uncertainty, their litigation and expense of no avail, with the necessity still resting upon them of bringing another suit to accomplish the very end the one in being was instituted to secure.

"Of course it is difficult, if not impossible, to lay down any general rule as to certainty or definiteness which will serve as a ready test in any case which may arise. It has been held, however, that a verdict must be sufficiently certain to stand as a final decision of the special matters with which it deals. So a verdict which is so uncertain that it cannot be clearly ascertained therefrom whether the jury meant to find the issue is bad. And a verdict which is so uncertain

that no judgment can be rendered on it must, of course, be void." 22 Ency. Pl. & Prac. 880.

Note 2 under the above text, after announcing the rule stated, continues; "It is of the greatest importance that when a final judgment is rendered the record shall be definite and certain and show unequivocally what matters have been adjusted and that the decision shall be a finality in regard to the matters in issue."

"Where, therefore, a verdict was uncertain to such an extent that it would require the finding of another jury to ascertain the intention of the jury who found the first verdict, it was held that such a verdict must be set aside."

It may be said that the special verdict, not being pleadable in bar is no verdict at all; that it amounts to nothing in settling the rights of the parties; that the general verdict covered all the plaintiff sought to recover in his writ. But we do not so understand it. If the defendant had submitted to a default the plaintiff could have taken judgment upon the facts averred in his writ. But the defendant did not default. It filed pleadings which in effect confessed the plaintiff's right to seizin in fee of the premises described, but sought to avoid the effect of the seizin upon one definite portion of the premises, by setting up an easement therein by virtue of a legal railroad location, and upon another portion by a prescriptive use. These pleadings were joined by the plaintiff and the issue thereby framed upon which the case was tried. Was there an easement in either or both of the ways claimed, was the question.

It seems evident that the special verdict was of paramount importance in settling this question. There could have been no reason, whatever, for developing the testimony in the case upon this issue, unless a special verdict was to be required, inasmuch as the plaintiff, if he had admitted the easements, would be entitled to the general verdict just the same, as we have before seen. In fact the issue actually tried out in the case could be settled only by a special finding of the jury upon the facts material to that issue. If the jury had found that the defendant was entitled to the whole easement claimed, or to any definite part, such a finding would be carried into effect in the judgment of the court. *Bank* v. *Morrison*, supra.

It was also expressly held in *Ayer* v. *Phillips*, supra, in a case precisely like the one at bar, that "the right of the demandant to recover is unquestionable so far as relates to the land demanded; but she is not entitled to have judgment and execution that would exclude the Somerset Railroad Co., from complete possession and control of the premises for all purposes pertaining to the full exercise of its corporate franchises." The general verdict therefore does not and should not conclude the rights of the defendant in this case. The jury have found that it is entitled to some easement, to which the general verdict under the last cases cited, is subject, and by which the judgment upon such verdict should be modified to the extent of giving "possession and control" to the defendant of so much of the premises as relate to the use of the easement. A special verdict is conclusive of the facts found by it, and is so decided in *State* v. *Inhab. of Madison*, 59 Maine, 540. "The question was submitted to the jury and by a special verdict they have found that this easterly channel, at the time the charter was granted was and ever has been a part of Kennebec River. No motion to set aside this verdict has been filed. Therefore the verdict so far as it goes is conclusive." To say therefore, that the special verdict may be regarded as surplusage for indefiniteness when, if definite, it would have been valid, and would have fully settled the issue joined by the parties, and have materially modified the effect of the plaintiff's general verdict, is avoiding the only question submitted to the court for consideration and decision.

For the above reasons both verdicts are set aside and a new trial granted.

In Equity.

JOSEPH C. BROWN *vs.* AMOS F. GERALD et al.

Kennebec. Opinion June 29, 1905.

Corporations. Charter. Construction. Eminent Domain. Power. Public Exigency. Public Use. "Plant." Supply of Electricity. Quasi Public Corporation. Const. Mass., Chapter 1, Sect. 1, Art. IV. Const. of Maine, Art. 1, Sect. 1. Special Laws of 1899, c. 86. Special Laws 1903, c. 271.

Under its charter, a corporation was empowered to manufacture, generate, sell, distribute and supply electricity for lighting, heating, traction, manufacturing or mechanical purposes, in Benton and Albion, or for any or either of such purposes. It was authorized to build and maintain a dam or dams on the Sebasticook river in Benton; also to take, as for public uses, any water rights or land, and to flow any lands or other privileges, for the purpose of constructing and maintaining its dams, and the establishment of its plant, but not to flow any mill privilege upon which a dam was then built without the consent of the owners thereof. It was also empowered specifically to transmit electric power within said towns, for lease or sale, "in such manner as may be expedient," and subject to the general laws, to erect poles and wires for that purpose. The towns and the corporations were authorized to make contracts for public lighting. Prior to the bringing of this bill, the corporation had constructed a dam, erected a station, and was installing an electrical plant, to be connected with the water wheels. It had contracted to deliver to a manufacturing corporation in Winslow the entire electrical current or energy developed by water power on the dam for a period of ten years. The current was to be delivered by the electric company at a point in Benton near the Winslow line, where the other party was to take it and transmit it by lines of its own to its own mills in Winslow for use as power in manufacturing pulp and paper. By a supplemental agreement, the right was reserved by the electric company to take from the wires so much electricity as might be required to enable it to perform its duties as an electric light company. The proposed line of poles and wires from the electric station to the point of delivery of the current at the Winslow line was nearly six miles long. It did not follow the roads, but crossed twenty-four farms, including the plaintiff's. The company under its charter had by regular proceedings, taken a strip of the plaintiff's land for the purpose of erecting thereon its line of poles and wires. On a bill brought to enjoin the company and its agents and servants from erecting such poles and wires on plaintiff's land so taken, it is *held:*

1. That the word "plant" in defendant's charter includes its pole and wire lines.
2. Assuming that the land was in form taken for all of the chartered purposes of the corporation, and that some of those purposes justified the exercise of the right of eminent domain, it does not necessarily follow that this taking can be sustained.
3. When the legislature grants the right of eminent domain for several purposes, for some of which the grant would be constitutional, and for others not, with the discretion in the grantee to exercise the right when and where it chooses, within the confines of a large territory, that discretion must be used in good faith, and the taking must actually be for the constitutional purpose in order to be valid. And the actual purpose is open to judicial inquiry.
4. Under the circumstances of this case, whatever may have been the purposes of the corporation elsewhere, the court finds that the land of the plaintiff was actually taken for the transmission of an electric current generated by the defendant corporation, and sold by it to another, for manufacturing or power purposes, and not for electric lighting or other purposes.
5. The private property of one cannot constitutionally be taken by another under the sanction of legislative authority, without the consent of the owner, except for public uses, and then only in case of public exigency.
6. Whether a public exigency exists for the granting of the exercise of the right of eminent domain, is for the legislature to determine. Whether the use for which it is granted is a public one, the court must decide.
7. A public use such as justifies the taking of private property against the will of the owner cannot rest merely upon public benefit or public interest, or great public utility. It implies a possession, occupation and enjoyment of the property taken by the public at large, or by public agencies. That only can be considered a public use where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience or welfare which, on account of their peculiar character and the difficulty or impossibility of making provisions for them otherwise, it is alike proper, useful and needful for the government to provide.
8. Manufacturing, generating, selling, distributing and supplying electricity for power, for manufacturing or mechanical purposes, is not a public use for which private property may be taken against the will of the owner.
9. A corporation empowered by its charter to generate and transmit electric power, for lease or sale, and having granted to it the right of eminent domain, does not by accepting the provisions of its charter become a quasi public corporation, and does not thereby become invested with the right to exercise the eminent domain for the purpose of supplying electric power for manufacturing purposes.

10. If a corporation is not a quasi public one, it cannot make itself one by a vote recognizing itself as such, and pledging itself to perform the duties of a quasi public corporation.

In Equity. On report. Bill sustained. Perpetual injunction to issue.

Bill in equity praying for an injunction to restrain the defendants from erecting a line of poles and wires across the plaintiff's farm in Benton, Kennebec County. When this cause came on to be heard before the Justice of the first instance upon a motion for a temporary injunction, the parties agreed that the answer and replication should be waived and that the testimony and admissions should stand as if taken upon a hearing for a final decree, and that the cause be reported to the Law Court and that "upon so much of the testimony as is legally admissible the Law Court shall render such judgment as the law and equity requires."

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

Brown & Brown, for plaintiff.

Heath & Andrews, for defendants.

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

SAVAGE, J. Bill in equity praying for an injunction to restrain the defendants from erecting a line of poles and wires across the plaintiff's farm in Benton. The case comes up on report. The defendants admit an intention to erect the line of poles and wires, but claim they have a right to do so under the charter of the Sebasticook Manufacturing and Power Company, one of the defendants, of which Mr. Gerald, the other defendant, is the president and general manager. It is therefore necessary to examine the charter of the defendant corporation, chap. 86, Private and Special Laws of 1899, as amended by chap. 271 of the Private and Special Laws of 1903, in order to ascertain its powers. Some question having been raised in regard to the proper construction of this charter, we will state, without much discussion, the construction we place upon so much of it as is involved in the consideration of the case before us. And this we do, at present, without any reference to the constitutionality of any of its provisions.

By the original charter the company was empowered to manufacture, generate, sell, distribute and supply electricity for lighting, heating, traction, manufacturing or mechanical purposes in the towns of Clinton, Benton and Albion, or for any or either of such purposes. The company therefore might generate, sell, distribute and supply electricity to others for electric lighting, or electric heating, or traction power for an electric railway, or for electric power for manufacturing or mechanical purposes, or for all of these purposes. But it is conceded that it could not use the electricity for these purposes on its own account. For instance, to suit the illustration to this case, it could not itself engage in manufacturing by electric power. It might sell such power to others. By the amendment of 1903, the right to manufacture, etc., electricity for lighting purposes in the town of Clinton was withdrawn. To accomplish its chartered purposes, it was authorized to build and maintain a dam or dams on the Sebasticook River, in the town of Benton. By the original act the company was also authorized to take as for public uses, that is, by the exercise of the right of eminent domain, any water rights or land, and to flow any lands or other privileges, for the purpose of constructing and maintaining its dams, and the establishment of its plant, which includes, we think, its pole and wire lines. But by the amendment it was provided that it should have "no right to flow any mill privilege upon which a dam is now built without the consent of the owners thereof." The company therefore might take land for the erection of its lines of poles and wires. Certain street rights in Benton were given by the charter, by which poles could be set and wires extended for the purpose of electric lighting, in the towns named, subject to the permission of the municipal officers, and subject to the general laws regulating the erection of poles and wires for electrical purposes. And the company was also empowered specifically to transmit electric power within said towns, for lease or sale, "in such manner as may be expedient," and, subject to the general laws, to erect poles and wires for that purpose. The towns and the corporation were authorized to make contracts for public lighting.

Prior to the bringing of this bill, the company had constructed a

dam on the Sebasticook River in Benton, capable of developing 1258 horse power of water power. It had erected a station and was installing an electrical plant, to be connected with the water wheels. It had contracted to deliver to the Hollingsworth & Whitney Co., of Winslow, the entire electrical current or energy developed by water power on the dam, for a period of ten years. The electrical current was agreed to be delivered at a point in Benton, near the Winslow line, where the Hollingsworth & Whitney Co. was to take it and transmit it by lines of its own to its mill in Winslow for use as power in manufacturing pulp and paper. By a supplemental agreement made after this controversy arose, the defendant company reserved the right to take from the wires so much electricity as might be required to enable it to perform its duties as an electric light company. To transmit the current from the station to the point of delivery at or near the Winslow line required a line of poles and wires nearly six miles long. This had nearly all been erected. The line was practically straight. It did not follow the roads in any place, but crossed twenty-four farms, including the plaintiff's. It did not pass in proximity to many buildings. The testimony of the defendant Gerald shows clearly that there is now no demand for public or municipal lighting in Benton, that there are no large villages which require lighting, that one man, and one only, had agreed to take domestic lights, though he (Gerald) had talked frequently with people about it, and that between plaintiff's farm and the end of the line, about two miles, with the exception of the last house in Benton, there is no call for lights whatever. Mr. Gerald said that he did "not know of a thing from the power station to the end of the line that would call for power." Being asked about the development of electricity for people that live along the line, he answered, "I don't know anyone that lives along the line that wants it." Of course these things are quite collateral in some aspects of the case, as will appear when we discuss what constitutes a public use. But in other aspects they seem to us to be material and important, as we shall attempt to show presently.

It is contended that the defendant company, under its charter, has the power to exercise constitutionally the right of eminent domain for

each of its four chartered purposes, — furnishing an electrical current for lighting, for heating, for traction, and for power for manufacturing or mechanical uses. But it makes the point, that if for any reason this power cannot be exercised within constitutional limits, for all of these purposes, it can certainly be used, so far as electric lighting is concerned, and perhaps for other uses, and therefore that if the company had the right of eminent domain for lighting purposes, and exercised it in this instance for those purposes among others, the taking would be valid, even if it could not be sustained, were it dependent upon power purposes alone. It says it had a right to take the plaintiff's land and erect pole lines upon it for the purpose of furnishing an electric current for lights, and that that affords a complete justification, whether it could exercise the eminent domain for supplying power for manufacturing or not. *Cole* v. *County Commissioners*, 78 Maine, 532. It says, and justly in this aspect, that it is for the legislature, and not the court, to say whether there is any such demand or exigency in that locality for electric lights as to justify the exercise of the right of eminent domain.

We assume in this case that the taking of the defendants was in form, for all of its chartered purposes. We also assume, but do not decide, that, under the authority of *Cole* v. *County Commissioners*, supra, a taking may be sustained, even if some of the uses are extra-constitutional, that the bad may be rejected, and the good may stand. Some courts have held to the contrary. *Gaylord* v. *Sanitary Dist.*, 204 Ill. 576; *Atty. Gen.* v. *Eau Claire*, 37 Wis. 400. But see 15 Cyc. 579. We think it should be conceded that the taking of land for the purpose of supplying the public, or so much of the public as wishes it, with electric lighting, is for a public use. But even so, it does not necessarily follow that this taking can be sustained as a taking for that purpose. The charter unquestionably gives the company the right of eminent domain for the purpose of supplying a current for electric lighting. It places no limitations or restrictions upon the exercise of this right. The company may go when and where it chooses. It may take whose land it chooses. It may use its discretion as to these things. But if the company seeks to justify on the ground that the taking was for lighting purposes, it must

appear that it exercised the right actually for lighting purposes. If it did so, it might also use the property thus obtained for other incidental purposes, as has many times been held. See *Atty. Gen.* v. *Eau Claire*, 37 Wis. 400. But to support the taking under the lighting feature of the charter, it is necessary that it should actually have been made for that purpose. If the legislature had authorized the taking of this particular land for lighting purposes, and nothing else, it would probably have been a conclusive determination of the use for which it is intended to be taken. But when the legislature grants the right of eminent domain for several purposes, for some of which the grant would be constitutional, and for others not, with the discretion in the grantee to exercise the right when and where it chooses, within the confines of a large territory, we think it must use that discretion in good faith, and the taking must actually be for the constitutional purpose in order to be valid. And we think further that the actual purpose is open to judicial inquiry. Randolph on Eminent Domain, 47. Suppose a company were chartered to do an electric light and a banking business, and had given to it generally the right of eminent domain. Could it condemn a lot for a banking house, under guise of its right to condemn for lighting purposes? And if it should in terms condemn land for lighting purposes, when the real and only purpose was to secure a lot for a banking house, would the public, or the owner of the land taken, be concluded? We think not. And if it did, under its general powers, condemn land for lighting purposes, and use it solely for a banking house, would not the presumption be strong that it was not actually condemned for lighting purposes. Certainly it would. The condemnation proceedings afford, of course, prima facie evidence of the purposes of the taking, but we think this ought not to be, and is not, conclusive. "The existence of the power to take private property for public use by right of eminent domain excludes the idea that it may be taken for private use, or under semblance of a public use and immediately or ultimately be converted and appropriated to private uses." *Dunham* v. *Williams*, 36 Barb. 136. "In determining the question of public use, courts are not confined to, and it is not to be tested exclusively by, the description of those objects and purposes as are set forth in the

articles of association, but evidence aliunde, showing the actual business proposed to be conducted, may be considered." In re *Niagara Falls Ry. Co.*, 108 N. Y. 375. And we think it equally so when a company attempts to exercise the right of eminent domain for several purposes, some of which are for public uses and some not. The law seeks the truth. It finds it sometimes under many disguises. It is particularly necessary to administer it in a proceeding by which one person seeks to obtain the property of another by eminent domain, which has often been said to be in derogation of common right. *Chi. & East. Ill. R. R. Co.* v. *Wiltse*, 116 Ill. 449; *Bangor & Piscataquis R. R. Co.* v. *McComb*, 60 Maine, 290; 15 Cyc. 567. It is not necessary to say, and it may not be true, that the provision in this charter for supplying currents for electric lighting were purely colorable and were never intended to be used. In re *Eureka Basin Warehouse & Mfg. Co.*, 96 N. Y. 42. But in view of the surrounding situation, in the sparsely settled town of Benton, in view of the absence of any call for electric lighting in that town, and of the large expense of installing an electric plant, if the promoters had any real intention of doing anything towards electric lighting in the lifetime of their charter, their hopes were highly illusionary.

But when we come to consider this particular case, we cannot doubt. We start with a dam and station erected, and electrical apparatus installed, all at a cost of $80,000, with one electric light customer for twelve lights secured, with one at the Winslow end of the line who "suggests" that he may take lights, with no other takers of light, actual or prospective, between plaintiff's land and the Winslow line, two miles, with no knowledge otherwise of anyone along the line who wants or will take light or power, but on the other hand with a contract to deliver the entire electrical power product of the dam to a manufacturing company for its own purposes for ten years, at a gross rental of about $20,000 a year. Under these conditions the company starts to locate its line of poles and wires. Metaphorically speaking, and practically so, in fact, it goes straight as an arrow to the point of delivery to the manufacturing company. When it reaches the plaintiff's land, it has seemingly gone beyond the area of possible electric lighting. Whatever

reasons there may have been for taking other lands before that, we must now inquire for what was the intended taking of the plaintiff's land? Can a reasonable man doubt? We think not. Everything in the case shows that the plaintiff's land was being taken to enable the company to deliver electrical power to the Hollingsworth & Whitney Company, according to contract. A purpose to use the line for electric lighting was wanting. It is not discoverable. "The use of a franchise granted for public purposes as a mere cover for a private enterprise is contrary to public policy," said the court in *Fanning* v. *Osborne*, 102 N. Y. 441.

It is, however, suggested that this conclusion of fact ought not to be reached, because the company should not be judged by its beginnings, and because it is ready to furnish electricity for lighting to all along the line who wish it, and are desirous of using it, and that the future may develop a call for lighting. We do not think this is a sufficient answer in this case. We are satisfied from the whole case, that the company, however willing it might be, did not expect or contemplate transmitting a current for electric lighting along the line on land taken from the plaintiff. The possibility of such a use for the public is too remote for consideration. We think it must be held that the land of the plaintiff was actually and primarily taken for the purposes of the Hollingsworth & Whitney Co. contract.

We are therefore brought to inquire whether a taking for that purpose can be sustained. In other words, can lands be taken by the eminent domain for a line of poles and wires on which is to be transmitted an electric current for manufacturing or power purposes? The charter of the defendant company confers authority as broad as that, if it can be held to be constitutional. It should be borne in mind that the defendant corporation has no authority by its charter to use the electric current generated by it for manufacturing purposes on its own account. It does not propose to do so. It merely intends to generate and sell an electric current, and it claims the right of eminent domain to enable it to do such a business, irrespective of the use to which the current is ultimately put. Of this we shall speak later. The ultimate uses to which the electric current is to be put, must, however, affect the application of the right

of eminent domain, and we must consider the question with those uses in mind.

The constitution of this state, Art. I, sect. 21, in the Declaration of Rights, provides "that private property shall not be taken for public uses, without just compensation, nor unless the public exigencies require it." And it is held to be necessarily implied that private property cannot be taken for private uses, without the consent of the owner, with or without compensation. And it is objected here that where one man is permitted to take another's property for the purpose of thereby transmitting an electric current for manufacturing or mechanical purposes, it is subjecting the property to a mere private use.

All property is held subject to that sovereign power which is called the eminent domain, or superior dominion. *Cottrill* v. *Myrick*, 12 Maine, 222. It is derived from the ancient jus publicum by which all property was held subject to the will of the sovereign. The constitutional provision referred to did not create the power, but is a limitation upon its exercise. Private property can be taken only for public uses, and then only in case of public exigency. Whether there is such an exigency,—whether it is wise and expedient or necessary, that the right of eminent domain should be exercised, in case the use is public,—is solely for the determination of the legislature. The legislature however cannot make a private use public by calling it so. 15 Cyc. 580. Whether the use for which it is granted is a public one must in the end be determined by the court. *Kennebec Water Dist.* v. *Waterville*, 96 Maine, 234. The right of the state to condemn property for public uses may of course be exercised through the agency of private corporations, formed for private gain. *Riche* v. *Bar Harbor Water Co.*, 75 Maine, 91. So that the real question before the court now is this: Is manufacturing, generating, selling, distributing and supplying electricity for manufacturing or mechanical purposes, a public use for which private property may be taken by the strong hand of the state? It has been pressed upon us with great force and ability, that the great public benefit and utility of manufacturing enterprises in this state are such as of themselves to give to the creation or development of

power for their benefit the character of a public use. We must therefore inquire to what extent public benefit and utility may be regarded as controlling in determining what is a public use. The term public use is difficult of exact definition, and most courts have avoided giving one. Public benefit is, however, one of the essential characteristics of a public use. There is no doubt that the conception of public benefit and public utility, and the general welfare of the state, even indirectly promoted, has had much to do in tempering the opinions of the courts. The term is a flexible one, and necessarily has been of constant growth, as new public uses have developed. Randolph on Eminent Domain, 35. And it has been said that what is a public use under eminent domain statutes may depend somewhat upon the nature and wants of the community for the time being. *Scudder* v. *Trenton Delaware Falls Co.*, 1 N. J. Eq. 694. It is beyond question that any instrumentality which tends to promote the manufacturing industries of a state, to furnish labor for its mechanics, to create the need of markets for its products, and to develop and utilize its natural advantages, is of great public benefit. And our attention has been called to many cases where this court, in discussing the doctrine of public use, has used expressions similar to those which we have used above. *Spring* v. *Russell*, 7 Maine, 273; *Lawler* v. *Baring Boom Co.*, 56 Maine, 445; *Riche* v. *Water Co.*, 75 Maine, 91; *Hamor* v. *Water Co.*, 78 Maine, 132; *Farnsworth* v. *Lime Rock R. R. Co.*, 83 Maine, 440; *Ulmer* v. *Lime Rock R. R. Co.*, 98 Maine, 580. But it is to be observed that in none of these cases was any question, like the precise one before us, under consideration. In each the question concerned a use which was public even by the narrowest definition of a public use,—a use in which the public had not only an indirect benefit, but in which the public had a right to participate directly. These cases relate to railroads, water companies, boom companies, canals, and the improvement of public streams. As to such cases there is now no doubt. Their uses are rightly deemed public. The public, or such part of the public as has occasion to, may directly enjoy them. Such uses are of great public benefit.

When, however, we leave those classes of cases which are universally regarded as public, and come to those which stand on debatable ground, we find that the doctrine, that public benefit and utility is a justification for the exercise of the right of eminent domain, has been asserted more especially in four classes of cases; those relating to the development of water power for mills under general or special mill or flowage acts; those arising under drainage acts for the reclamation of wet and marshy lands; those relating to the irrigation of arid lands, and those relating to the promotion of mining. Of the mining acts, outside of states whose constitutions in terms recognize mining as a public use, it may be said that the authorities differ as to the effect of the mere public benefit. *Overman Silver Mining Co.* v. *Corcoran*, 15 Nev. 147; *Consolidated Channel Co.* v. *C. P. R. R. Co.*, 51 Cal. 269. And it was held in *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U. S. 112, that the irrigation acts of the western states are sustainable on the ground of a regulation of the common interests of the owners, a doctrine applied elsewhere to drainage acts.

It is in the early cases in Massachusetts that we find that mill acts, giving the right to flow the lands of others for the purpose of creating a water power for mills, and drainage acts for the reclamation of waste lands, were first sustained under the eminent domain clause of the Bill of Rights. And it would seem that the doctrine has been accepted, in most of the states where it is now in vogue, on the authority of the Massachusetts decisions. The history of those decisions is instructive. In *Fiske* v. *Framingham Mfg. Co.*, 12 Pick. 68, (1831) it was declared that the mill acts, by which the owner of a mill privilege was authorized to build a dam on his own land for the purpose of creating a water power, and thereby flow the water of the stream back upon the land of an upper proprietor, rest only partly for their justification upon the interest which the community at large has in the use and employment of mills, and partly upon the nature of the property which is often so situated that it could not be beneficially used without the aid of this power. See *Veazie* v. *Dwinel*, 50 Maine, 479. In *Boston and Roxbury Mill Corp.* v. *Newman*, 12 Pick. 467, (1832) it was held that the construction under legislative authority of a dam across a navigable arm of the sea for the purpose of obtaining

a head and fall of water, whereby to work grist mills, run manufactories, and other mills for other useful purposes, and also to make an avenue or highway over the dam, was an appropriation to public uses within the provision of the 10th article of the Bill of Rights. The court, arguendo, said: "Here was a creation of an immense perpetual mill power, as well as a safe and commodious avenue. . . . . We should be at a loss to imagine any undertaking . . . . . in which the public had a more certain and direct interest and benefit." The court cited the mill acts as analogous, on the ground that they were "greatly beneficial to the public." In *Hazen* v. *Essex Company*, 12 Cush. 475, (1853) the declared purposes of the defendant corporation were to improve the navigation of the Merrimack River, and to construct a dam across it for the purpose of creating a water power to be used for mechanical and manufacturing purposes. The court speaking of the latter purpose said: "The establishment of a great mill power for manufacturing purposes as an object of great public interest, especially since manufacturing has come to be one of the great public industrial pursuits of the commonwealth, seems to have been regarded by the legislature and sanctioned by the jurisprudence of the commonwealth, and in our judgment, rightly so, in determining what is a public use, justifying the right of eminent domain." This was affirmed in *Com.* v. *Essex Company*, 13 Gray, 239, (1859). In *Talbot* v. *Hudson*, 16 Gray, 417, (1860) a large area of land in different towns, and owned by many owners, was overflowed by water raised by a dam, which it was sought, under legislative authority, to remove, for the purpose of reclaiming the land. It was held that the dam could be taken as for a public use. This language was used: "In a broad and comprehensive view, such as has been heretofore taken of the construction of this clause of the Declaration of Rights, everything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new sources for the employment of capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community." The mill acts were cited as examples of a

public use, and it was declared that "if it is lawful and constitutional to advance the manufacturing or mechanical interests of a section of the state, by allowing individuals acting primarily for their own profit to take private property, there would seem to be but little if any room for doubt as to the authority of the legislature, acting as the representatives of the whole people, to make a similar appropriation by their own immediate agents in order to promote the agricultural interests of a large territory." The general drainage act for the improvement of meadows was also cited as providing for an analogous public use. But in *Murdock* v. *Stickney*, 8 Cush. 113, (1851) and *Bates* v. *Weymouth Iron Co.*, 8 Cush. 548, it was held that the principle on which the mill acts "are founded is not, as has sometimes been supposed, the right of eminent domain, the sovereign right of taking private property for public use." The mill acts were said to be only a slight modification of the rule of the common law for regulating the rights of proprietors, on one and the same stream, from its rise to its outlet, in a manner best calculated, on the whole, to promote and secure their common rights in it. "Whether," the court say in *Murdock* v. *Stickney*, "if this were an original question, this legislation (a mill act) would be considered as trenching too closely upon the great principle which gives security to private rights, it seems now too late to inquire."

Later the Massachusetts court, in *Lowell* v. *Boston*, 111 Mass. 454, (1873) said that the doctrine of public use asserted in *Hazen* v. *Essex Company*, supra, rested upon the improvement of navigation provided for, and not upon the general benefit flowing from the establishment of mills. And the court in that case said that the mill acts, and drainage acts, as in *Talbot* v. *Hudson*, supra, were not to be justified under the right of eminent domain, and that they involved no other governmental power than that "to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances," as the General Court "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," Const. of Mass., c. 1, sect. 1, Art. IV. In the same case, speaking of *Dorgan* v. *Boston*, 12 Allen, 223, and *Dingley* v. *Boston*, 100 Mass. 544, in which

the right of eminent domain for certain public improvements was contested, the court used this significant language:—"This benefit" (the promotion of the general prosperity and public welfare) "was anticipated, and doubtless was one of the influential inducements to the adoption of the statutes giving authority for the improvements. It was not in this general advantage however, that the justification, under the constitution, for such an exercise of power was found, but in the direct and special public service." And finally in *Turner* v. *Nye*, 154 Mass. 579, (1891) where the court sustained the constitutionality of an act authorizing the flowing of flats for the raising of a pond for the culture of fishes, but expressly on the "good and welfare" clause of the constitution cited by us, and not on the right of eminent domain, the court said: It is upon this provision (the "good and welfare" clause) that the mill acts have been placed finally in this state, after what appear at times to have been somewhat conflicting views. It may be doubted whether, as new legislation, they could be sustained as an exercise of the right of eminent domain." If we understand the purport of the latter Massachusetts decisions, it is to the effect that the earlier cases of *Boston & Roxbury Mill Corp.* v. *Newman*, 12 Pick. 467; *Hazen* v. *Essex Company*, 12 Cush. 475, and *Talbot* v. *Hudson*, 16 Gray, 417, are no longer authority for the doctrine that either the general mill acts, or special legislation for taking private property for the purpose of creating a water power for manufacturing purposes can be sustained as involving public uses, on the ground of great public benefit or utility. We have no such broad and comprehensive "good and welfare" provision in our constitution as the one referred to in the constitution of Massachusetts, and if we had, it is difficult to see why such a legislative authority would not be limited by the necessarily implied provision that private property shall be taken only for public uses. Besides it is held, and we think properly, that the term public use cannot be construed to be the equivalent of general welfare or public good. It must receive a more restricted definition. *Kinnie* v. *Bare*, 68 Mich. 625; 1 Lewis on Eminent Domain, sect. 163.

But following the earlier Massachusetts cases, in time, at least, it was held in *Great Falls Mfg. Co.* v. *Fernald*, 47 N. H. 444, (1867)

that the legislature had power to authorize a corporation established for manufacturing purposes, to flow back water onto the land of another, without his consent, in order to create the water power used in carrying on their works. This was held to be a public use, on the ground that it was for general public utility, and *Boston & Roxbury Mill Dam Corp.* v. *Newman*, supra, and *Hazen* v. *Essex Company*, supra, were cited as authorities to that effect. The court also cited the "general welfare" clause in the New Hampshire Bill of Rights, similar to that in Massachusetts. The court in New Hampshire did not waver from this public use doctrine, *Ash* v. *Cummings*, 50 N. H. 592; *Amoskeag Mfg. Co.* v. *Head*, 56 N. H. 386; *Amoskeag Mfg. Co.* v. *Worcester*, 60 N. H. 522, except to say that the flowage act went to the verge of constitutional power, *Salisbury Mills* v. *Forsaith*, 57 N. H. 124, until *Rockingham County Light & Power Co.* v. *Hobbs*, 72 N. H. 531, in which case, the court said of *Great Falls Mfg. Co.* v. *Fernald*, supra: That case is sui generis, and is limited to flowage rights. That and other cases cannot be regarded as deciding the "public use" in the Bill of Rights is synonymous with public benefit, public advantage, or any use that is for the benefit and welfare of the state." Nevertheless the court said that the conclusion that the use of land for the production and distribution of power may be a public use is shown by the mill acts and the decisions respecting them, citing the Fernald case in Massachusetts, and its own case of *Amoskeag Co.* v. *Head.*

In Vermont the ruling has been the other way. The court there declined to follow Massachusetts and New Hampshire, and held that under a mill flowage act, the exercise of flowage rights for the benefit of mills, even of grist mills, was not for a public use. *Tyler* v. *Beacher*, 44 Vt. 648. In re *Barre Water Co.*, 62 Vt. 27, it was held that a water Company having authority to take private waters for the extinguishment of fires, and for domestic, sanitary and other purposes, cannot use the water of a private stream for private manufacturing purposes. And in *Avery* v. *Vermont Electric Co.*, 75 Vt. 235, (1903) it was held that the generation of electricity by an individual for the purpose of supplying a railroad company with power to operate its road is not a public use. The court in Rhode Island, we

think, inclines the same way. In re *Rhode Island Suburban Ry. Co.*, 22 R. I. 457; 52 L. R. A. 879. On the other hand the court in Connecticut, in *Olmstead* v. *Camp*, 33 Conn. 532, (1866) holding a flowage act, for the benefit of mills constitutional, as authorizing a taking for public use, declared that it is the settled law of the country that the flowing of lands for mill purposes is a taking for a public use. The court defined public use to be public usefulness, utility or advantage, or what is productive of general benefit, and said that any taking by the state for purposes of great advantage to the community is a taking for a public use, citing *Fiske* v. *Framingham Mfg. Co.*, supra; *Boston & Roxbury Mill Dam Corp.* v. *Newman*, supra, and *Talbot* v. *Hudson*, supra. In *Miller* v. *Troost*, 14 Minn. 365, (1869) the court felt constrained to hold a mill act constitutional, purely on the authority of the cases decided elsewhere, citing *Olmstead* v. *Camp*, supra, and *Fiske* v. *Framingham Co.*, supra. But the court said,—"It is difficult to reconcile these statutes, upon principle, with the constitutional rights of the citizen." In *Newcomb* v. *Smith*, 1 Chand. (Wis.) 71, (1849) a majority of the court held a mill dam and a flowage act constitutional on the authority chiefly of the prior decisions in Massachusetts and New Hampshire. The same court, in *Fisher* v. *Horicon Iron Mfg. Co.*, 10 Wis. 351, (1860) said:—"We are free to confess that if the question as to the constitutionality of the mill dam act was now for the first time presented to this court, and we were not embarrassed by former adjudications upon it, we should doubtless come to a different conclusion upon the question from that arrived at by the majority of the court in *Newcomb* v. *Smith*." That a great public benefit justifies the exercise of the right of eminent domain, as for a public use, in creating or improving water power for manufacturing purposes, is supported on the ground of public benefits, in *Scudder* v. *Trenton Delaware Falls Co.*, 1 N. J. Eq. 694; *Hankins* v. *Lawrence*, 8 Blackf. (Ind.) 266; and perhaps in other states. It is noticeable that the mill acts generally, when sustained, have been sustained under protest. See note to *Turner* v. *Nye*, 14 L. R. A. 487.

In *Varick* v. *Smith*, 5 Paige, (N. Y.) 137, it was held that water could not be diverted for the purpose of creating water power to

lease, because it was not a public use. In *Hay* v. *Cohoes Co.*, 3 Barb. 42, it was denied that the legislature could exercise the right of eminent domain for mills of any kind. See in re *Eureka Basin Warehouse & Mfg. Co.*, 96 N. Y. 42. See also in re *Tuthill*, 133 N. Y., holding a drainage act unconstitutional. In *Gaylord* v. *Sanitary Dist.*, 204 Ill. 576, the court held that a mill act with accompanying right of eminent domain could be sustained for public grist mills, but not for other mills. The same doctrine is supported in *Harding* v. *Goodlet*, 3 Yerg., (Tenn.) 41. A mill act was held unconstitutional as not being for public uses in *Ryerson* v. *Brown*, 35 Mich. 333, in an able and exhaustive opinion prepared by Judge Cooley, in which he analyzed nearly all the authorities. See *South West Mo. Light Co.* v. *Scheurick*, 174 Mo. 235. When the case of *Amoskeag Mfg. Co.* v. *Head*, supra, was before the Supreme Court of the United States on error, that court declined to express any opinion as to whether the creation of water power for manufacturing purposes was a public use, but rested its decision, sustaining the judgment of the Supreme Court of New Hampshire, on the ground, that a statute that authorized the building of dams, and the raising of water, thereby causing it to flow back upon lands of another, might be considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with due regard to the interests of all, and to the public good. *Head* v. *Amoskeag Co.*, 113 U. S. 9. See *Wurts* v. *Hoagland*, 114 U. S. 606. This is the doctrine, as we have pointed out, of the later Massachusetts cases. In *Kaukauna Water Power Company* v. *Green Bay Co.*, 142 U. S. 254, the court sustained the taking in that case, on the ground that it was for the improvement of the navigation of a river, but said also: "It is probably true that it is beyond the competency of the state to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes. This would be a case of taking the property of one man for the benefit of another, which is not a constitutional exercise of the right of eminent domain."

It is suggested by counsel that in this state, the court has already, by implication at least, sustained the doctrine that the creation of

power for manufacturing, either as electrical power or water power, may be regarded as a public use. But that position cannot be sustained. Two cases are cited. In *Edison Co.* v. *Farmington Electric Light & Power Co.*, 82 Maine, 464, although the word "Power" appeared in the corporate name of the defendant, the case does not show what authority it had or claimed as to the creation or distribution of electric power. That question was not discussed in the opinion of the court. The defendant was treated as an electric light company. In *Rockland Water Co.* v. *Camden & Rockland Water Co.*, 80 Maine, 544, the right to the exercise of eminent domain for creating water power was not under consideration.

But *Jordan* v. *Woodward*, 40 Maine, 317, (1855) was a case arising under our mill act. Its constitutionality was sustained, but only on the ground of its great antiquity, and the long acquiescence of our citizens in its provisions. The court said that it pushed the power of eminent domain to the very verge of constitutional inhibition, and added,—"But the reasons in which this policy originated have long since ceased to exist. Private capital has largely accumulated, and now seeks investment in mills of various descriptions, or in other enterprises for private gain. That the existence of water mills is a matter of public convenience at this day is undeniable; so too is the existence of the shop of the smith, the store of the grocer, the house of the innholder, and a great variety of business enterprises in which our citizens employ their labor and capital. In fact, there is no branch of lawful business which may not contribute to the public good, and for which there may, to a certain extent, exist a public necessity. Yet to authorize the appropriation of private property for all these various purposes would be destructive of private rights, and unsettle the tenure by which property is holden." These general views were emphasized in *Allen* v. *Jay*, 60 Maine, 124, and they have continued to express the law of this state until the present time. The doctrine of *Jordan* v. *Woodward*, basing the constitutionality of the mill act upon "great antiquity and long acquiescence" and not upon "public benefit" has never been extended, and we think it should not be. Mr. Lewis in his work on Eminent Domain, after reviewing the cases says, section 181, "Saw mills and grist mills,

carding mills and fulling mills, cotton gins and other mills, which are regulated by law, and obliged to serve the public, are undoubtedly a public use. But, as respects all other kinds of mills, although they may be a public benefit, they are not a public use within the meaning of the constitution." *State* v. *Edwards*, 86 Maine, 102.

Taking the decided cases generally, we think that the weight of authority does not sustain the doctrine that a public use such as justifies the taking of private property against the will of the owner, may rest merely upon public benefit, or public interest, or great public utility. This was, no doubt, the early doctrine in Massachusetts, as applied to mill acts and drainage acts, and we think the cases show that the doctrine was adopted in other states largely on the authority of the Massachusetts decisions. But, plainly, it has since been repudiated by Massachusetts herself. Something more than mere public benefit must flow from the contemplated use. *Gaylord* v. *Sanitary Dist.*, 204 Ill. 576. Public benefit or interest are not synonymous with public use. In re *Niagara Falls Ry. Co.*, 108 N. Y. 375; *Avery* v. *Vermont Electric Co.*, 75 Vt. 235. Neither mere public convenience nor mere public welfare will justify the exercise of the right of eminent domain. *Kinnie* v. *Barr*, 68 Mich. 625. If the doctrine of public utility were adopted in its fullest extent, there would practically be no limit upon the exercise of this power. See *Beekman* v. *S. & S. R. R. Co.*, 22 Am. Dec., note 688, 704.

Judge Cooley, in his work on Constitutional Limitations, 6th Ed., 653, says: "Nor could it be of importance that the public would receive incidental benefits, such as usually spring from the improvement of lands or the establishment of prosperous private enterprises. The public use implies a possession, occupation and enjoyment of the land by the public at large, or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it." And again on page 655: "That only can be considered a public use where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience

or welfare which, on account of their peculiar character, and the difficulty,—perhaps impossibility—of making provisions for them otherwise, is alike proper, useful and needful for the government to provide." There is perhaps no general definition more satisfactory than this one. And we think there is nothing in the creation and distribution of power for manufacturing enterprises, no matter how great their general utility, which makes it "alike, proper, useful and needful" for the government to provide for it. They are clearly private enterprises, built up by private capital, for private gain. They are not subject to governmental regulation as public enterprises. Their promoters and owners manage them to suit themselves, so long as they do not interfere with the rights of others. The history of water power development in this state shows that private enterprise has been amply able to overcome all obstacles. It is not enough to say, that by converting water power into electric power it can be carried great distances, and applied more economically and profitably. In that way the use of power may be made more convenient. It may tend to the building of more mills, or larger ones. It may be incidentally a public benefit. But it is nevertheless, in its legal aspect, merely an aid to private enterprise. To enable the right of eminent domain to be exercised in such behalf, would be taking the property of one private person for the use of another private person, and this has been denominated "not legislation, but robbery." *Coster* v. *Tidewater Co.*, 18 N. J. Eq. 54. We think it cannot be done without an entire disregard of the constitutional limitation. *Allen* v. *Jay*, 60 Maine, 124.

So far we have considered the general question whether the development of power for manufacturing purposes is a public use, because we have deemed it essential to the correct consideration of the remaining position of the defendants. It is contended that, granting that the manufacturing uses of the current of electricity proposed to be developed are private, nevertheless the powers granted to this corporation are for public uses. The defendant corporation claims that it is a quasi public corporation, charged with the performance of public duties, and subject to governmental regulation, and that it possesses the rights of quasi public corporations, among which may be, if a

statute authorizes it, the right of eminent domain. It says the uses of property taken by it under the right of eminent domain for the purpose of performing its public duties are public uses.

It is generally well settled now that when the legislature grants to a corporation the right of eminent domain, or public rights, like street rights, for public uses, and the corporation accepts and exercises the grant, it thereby impliedly comes under obligation to the public to perform all those duties in which the public are interested, and to aid in the performance of which the right of eminent domain was granted. It can be compelled to perform them, and at reasonable rates. It subjects itself to public regulation and control, and to forfeiture of its charter for failure to perform. It devotes its property to public use, and in a way the public have acquired an interest in the use of the property. *Munn* v. *Illinois*, 94 U. S. 113; *Kennebec Water District* v. *Waterville*, 97 Maine, 185. The public has a definite and fixed right to the use of the property, independent of the will of the owner. In re *Mayor of New York*, 135 N. Y. 253; *Varner* v. *Martin*, 21 W. Va. 534, 15 Cyc. 583; *Jordan* v. *Woodward*, 40 Maine, 317. "Property is devoted to a public use, when, and only when, the use is one which the public in its organized capacity, to wit the state, has a right to create and maintain, and therefore one which all the public has a right to demand and share in." *Budd* v. *New York*, 143 U. S. 517. In a broad sense it is the right in the public to an actual use, and not to an incidental benefit. If it be a railroad company, the public have a right to be transported, and to have their goods carried from place to place, upon payment of reasonable tolls. The company must accommodate them, whether it will or no. If it be a canal or turnpike or bridge, all may travel thereon. If it be a boom company, all who have logs in the river are entitled of right to have the booms used for them. If it be a telephone or telegraph company, its privileges are open to, and compellable by, all. If it be a water company, the entire public has, and must have, a right to the use of the water. These are the more ordinary kinds of quasi public corporations, and they illustrate better perhaps than any definition can express, the particular personal quality of the use which the public as individuals have by right in the

property of such corporations. It is the right of the public as individuals to use, when occasion arises. The use must be for the general public, or some portion of it, and not a use by or for particular individuals. *McQuillen* v. *Hatton*, 42 Ohio St. 202; *Coster* v. *Tidewater Co.*, 18 N. J. Eq. 68; *O'Reiley* v. *Kankakee Valley Draining Co.*, 32 Ind. 169; *Pocantico Water Works Co.* v. *Bird*, 130 N. Y. 249; 15 Cyc. 581. It is not necessary that all of the public should have occasion to use. It may suffice if very few have, or may ever have occasion. *Riche* v. *Bar Harbor Water Co.*, 75 Maine, 91. It is necessary that every one, if he has occasion, shall have the right to use. *Ulmer* v. *Lime Rock R. R. Co.*, 98 Maine, 579. It must be more than a mere theoretical right to use. It must be an actual, effectual right to use, 15 Cyc. 581.

But this public character of a corporation does not follow merely because it has accepted a grant of the right of eminent domain, unless it was granted for public uses. For unless the grant was for public uses, it was unconstitutional and void, and the company by accepting it obtained no rights as a public instrumentality, and came, thereby, under no obligations to the public. Because the legislature assumed to grant the right of eminent domain, and the grant was accepted, it does not follow that the corporation is a quasi public corporation. As we have said, the legislature could not make a use public by declaring it such. The question, after all analyses, must come back to the inquiry whether the declared uses are in law public uses.

Now, we have taken it for granted, that some of the ultimate purposes expressed in the defendant corporation's charter are public ones. We repeat that we think that no one would now deny that electric lighting for the public is a public use, and that a corporation engaged in that business may properly be granted the right of eminent domain for that use. And we have no occasion at this time to deny, that the right of eminent domain might properly be granted to a corporation to enable it to generate, sell and distribute electricity for public lighting, though not a lighting company itself. We are now concerned with the right, under eminent domain, to generate, sell and distribute electricity for power for manufacturing purposes. We suppose that a corporation may be a quasi public one as to

electric lighting for instance, and not as to other, though chartered, purposes, just as, to use a former illustration, a company may be chartered to build and operate an electric light plant, and to run a bank, or cotton mill, or shoe factory. The question now is, was this defendant a quasi public corporation, as respects creating, selling and distributing electric power for manufacturing or mechanical purposes? Because, as we have found, that is the use for which this taking is to be made, if at all. We think that the ultimate use of the power is an important consideration. If that use is essentially a private use, in a private business, will it become a public use by merely multiplying the number of persons who may have occasion to use the power? If it would not be a public use to supply power for one mill, would it be such to supply for two mills, or for six or twelve? We think not. In each individual case it would be supplying the power for a private use. If the state cannot take the property of one and give the use of it to another for private use, can it give the use to that other in order that in the form of electric power he may distribute the use to a dozen others for their private business purposes? We think not. There is no underlying necessity or peculiarity in the business of distributing electric power which requires any such enlargement of the power of eminent domain. There seems to be such a necessity in the cases of all the quasi public corporations which we have mentioned. Railroads, telegraphs, telephone and water companies cannot be built and maintained by individuals for their several use, each one for himself. There is an "impossibility," to use Judge Cooley's words, "of making provisions for them otherwise" than through the power of eminent domain. But every man can, if he wishes, have a mechanical power of his own, either steam, or water, or electric. He can serve himself, without the intervention of the state. Not so conveniently or advantageously perhaps, as it would be to be served by others. But mere convenience and advantage in private business must yield to the property rights of citizens sacredly guarded by the constitution. We cannot find any ground for sustaining the defendant's contention, except that of "public benefit," or general utility, and we think that is not sufficient.

There is, however, one other consideration which we deem to be of weight though perhaps not conclusive, in determining whether the creation and distribution of electric power is a public use. In all the other public uses which have been referred to, the supplying of them to some does not disenable the company to supply to others. The use is not exhausted by using. If the railroad carries one, it is not thereby made less able to carry others. It is simply a matter of more trains. In a telegraphic or telephonic service it is simply a matter of more posts and wires. The capacity is practically unlimited. In water services, the calls in those public services for which the right of eminent domain is given is usually infinitesimal, in comparison with the supply. It is practically the same in electric lighting. The units of service are small ordinarily in comparison with the total capacity for service. It is practicable to serve all the public.

But a power service is entirely different. By every unit used, the capacity to serve others is by so much exhausted. It cannot be used again. To be useful, power must be constant and steady during all the working hours of the day. Unless the purchaser can be assured of a definite and stable power, it is of little value. What he contracts for another cannot have. Moreover, it is said that the larger the unit, the more economical and profitable. Counsel for the defendants argues that the best and cheapest service is obtained with the largest possible units. And further that all power contracts must be time contracts. Suppose as in this case the first customer agrees to take it all, what is the next customer to do? There is nothing left for him. But has not the company the right to sell it all? And may it not sell it all to the only customer in sight at that time? Must it reserve a part of its product for contingent later customers? And may it not contract for long periods of time? Purchasers will not buy, ordinarily, if they are subject to the necessity of dividing the power with later customers, unless the danger is as remotely contingent as electric lighting seems to be in this case. When a purchaser contracts for power, he is likely to expend large amounts to enable himself to use it. It is said in argument that the Hollingsworth & Whitney Company have so spent $100,000 in this instance. The sum of it is that electric power, generated for sale for manufacturing

purposes, is not ordinarily adaptable to public uses, as legally defined. This company expects to have it for sale, and when it is sold, it is gone. It is no longer for public use.

But the defendant company says it can generate more power for the public, and that it must do so if the public calls for power. No doubt its public duty, if any, is co-extensive with those means which the state has given to it to enable it to perform those duties. The state has given to it the use of the water in the Sebasticook River within certain limits to create power. That is the scope of the charter so far as the creation of power by means of the right of eminent domain is concerned. And if it be a quasi public corporation, for the production of power, when it has fully used the supplies given to it, it can be under no further public duty. No trust is impressed upon the property for any further use, and that is one of the tests of a public use. *Twelfth St. Market Co.* v. *Phila. & T. R. R.*, 142 Pa. St. 580. But suppose it does create more power, the old customer or the first new one, may take it all. Really the right of the public to be served, under such conditions, in any event is purely theoretical, and not effectual. "A particular improvement palpably for private advantage only will not become a public use because of the theoretical right of the public to use it." *DeCamp* v. *Hibernia R. R. Co.*, 47 N. J. L. 43. "A use is not made public by the fact that the public has a theoretical right to use it, or that the public will receive incidental or prospective benefit therefrom." 15 Cyc. 581. The case at bar lacks one of the essential conditions of a public service by a quasi public corporation, namely, the right of the public, or so much of it as has occasion, to be served as a matter of right, and not of grace. *Olmstead* v. *Morris Aqueduct*, 47 N. J. L. 311; *Gaylord* v. *Sanitary Dist.*, 204 Ill. 576. "A use which may be monopolized or absorbed by the few, and from which the general public may and must ultimately be excluded, is in no sense a public use." *Board of Health* v. *Van Hoesen*, 87 Mich. 533.

The recent case of *Fallsburg Power & Mfg. Co.* v. *Alexander*, (Va.) 61 L. R. A. 129, holds that the development of water power by a corporation for the purpose of generating electric power, light and

heat for its own use, or for the use of other individuals and corporations, is a private and not a public use.

Our attention has been called to the recent case of *Rockingham Light & Power Co.* v. *Hobbs*, 72 N. H. 531, as an authority directly in point, and fully sustaining the defendant's contentions. In that case the company was organized for the purpose of creating, furnishing and selling electricity, among other things for the propulsion of cars, and for all mechanical, commercial and business purposes. The right of eminent domain was granted to it. Under this it took pole and wire rights on the defendant's land. The real purpose of the taking was to furnish power for the operation of lines of electric railway, and also, if it had occasion, to furnish power for any of the purposes authorized by its charter. It may be observed that one of the ultimate purposes of the taking was to furnish power to corporations engaged in a quasi public business, but the court does not rest its decision upon that ground. (And see *Avery* v. *Vermont Electric Co.*, 75 Vt. 235.) It likens the purposes of the power company to those of an aqueduct company and reaffirms the doctrine of *Great Falls Mfg. Co.* v. *Fernald*, 47 N. H. 444, that the use of land for the production and distribution of power may be a public use. This latter doctrine has never been accepted as the law in Maine, and we think that there are vital distinctions between power companies and water companies.

The New Hampshire court uses this language:—"The demand for power . . . . is of a public character. Like water, electricity exists in nature, in some form or state, and becomes useful as an agency of man's industry only when collected and controlled. It requires a large capital to collect, store and distribute it for general use. . . . . It may happen that the business cannot be inaugurated without the aid of the power of eminent domain for the acquisition of the necessary land, or rights in land. All these considerations tend to show that the use of land for collecting, storing and distributing electricity, for the purpose of supplying power and heat to all who may desire it, is a public use, similar in character to the use of land for collecting, storing and distributing water for public needs, a use that is so manifestly public "that it has seldom been

questioned and never denied." It is, perhaps, sufficient to say that we are unable to concur in the reasoning of the New Hampshire court, for reasons already fully stated. The defendants also cite *Salt Lake City* v. *Salt Lake City Water & Electric Power Co.*, 25 Utah, 456. That case involved an appropriation of water by a power company, which was a riparian proprietor, and the questions considered in the case at bar were not discussed.

The record of the case before us shows a vote of the corporation whereby, "in view of the litigation now pending," it recognized itself as a quasi public corporation, and pledged itself to the performance of its duties as such in furnishing the public with electric light and power, and to make all extensions necessary to meet the public demand for light and power. We do not think this vote can make any difference. In a constitutional sense, a use cannot be enlarged, it cannot be made any more public, by a vote. The public duties of a quasi public corporation, except so far as directly imposed by statute, arise by implication of law. If a corporation is not a quasi public one, it cannot make itself such by voting to perform the duties of a quasi public corporation.

Our conclusion is that the acts threatened by the defendants will be an invasion of the plaintiff's constitutional rights, and that he is entitled to a perpetual injunction as prayed for. A decree to that effect will be signed by a single justice.

Bill sustained with costs. Decree for a perpetual injunction to issue.

In Equity.

WILLIAM W. CUTTER et als. *vs.* ALBERT H. BURROUGHS et als.

Cumberland. Opinion July 6, 1905.

Equity. Wills. Construction. Imperative Power and Trust. Guardian Acting as Trustee without Legal Authority. Equitable Lien. Subrogation.

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

The executrix named in said will duly qualified as such but died a little more than a year after such qualification and her account as such executrix was duly settled by her administratrix. After the death of said executrix, one Celina Purington was appointed and qualified as guardian of the aforesaid Marie J. Purington who was then twelve years of age. Said guardian resigned her said trust about a year after her appointment, and thereupon William W. Cutter, one of the plaintiffs, was duly appointed and qualified as guardian of said Marie J. Purington who was then thirteen years of age. Said Marie died on the 17th day of April, 1900, at the age of nineteen years, without leaving issue.

From the time of the death of the aforesaid executrix, no legal representative of the estate of the said Helen J. Purington was appointed until after the death of the said Marie J. Purington.

After said William W. Cutter was appointed guardian of said Marie J. Purington, he proceeded to act under item 4 of the will in precisely the same manner that he would have done had he been appointed as trustee to carry out the provisions of said fourth item. That he had no legal authority to do so, is not denied. But he contended that he did in his capacity as guardian precisely what he should have done had he been appointed trustee to execute the power and trust of item 4; that, in disposing of the income and principal of the estate he faithfully observed the directions of the will, and that the quantity and quality of the estate left in his hands as guardian was exactly as it would have been, had he acted as trustee instead of guardian; that is, so far as the disposal of the estate was concerned, he applied it to the use of Marie, his ward, precisely as her mother directed and commanded it should be used.

After the plaintiff Cutter, acting under the advice of counsel and by authority of Probate Court, had made sales of the real estate named in said item and transacted all the business of the estate, in his capacity as guardian of Marie, it appeared upon a legal investigation and the discovery of a question of sufficient doubt as to the legality of his acts as to require a decision of the law court that the title of the real estate devised did not vest in Marie in fee simple, but was contingent and therefore that all the sales made by Cutter as guardian, were without authority and void. The several plaintiffs, who purchased and paid for this real estate, did services, or expended money for the benefit of Marie under item 4 of the will, then asked to be subrogated to her rights in her mother's estate under said item.

Held: 1. That the testatrix by item 4 of her will created an imperative power and trust duty and not a mere naked and discretionary power.

2. That a power coupled with a trust of this kind being imperative must be executed; that the courts will not allow such a trust to fail of execution when by any possible means it can be executed by the court itself; that the court will act retrospectively and in the face of the greatest difficulties to accomplish this object.

3. That this imperative power having failed of a legal execution, the title to the property which should have been applied for the benefit of Marie, passed to the devisee and heirs of the decedent.

4. That the devisees and heirs did not take this property freed from the trust, but received it charged with a resulting trust and equitable lien in favor of the beneficiary.

5. That therefore the plaintiffs who have in effect furnished their money and services in good faith and not as mere volunteers for the support and maintenance of the beneficiary, which support the land was charged with the burden of furnishing, are entitled to be subrogated to the rights of the beneficiary therein and have a lien thereon.

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

In Equity. On report. Bill sustained.

Case remanded for decree in accordance with opinion.

Bill in equity seeking to enforce the execution of an imperative power and trust after the death of the beneficiary, which failed of legal execution for want of a trustee, in behalf of the plaintiffs who have contributed their money and services to furnish the support and maintenance to the daughter of the testatrix, which should have been furnished by the property devised in trust for that purpose under the terms of the will; and to effect such execution of the trust in behalf of the plaintiffs, by subrogating their claim to the rights of the beneficiary in such property, and charging the same with a resulting trust and equitable lien in their favor.

When this cause came on to be heard before the Justice of the first instance, on bill, answer and evidence, it was agreed that the cause should be reported to the Law Court for hearing and decision.

The facts are fully stated in the opinion.

Robert Treat Whitehouse, for plaintiffs.

F. M. Ray, Foster & Hersey, and William M. Ingraham, for defendants.

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

SPEAR, J. This is a bill in equity seeking to enforce the execution of an imperative power and trust after the death of the beneficiary, which has failed of legal execution for want of a trustee, in behalf of the plaintiffs who have contributed their money and services to furnish the support and maintenance to the daughter of the testatrix, which should have been furnished by the property devised in trust for that purpose under the terms of the will; and to effect such execution of the trust in behalf of the plaintiffs by subrogating their claim to the rights of the beneficiary in such property, and charging the same with a resulting trust and equitable lien in their favor. The facts are as follows: On the ninth day of June, 1892, Helen J. Purington of Westbrook died, leaving a will dated November 12th, 1891. Item four of the will is all that it is necessary to quote, as no question is raised as to the devisees and heirs to whom the residue of the estate should go, after discharging the obligations imposed by

the power and trusts commanded by said item. It reads as follows: "I order and direct my executrix herein named to apply all or whatever is necessary of the rents, profits and income of my real and personal estate to the support and education of my daughter, Marie J. Purington, giving her a high school, and if she desires, a seminary or collegiate education, and should the rents, profits and income of my estate, real and personal, prove insufficient for that purpose, I order and direct my executrix to first sell (the real estate situated on the westerly side of Spring St. in said Westbrook) and after the proceeds of the same shall have been applied to the support, clothing and education as aforesaid of my said daughter, Marie J. and should they prove insufficient, I order and direct my executrix to next sell (the house and lot situated on Stroudwater Street near the P. & R. Railroad,) and should that also prove insufficient for said purposes I order and direct my executrix to sell (the house and lot situated at the corner of Main and Stroudwater Streets), being the one in which I now live, and it is my wish and desire and I so order and direct that nothing contained in the second provision herein made shall prevent or in any way interfere in my executrix disposing of the whole of my estate, real, personal and mixed, for the support, clothing and education as aforesaid of my said daughter Marie J. Purington." The will also appointed Dora Purington sole executrix without bond. On the 20th day of September, 1892, the will was proved and Dora Purington was duly qualified as executrix.

Dora Purington entered upon the performance of her duties as executrix, but died on the 6th day of November, 1893. Celina Purington, her mother, was appointed administratrix de bonis non of Dora Purington, on the first Tuesday of March, 1894, and settled the account of Dora Purington as executrix of the estate of Helen J. Purington on the third Tuesday of April, 1894.

On the first Tuesday of April, 1893, Celina Purington was appointed and qualified as guardian of Marie J. Purington, who was then twelve years old, and on the 29th day of the following March, settled her first account, and her resignation was filed and accepted on the fifth day of April, 1894.

On the same day, the plaintiff, William W. Cutter, was duly

appointed and qualified as guardian of the said Marie, now thirteen years of age. Marie died on the 17th day of April, 1900, at the age of nineteen years, without leaving issue. From the time of the death of Dora Purington, executrix of said will, November 6th, 1893, no legal representative of the estate of Helen J. Purington was appointed up to the 17th day of July, 1900, when O. H. Hersey of Portland, was duly appointed administrator, de bonis non with the will annexed, of said Helen J. Purington.

After the plaintiff, William W. Cutter, was appointed guardian of Marie J. Purington, he proceeded to act under item 4 of the will in precisely the same manner that he would have done had he been appointed as trustee to carry out the provisions of said item. That he had no legal authority to do so, is not denied. But it is earnestly contended that, having done through a mistake of his legal duty, just what he could and should have done had he been in the discharge of the duty imposed by the will, he should not now be made to suffer and others to profit. In other words, he contends that he has done in his capacity as guardian, precisely what he should have done had he been appointed trustee to execute the power and trust of item 4; that, in disposing of the income and principal of the estate he faithfully observed the directions of the will, and that the quantity and quality of the estate left in his hand as guardian was exactly as it would have been, had he acted as trustee instead of guardian; that is, so far as the disposal of the estate was concerned, he applied it to the use of Marie, his ward, precisely as her mother directed and commanded it should be used. The undisputed evidence shows that he first used the rents, profits and income of the real and personal estate. The income from these sources being insufficient for the care and maintenance of Marie, he then sold the real estate, situated on the westerly side of Spring Street in Westbrook, as directed in the will. The proceeds of this sale having been consumed, he sold the house and lots on Stroudwater Street, as directed. The funds from these sources still proving insufficient, he finally sold the house at the corner of Main and Stroudwater Streets, on the 19th day of May, 1896.

He sold a portion of the Spring Street property to one of the

plaintiffs, Charles Peterson, for the sum of $625.00, a full and fair value. He is still in possession of the real estate and has made extensive alterations and repairs. On the 18th day of May, Mr. Cutter sold the remainder of the Spring Street property to Lillis M. Merrill, for $325.00, also a fair value. This property, after several mesne conveyances, came into the possession of Samuel C. Holm, also one of the plaintiffs, who still occupies it.

On the 6th day of November, 1899, the plaintiff Cutter, also sold the equity in the property, situated on Stroudwater Street to Stephen F. Hopkinson, for the sum of $650.00, a fair value; and thereafterward, on the same day, took a conveyance of said property for the same consideration to himself.

On the 17th day of April, 1900, the last parcel of real estate, situated at the corner of Maine and Stroudwater Streets, was sold by the plaintiff Cutter, to his own daughter, Elizabeth E. Cutter, one of the plaintiffs, for the sum of $2800.00, which the testimony shows to be a full and fair value for this piece of property.

It should be here observed that the plaintiff, William W. Cutter, consulted counsel reputed to be competent and acted under legal advice with respect to every step he took, and also proceeded in everything he did as guardian under the directions and sanction of the probate court. Each piece of real estate was duly advertised and all his receipts and expenditures up to March, 1900, were examined and allowed by said court. After the plaintiff Cutter had made all the above sales of real estate, and transacted all the business of the estate in his capacity as guardian of Marie, it appeared, upon a legal investigation and the discovery of a question of sufficient doubt as to the legality of his acts as to require a decision of the court, that the title of the real estate devised did not vest in Marie in fee simple, but was contingent, and therefore that all the sales made by Cutter, as guardian, were without authority and void. The several plaintiffs, who have purchased and paid for this real estate, did other services, or expended money for the benefit of Marie under item 4 of the will, now ask to be subrogated to her rights in her mother's estate under said item. Whether they are entitled to such subrogation depends upon several well defined propositions of law.

I. Did the testatrix by item 4 of her will create an imperative power and trust duty and not a mere naked and discretionary power?

An examination of this clause reveals in the purpose of the testatrix not only an active power and trust but a peremptory command that all her estate should, above all other interests, be absolutely subject to the benefit and comfort of her daughter. The mother's deep solicitude for this single purpose is clearly made manifest from the whole tenor of the will. The language used enjoining the disposal of her estate for the benefit of her daughter was positive and certain, and expressed by the words "I order and direct." Not only does she command her estate to be thus expended but, that there may be no mistake, negatives any possible construction to the contrary that might be put upon it under item 2 of her will.

It is well settled law that the words contained in this item did not create a mere naked or discretionary power to sell but a power coupled with active trust duties, therefore an imperative power. The legal construction of the words contained in the item has already been determined by this court in the case of *Hersey* v. *Purington*, 96 Maine, 166, in which the court say: "The trust there created is an active trust. The trustee is to apply all or whatever is necessary of the rents, profits and income, and if need be, the corpus of the estate, to the support and maintenance of the daughter. This is not a mere naked power. Active duties are imposed upon the trustee." The court in this case also held "that on the death of the testatrix an equitable fee simple conditional passed to and vested in Marie J. Purington subject to be divested on her dying under 21 years of age, and without issue; which condition was itself subject to the condition that the estate had not already been disposed of for her maintenance and education as provided in the 4th item of the will." That is in equity this estate vested in Marie subject to partial or complete consumption in the hands of a trustee for her maintenance and education, without the right of any of the beneficiaries under the will, or the heirs of the testatrix, to say nay.

The authorities upon this point are also numerous and uniform. *Ferre* v. *American Board*, 53 Vt. 166, is a case exactly in point. The same words are used in directing the disposal of the estate.

The court say: "The power to sell conferred by the testator or his executors was more than a mere power. No reasonable man can contemplate the language of the will and surroundings of the testator leaving only his widow to be provided for and not become convinced that he intended by conferring the power to provide her a reasonable support if the property should prove sufficient; not depending upon the caprice or the mere discretion of the donees." This case is not only similar in the law but in the facts, to the case at bar. After stating the law the court proceeds with this illustration: "Suppose the widow had been stricken down with a painful, lingering disease, so that she required constant attendance of a nurse and frequent medical attendance, to meet the expense of which the income from the farm was wholly inadequate, and while in this condition and not provided for she had called upon her co-executor to join her in the execution of the power, and sell so much of the farm as would raise money enough to supply her actual necessities, can there be any doubt but that he would, by the language of the will, be under the imperative duty to exercise the power and duty, which he could not disregard in his discretion. The language of the testator is "In such case I ORDER my executors to sell so much of the land as may be necessary for their support while in this life." I think it may safely be held that the testator conferred more than a mere power upon his executors." The language of this assumed case is also apt in its application to the case before us. The daughter Marie, whose future welfare and happiness were undoubtedly the mother's first care in life and her last conscious thought in death, was in fact, "stricken down with a lingering disease," consumption, so that "she required the constant attendance of a nurse and frequent medical attendance to meet the expense of which the income of the property was wholly inadequate." See also, *Williams* v. *Bradley*, 3 Allen, 270. *Hawley* v. *James*, 5 Paige, 318. *Heard* v. *Still*, 26 Ga. 302. Under these decisions it is perfectly clear that a trustee, if one had been appointed to administer the power and trusts imposed by this will, would have been under the imperative obligation as a matter not of discretionary, but of legal duty to have disposed of both the income and the corpus of the estate for the benefit of the daughter in the same

manner as it was disposed of by the plaintiff Cutter acting as guardian. But as a matter of law, after the death of Dora Purington no trustee was appointed, hence there was a total failure of a legal trustee after that event. Cutter was a de facto but not a de jure trustee.

II. The second legal proposition which the plaintiffs seek to establish is that a power coupled with a trust of this kind being imperative must be executed; that the courts will not allow such a trust to fail of execution when by any possible means it can be executed by the court itself; that the court will act retrospectively and in the face of the greatest difficulties to accomplish this object. Perry on Trusts, Vol. 1, sect. 248, in speaking of powers which imply a trust, lays down this rule: "In this class of cases the power is so given that it is considered a trust for the benefit of other parties; and when the form of a gift is such that it can be construed to be a trust, the power becomes imperative, and must be executed. Courts will not allow a clear trust to fail for want of a trustee; nor will they allow a trust to fail by reason of any act or omission of the trustee; . . . . In all cases where parties have an imperative power or discretion given them, and they die in the testator's lifetime, or decline the trust or office or disagree as to the execution of it or do not execute it before their death, or if from any other circumstances the exercise of the power by the party entrusted with it becomes impossible, the court will imply a trust, and will put itself in the place of the trustees, and will exercise the power by the most equitable rule. And the court will act *retrospectively* in executing these powers as quasi trusts; and although there may be great difficulties and impracticabilities in the way, yet the court will exercise a power and enforce the trust; for if the trust or power can by any possibility be exercised by the court the non execution by the party entrusted shall not prejudice the party interested or the cestui que trust." In Pom. Eq. Juris., sec. 835, we find this rule: "Powers in trust," like any other trust are imperative; they create a duty in a trustee, and a right in a beneficiary. Equity will not suffer this right of the beneficiary to be defeated, either by accident or by design of the trustee and will therefore carry into effect the intention of the donor, and give all needed relief to the beneficiary, wherever there has been a

total or partial failure to execute the power according to the terms of the trust."

In *Attorney Gen.* v. *Downing*, Wilm. 23 Ld. Ch. J. Wilmot, said; "As to the objection that those powers are personal to the trustees and by their death become unexecutable, they are not powers but trusts, and there is a very essential difference between them. Powers are never imperative; they leave the acts to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted. The court supplies the defective execution of powers, but never the non-execution of them; for they are not meant to be optional. But a person who creats a trust means it shall be executed at all events. The individuals named as trustees are only the nominal instruments to execute that intention, and if they fail, either by death, or being under disability, or by refusing to act, the constitution has provided a trustee. Where no trustees are appointed at all, the court assumes the office. There is some personality in every choice of trustees, but this personality is res unius aetatis, and if the trust cannot be executed through the medium which was in the primary view of the testator, it must be executed through the medium which the constitution has substituted in his place."

In *Faulkner* v. *Davis*, 18 Gratt. (Va.) 651, two lots were conveyed in trust to be sold provided one Doctor Norton should think it expedient to sell. He died, not having passed upon the question of expediency, not having executed the trust. The court say: "Now it is true that the framers of the trust referred the question of expediency to the opinion of Dr. Norton; and so long as he lived, he was a safe depository of such a trust. But that was a mere means of accomplishing an end; and a court of chancery will not permit the end to be lost because the means marked out have been lost, but will devise other means to accomplish the end. The fact to be ascertained in order to exercise the power is that *it is expedient to make a sale.* And that fact the court of chancery is as competent to ascertain as was Dr. Norton." And the court itself, twenty-five years after the death of Doctor Norton, determined the question of expediency and ordered a sale of the property.

Mayberly v. *Turton*, 14 Vesey, 499, is a case in which the trustees had the power to apply a dividend to the maintenance of the children, but had died without ever having applied it and the court examined into what the trustees if there had been any, ought to have done and then did it itself in their stead. This is what was meant by Perry on trusts, supra, when he said the court will act retrospectively. *Wareford* v. *Thompson*, 3 Vt. 513; *Brown* v. *Higgs*, 8 Vesey, 561; *Gibbs* v. *Marsh*, 2 Met. 243.

In *Greenough* v. *Welles*, 10 Cush. 571, the court executed the trust. After finding that the power to sell was a power coupled with a trust and therefore imperative, they then further held "that by the flight and outlawry of the executor, he became civiliter mortuus, and that so much of the demanded premises as descended to the son of H. as heir at law, was held by him still subject to the trusts declared by the testator for the benefit of his daughters, which it was the duty of said son to carry into effect by the sale and conveyance of the estate as provided in the will." And that "in all such cases the law grounds the presumption on the fact that a court of equity would compel the execution of the trust, and, in this respect seems to approximate to the rule in chancery, that what ought to be done, shall be considered as done."

Applying these principles to the case at bar, the doctrine appears to be well established that it is the duty of the court to inquire into the facts as presented by the report of the evidence and determine, (1) whether the power and trust, expressed in item 4 of the decedent's will, were legally executed, and if not, (2) whether they should have been.

Upon these questions of fact there is no room for doubt. The trusts were not legally executed and they emphatically should have been.

(3) This imperative power having failed of a legal execution, the title to the property which should have been applied for the benefit of Marie passed to the devisee and heirs of the decedent.

Dora J. Purington, the executrix and trustee under the will, died within a little more than a year, without having undertaken or executed any of the trust duties. But the trust duties did not pass to the executrix and personal representative of Dora J. Purington, the

trustee, nor to the administrator de bonis non, with the will annexed of the testatrix, Helen J. Purington, nor to the heirs of Dora J. Purington, who held the legal title to the trust property during the trust. *Hersey* v. *Purington*, 96 Maine, 166; because in the first place it was a personal trust and confidence. *Greenough* v. *Welles*, 10 Cush. supra. See also *Knight* v. *Loomis*, 30 Maine, 204, with respect to the relation of the administrator de bonis non to the trust.

The trust duties imposed by the item of the will in question could therefore be legally performed only by some new trustee appointed by the court or by the court itself; but no such trustee, as already observed, has been appointed.

Therefore, the acts of Celina Purington and the plaintiff Cutter, in the de facto execution of the trust duties by virtue of their guardianship were void. Under this state of affairs, upon the death of Marie, the title to the property of the decedent passed as follows; that of the Main Street property to the devisee, the defendant Burroughs, by the terms of the will; *Burroughs* v. *Cutter*, 98 Maine, 178; the title to the remainder of the property, to the heirs of the testatrix, by the lapsing of the residuary legacy to Dora Purington; the legacy to Dora being a contingent remainder and never having become vested in her. The item of the will under which she was made residuary legatee was as follows: "Should my daughter Marie J. die as above stated under twenty-one years of age and without issue, I give, bequeath and devise to Dora Purington, sister of my late husband and her heirs and assigns forever, all the rest, residue and remainder of my estate, real, personal and mixed wherever found and however situated; should it not have to be disposed of for the purposes hereinafter provided."

For definitions of vested and contingent remainders, see *Woodman* v. *Woodman*, 89 Maine, 128; *Russell* v. *Elden*, 15 Maine, 193; *McGreevy* v. *McGrath*, 152 Mass. 24; *Carpenter* v. *Heard*, 14 Pick. 449; *Spear* v. *Fogg*, 87 Maine, 132.

Dora Purington died November, 1893, at which time, Marie was still living and the devise being a contingent one, and the contingency of Marie's death without issue not having happened, had never vested in Dora, consequently as a matter of law, this devise lapsed.

A lapsed residuary devise goes to the heirs of the testatrix, who are the next of kin of equal degree living at the time of her death or their descendants by right of representation. In this case they were, as the undisputed evidence shows, the defendant Thomas W. Jenness; and by descent from Joseph W. Nye, Amilie A. Nye, Sarah P. Way, Ida C. Chadwell and Sarah A. Nye; by descent from Solomon Haskell to Lillian J. Haskell and Adeline Haskell.

(IV) The devisees and heirs did not take this property freed from the trust, but received it charged with a resulting trust and equitable lien in favor of the beneficiary. Lewin on Trusts, Vol. 2, 8th Ed. p. 1117, says: "Thus, if a devisee or settler appoints a trustee, who either dies in the testator's lifetime, or disclaims, or is incapable of taking the estate, or if the trustee otherwise fail, the trust is not thereby defeated, but fastens on the conscience of the person upon whom the legal estate has devolved." "I take it," said Lord Chief Justice Wilmot, "to be a first and fundamental principle in equity, that the trust follows the legal estate wheresoever it goes, except it comes into the hands of a purchaser for valuable consideration without notice."

In *Greenough* v. *Welles*, above cited, it is held: "But it does not follow, in case of the failure to execute the power by the donee so that it is defeated at law, that the heir holds the estate discharged of the trust. On the contrary, it is laid down in Sugden on Powers, 394, and the rule is well supported by numerous authorities that in such case the heir holds the estate in trust only, and if the power becomes extinguished by the death of the person to whom it is given, equity acting upon the trust will compel the heir to join in the sale of the estate for the purposes designated by the testator."

(V) Therefore the plaintiffs who have in effect furnished their money and services in good faith and not as mere volunteers for the support and maintenance of the beneficiary, which support the land was charged with the burden of furnishing, are entitled to be subrogated to the rights of the beneficiary therein and have a lien thereon. The decisions upon this point are numerous. Perhaps the leading case is *Bright* v. *Boyd*, 1 Story, 478, and 2 Story, 607, decided by the Circuit Court of Maine and rests upon the authority of Judge Joseph

Story. This case involved an administrator's sale void for want of compliance with the requirements of the law. Judge Story, after elaborately discussing the authorities, said: "There is still another broad principle of the Roman Law, which is applicable to the present case. It is, that where a bona fide possessor or purchaser of real estate pays money to discharge any existing incumbrance or charge upon the estate, having no notice of any infirmity in his title, he is entitled to be repaid the amount of such payment by the true owner, seeking to recover the estate from him." *Pratt* v. *Thornton*, 28 Maine, 355; *Blodgett* v. *Hitt*, 29 Wis. 169; *Valle's Heirs* v. *Fleming's Heirs*, 29 Mo. 152. In this case the court say: "Nothing could be more unjust, we may repeat, than permit a person to sell a tract of land and take the purchase money and then because the sale happens to be informal and void, to allow him, or, which is the same thing, his heir, to recover back the land and keep the money." *Springs* v. *Harven*, 56 N. C. 96; *Waggener, et als*, v. *Lyles, et als*, 29 Ark. 47; *Jones, Administrator*, v. *French, et als*, 92 Ind. 138; *French* v. *Grenet*, 57 Texas, 273; *Cobb* v. *Dyer*, 69 Maine, 494.

It may be here said with respect to the claim on the part of the defendants that the plaintiffs, in whatever they did by way of furnishing money or rendering services for Marie, acted as mere volunteers, is without support. The facts and circumstances connected with the furnishing of such money and services so clearly prove that the plaintiffs did not act as volunteers that we deem further allusion to this phase of the case unnecessary.

It now remains for us to consider under the law, and the facts as reported in this case, the claim of each plaintiff with respect to his right of subrogation to the interests of Marie J. Purington in the property devised to her under the will of her mother. The evidence shows that Ida M. Chadwell, one of the plaintiffs, furnished her services as nurse in good faith upon the request of the beneficiary and her guardian, and in direct reliance upon the promise of the beneficiary and upon the trust property for her pay, and is, therefore, entitled to be subrogated to the rights of the beneficiary in said property to the amount to which the evidence shows she is justly entitled. No evidence whatever to the contrary having been offered by the

defence, $396.00 and interest thereon from the time of the death of Marie J. Purington, the amount claimed, seems to be reasonable, and we find the plaintiff Chadwell is entitled to judgment for $491.00. While those who would now like the proceeds of this estate and deprive this plaintiff of her just dues stood by and did nothing, she broke up her home to administer to the comfort and happiness of this young girl, as far as her sad fate and fading life would admit of happiness, and remained with her through the last days of her lingering illness.

Therefore, Ida M. Chadwell is entitled to have the above amount due her made a charge and lien upon the trust fund of $1854.16, the amount received from the proceeds of the sale of the Main Street property in excess of the amount expended for the benefit of Marie.

The plaintiffs, Samuel Holm and Charles Peterson, both fall in the same category in their relations to the estate under consideration. Both were purchasers in good faith either directly or indirectly, and in possession of real estate, purchased from the plaintiff Cutter and sold by him upon the covenant that he had good right and lawful authority to sell. They have obtained no title by reason of void judicial sales, although their purchase money was applied in furnishing to the beneficiary the support and maintenance with which the land purchased was charged. That equity will take jurisdiction to enforce the rights of Holm and Peterson in a case like this, is well settled. While these two parties are in possession of their respective estates yet their absolute want of title was decided in *Burroughs* v. *Cutter*, 98 Maine, 178. But the title being settled, it is not necessary to be ousted from possession before equity can be resorted to. "In such cases the court treats "the purchaser as the equitable owner of the land and protects his possession as such against the holder of the legal title by enjoining any interference with the possession until payment is made of the equitable charge." *Weaver* v. *Norwood*, 59 Miss. 672; *Blodgett* v. *Hitt*, 29 Wis. 169; (*Valle's heirs* v. *Fleming's heirs*, 29 Mo. 152.) Again when equity has gained jurisdiction it will settle all questions involved, whether legal or equitable. It will "proceed to decide the whole issue and to

award complete relief, although the rights of the parties are strictly legal." Hence it follows that these two plaintiffs, Holm and Peterson, as bona fide purchasers for value at the void probate sale, are entitled to have their purchase money made a charge upon the trust property in the hands of the heirs. The rule of caveat emptor does not apply to either case. It is held in 15 Amer. & Eng. Encyc. 2 Ed., 64, "that the purchaser is bound to look to the proceedings for sale and see that an order is properly made by a competent court and so far the maxim caveat emptor applies, and if he pays the purchase money in good faith without actual knowledge of defects, the ward will be required to do him equity if he avoids the sale." Under these rules, the plaintiff Holm is entitled to receive from the heirs of the testatrix $325.00, the amount of money which he paid for the real estate of which he is in possession and thereupon execute a deed of said real estate to said heirs; or the heirs, if they do not desire to pay said amount of money and take the deed of said property, should be required to execute and deliver a release of the same to the plaintiff Holm. This same rule would apply to the rights of the plaintiff Peterson, did it not appear that in addition to the purchase money which he paid for the real estate of which he is in possession, he had made valuable improvements. He is therefore, not only entitled to the return of his purchase money if the heirs should elect to take the property from him, but also remuneration for the amount which he has expended in improvements, and a release from the heirs. *Bright* v. *Boyd*, 2 Story, 607; *Pratt* v. *Thornton*, 28 Maine, 355; *Blodgett* v. *Hitt*, 29 Wis. 169; *Valle's heirs* v. *Fleming's heirs*, 29 Mo. 152. See also *Ferre* v. *American Board*, above quoted upon other points, which also seems to be pertinent to the point now in consideration.

If in this instance the heirs should elect to take the property upon the payment to Peterson of his purchase money, then the case will have to be sent to a master to determine the amount to which Peterson is entitled for improvements which he has made upon the place.

The plaintiff Elizabeth E. Cutter whether she be treated as a bona fide purchaser in her own behalf or indirectly for her father, is entitled to subrogation. As already disclosed, she had been evicted

by a writ of entry; *Burroughs* v. *Cutter*, 98 Maine. It appears from the evidence that William W. Cutter sold the Main St. property to his daughter, Elizabeth E., after having advertised it for several weeks for a consideration $50.00 in excess of what he had ever been offered for it, and which according to the testimony of Mr. Ward, who had recently acted as an assessor, was a good price for the property. Elizabeth E. had no money with which to purchase this property and the consideration was paid by a joint note of the daughter and Mrs. Cutter, the plaintiff's wife, who had real estate in her own name. This note was discounted at the bank and the proceeds all but $1800.00 were expended by the plaintiff Cutter in behalf of his ward Marie. This transaction might seem without any explanation as an attempt on the part of the guardian to obtain this piece of property for his own personal advantage; but the case shows that he had been informed at the time of the sale, that his ward could not survive during the day, and owing some bills for the payment of which he had no money of the estate in his hands, and being ignorant of what he ought to do, he consulted not only his regular counsel, but other counsel known to this court to be eminent, who advised him that he should make sale of this property before the death of his ward. To comply with this advice he was obliged to sell immediately, and consequently conveyed to his daughter, as he did, in order to obtain possession of ready money rather than for any mercenary purposes. While this transaction was unwise and unfortunate we do not think it was tainted with fraud, and therefore voidable and not void.

The plaintiff, Elizabeth E. Cutter, is the nominal grantee of this property for which she paid $2800. $945.84 of this amount has already been expended for the benefit of Marie, the beneficiary of this property. The remaining sum of $1854.16 is still in the hands of the plaintiff, Cutter, unexpended. The defendant, Burroughs, having evicted the plaintiff, Elizabeth E. Cutter, must be deemed to have accepted the devise to him and to have decided to retain his title, subject, however, to the charges imposed upon the property by the terms of the devise. The $945.84 was expended, for the benefit of Marie out of the $2800 received by the plaintiff, William W. Cutter, for the sale of this property, in the payment of bills on account of

which it had become necessary to sell this last piece of real estate. Elizabeth E. Cutter is therefore entitled to be subrogated to the rights of the beneficiary in this piece of property and made whole by having the balance of $1363.16 remaining in the hands of William W. Cutter after the payment by him of the amount due the plaintiff, Ida M. Chadwell, returned to her by him, and also by having the sum of $1436.84, being the amount required to make up the balance of the total sum of $2800 paid by her, made a charge and lien upon this particular piece of real estate devised to the defendant, Burroughs.

We think the same rule should apply to the sale of the equity in the Stroudwater property from the plaintiff, Cutter, as guardian to Stephen F. Hopkinson for the sum of $650, and from Hopkinson to himself for the same consideration. This conveyance to Hopkinson and re-conveyance to himself seemed to have been done in good faith by Cutter after advertising the real estate in the newspapers for several weeks for a full and fair value of the property. In all these matters Cutter acted upon the advice of counsel as laymen under similar circumstances are accustomed to act, and there is not the slightest testimony or inference that he did not rely and act in good faith upon the legal advice given. Therefore this transaction does not seem to be so tainted with fraud as to make it void instead of voidable. We think that the plaintiff, Cutter, having in good faith expended the $650 which he paid for this property for the benefit of the beneficiary in this particular property should be subrogated to her rights therein and have a lien upon the property therefor, and that the heirs, if they do not wish to retain this particular piece of property, should be required to make proper releases of the same to said Cutter. We have now disposed of all the property involved in this case.

No evidence having been offered by the defendants with respect to the value of the rents and profits of these various pieces of property to those in possession, or the payment of interest, in case of the election of the heirs to take the property, to the various purchasers upon their purchase money, we have assumed in the conclusion arrived at, that in case the heirs elect to take the property, the rents and profits on the one side and the interest on the other may be about equal and

therefore be offset. The heirs who elect to take any property herein referred to, must make their election within thirty days from the date of the final decree in this case.

Case to be remanded for a decree in accordance with this opinion.

C. ARCHER DUNLAP AND SUSAN M. DUNLAP, Appellants from the Decree of the Judge of Probate.

Androscoggin. Opinion July 7, 1905.

Guardian. Appointment. Welfare of Child. Power of Probate Court. Appeal. Justice of Supreme Judicial Court. Exceptions.

When the appointment of a guardian for a minor child is asked for, the welfare of the child is the main and controlling consideration.

The determination of this question is in the first instance submitted to the Probate Court, and ultimately, if an appeal be taken, to the determination of a Justice of the Supreme Judicial Court sitting as a Judge of the Supreme Court of Probate.

It is the duty of such Justice to hear and decide the fact whether the welfare of the child requires such guardianship.

The decision of such Justice is not a ruling of law, but is his judgment of the facts and of the necessity and propriety of his conclusions, and is not subject to exception.

On exceptions by appellants. Dismissed.

Appeal from the decision of the Judge of Probate for the County of Androscoggin, upon petition of Charles F. Dunlap for appointment as guardian of one Erlon M. Dunlap, the son of C. Archer Dunlap and Susan M. Dunlap, the appellants, and grandson of the petitioner.

After hearing in the Probate Court, the Judge decided in favor of the petitioner, and entered a decree appointing him guardian of the said Erlon M. Dunlap, who is a minor, of the age of twelve years.

An appeal was duly taken and full hearing was had before the presiding Justice at the Supreme Judicial Court for the County of

Androscoggin, April term, 1905, who affirmed the decree of the Probate Court. Thereupon the appellants took exceptions.

H. E. Coolidge, for appellants.

Ralph W. Crockett, for appellee.

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

STROUT, J. This is a petition of Charles F. Dunlap, grandfather of Erlon M. Dunlap, a minor of the age of twelve years, for the appointment of the grandfather as guardian of the minor, with the care and custody of his person. The Judge of Probate granted the prayer of the petition, and the appellants, his parents, appealed from the decree of the Probate Court. In the Supreme Court of Probate after full hearing had before a Justice of this Court, who found the facts, he affirmed the decree of the Probate Court, and the case is here upon exceptions.

In cases of this kind the welfare of the child is the main and controlling consideration. The determination of this question is in the first instance submitted to the Probate Court, and ultimately, if an appeal is taken, to the determination of a Justice of this Court sitting as Judge of the Supreme Court of Probate. The statute imposes upon such justice the duty of hearing and deciding the fact, whether the welfare of the child requires such guardianship. Such decision is to be arrived at by the exercise of the sound judgment and discretion of the Justice hearing the case. His decision is not a ruling of law, but his judgment of the facts and necessity and propriety of his conclusions. It is not subject to exception. In this case the Justice determined that the welfare of the minor demanded his removal from the influences surrounding him while in the custody of his parents, and that they were incompetent to discharge their duty in that regard. We cannot reverse that finding upon exceptions. The entry must be

Exceptions dismissed. Decree below affirmed.

GEORGE B. HOOK et al. *vs.* RICHARD D. CROWE et al.

Penobscot. Opinion September 27, 1905.

Contract. Sales. Principal and Agent. When Agent has no Implied Authority to Bind Principal. When Undisclosed Principal is Bound.

1. A selling agent has no implied authority, which binds the principal, to contract that payment may be made by goods to be sold, or services to be rendered, to him on his own personal account.
2. Persons dealing with a selling agent, knowing him to be such, are bound to know that he has no such implied authority, and that the principal will not be bound by such terms of payment. If a purchaser makes such an unauthorized agreement as to the payment with an agent, and receives the goods, he becomes liable to pay in cash.
3. But if the purchaser in dealing with the agent believes him to be a principal, the undisclosed principal must take the contract, if he seeks to enforce it, as his agent and the purchaser left it. If he seeks the advantages of the contract, he must suffer its burdens. He must take his pay as the agent agreed to take it.
4. The facts stated in this case are not sufficient to warrant the finding necessarily involved in the ruling in the court below, that the defendants when they purchased the goods, the price of which is sued for, had knowledge that the plaintiffs' agent to whom they gave the order was an agent and not a principal.

Billings v. *Mason*, 80 Maine, 496, distinguished.

On exceptions by defendants. Sustained.

Assumpsit on account annexed to recover the price of awnings and a sash curtain sold and delivered by the plaintiffs to the defendants. The action was brought in the Bangor Municipal Court and was submitted on an agreed statement of facts. Upon this agreed statement of facts, the Judge of that court ruled, pro forma, that the plaintiffs were entitled to recover, and to this ruling the defendants excepted. Thereupon in accordance with the provisions of chapter 211, section 6, Public Laws of 1895, the agreed statement of facts was certified to the Law Court.

The case is sufficiently stated in the opinion.

Thomas W. Vose, for plaintiffs.

Forrest J. Martin and H. M. Cook for defendants.

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

SAVAGE, J. Action to recover the price of two awnings and one sash curtain, sold and delivered by the plaintiffs to the defendants. The agreed statement of facts shows that one Harry F. Hook, the selling agent of the plaintiffs, applied to the defendants for an order and that the defendants gave an order for the articles mentioned on condition that he, Harry F. Hook, would take the pay therefor in clothing and work out of defendants' store, which he agreed to do. On the same day Hook delivered to the plaintiffs an unsigned order for the awnings upon one of their printed blanks. The goods were shipped to the defendants seven days later, and by them received. A bill for the same was sent to them by mail the same day. The plaintiffs took the order from their agent Hook without knowledge of the agreement which he had made with the defendants in regard to the manner of payment, and without notice or suggestion of payment otherwise than in cash as usual. On the day the original order was given, the agent, Hook, had work done by the defendants to the amount of $1.50, and nearly a month later he had clothing of them to the amount of $8.50, all in accordance with his agreement with them when they gave the order for the awnings. The defendants now seek to have these items allowed against the bill sued by the plaintiff. The court below gave judgment for the plaintiffs for the full amount of their bill, and the defendants took exceptions.

The case hinges upon whether the defendants at the time they gave the order, knew that Hook was acting as agent for the plaintiffs, or whether they believed him to be a principal. For whatever may be the implied authority of selling agents to make terms and provision for payment, and however far principals are bound generally by the conditions their agents agree to, we think it cannot be gainsaid that an agent has no implied authority, which binds the principal, to contract that payment may be made by goods to be sold, or services to be rendered, to him on his own personal account. The doctrine laid down in *Parsons* v. *Webb*, 8 Maine, 38, and also *Rodick* v. *Coburn*, 68 Maine, 170, is analogous and not

distinguishable in principle. Persons dealing with an agent, knowing him to be such, are bound to know that he has no such implied authority. If they deal with him upon such terms, they are bound to know that the principal will not be bound, unless he ratifies. Accordingly if these defendants made such an unauthorized agreement with the agent, knowing him to be such, and, nevertheless, received the goods ordered, they should pay for them. Although the contract with the agent was express, it was invalid as to manner of payment. If under such circumstances the defendants chose to receive the goods, they affirmed the order itself, and became liable to pay in cash. In this respect this case is to be distinguished from *Billings* v. *Mason*, 80 Maine, 496.

On the other hand, if the defendants dealt with Hook, the agent, believing him to be a principal, the plaintiffs, who were undisclosed principals, must take the contract, if they seek to enforce it, as their agent and the defendants left it. If they seek the advantages of the contract, they must suffer its burdens, and must allow the defendants by way of payment for the goods sold and services rendered to the agent.

As to whether or not the defendants knew Hook was acting as agent, the agreed statement of facts is vague and uncertain. It is true that Hook delivered to the plaintiffs a written, but unsigned, order. It is true that that order discloses on its face that the plaintiffs were the principals, and therefore that Hook was only an agent. But it does not appear satisfactorily, and we cannot find that the defendants saw the written order or knew its contents, or that they were in any way informed that Hook was an agent and not a principal. The case states that the defendant "did give the order sued for." But no order is "sued for." The suit is for the price of goods ordered. And unquestionably the defendants did give an order for the goods. The question is whether they gave the order which Hook delivered to the plaintiffs, and so were advised of its contents, and that plaintiffs were the principals. We think the plaintiffs' case, on this point, fails for want of proof.

The ruling of the court below, being in effect to the contrary, cannot be sustained.

Exceptions sustained.

STATE OF MAINE *vs.* INHABITANTS OF SWANVILLE.

Waldo. Opinion September 28, 1905.

Highways. Towns. Guide-posts. R. S., c. 23, § 91.

The statute, R. S., chapter 23, section 91, imposing a penalty upon towns for not maintaining guide-posts at junctions and crossings of highways, includes only roads leading from town to town. Roads wholly within a town and merely leading into or connecting such highways are not within the statute, and towns are not obliged to maintain guide-posts where such roads enter highways.

On report. Judgment for defendant.

Indictment against the defendant town for failing to erect and maintain guide-posts as required by Revised Statutes, chapter 23, section 91. After the evidence had been taken out in the court of the first instance, the presiding Justice ordered the case to be reported to the Law Court for determination "upon so much of the evidence as is legally admissible."

The facts are fully stated in the opinion.

B. F. Foster, County Attorney, for the state.

R. F. Dunton, for defendant town.

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

EMERY, J. The defendant town was indicted for violation of R. S., ch. 23, sec. 91, providing that "Towns shall erect and maintain at all crossings of highways, and where one public highway enters another, substantial guide-posts . . . on which shall be plainly printed . . . the name of the next town on the route."

The facts found from the evidence are these: There are two nearly parallel public highways leading from Belfast, through the defendant town Swanville, to Monroe. At one place in Swanville there is a cross road from one of these highways to the other. This cross road

is wholly within Swanville and simply goes across country from one highway to the other, without crossing either. The town did not erect the statutory guide-post at either end of this cross road.

The case proved is not within the statute. Statutory "highways" are those leading from town to town. Local or cross roads wholly within one town are not within that term. In this case the locus was not at a "crossing of highways" nor where "one public highway enters another."

Judgment for defendant.

STATE OF MAINE

vs.

FRANK CALL, JOHN GILLIGAN AND ROY MCMASTERS.

Washington. Opinion September 28, 1905.

Criminal Law. Evidence. Plea of Guilty. Record from Municipal Court.

1. A plea of guilty in court is a confession of the crime charged in the complaint or indictment, and may be shown by oral testimony. It is not necessary to show it by record.
2. When a record of a municipal court offered to show a plea of guilty is incomplete, in that, the spaces for the names of witnesses ordered to recognize, and for the amount of their recognizance, in the printed form, are left blank, it is held to be admissible, and sufficient for the purpose for which it is offered.

On exceptions. Overruled. Judgment for the state.

The respondents were indicted at the January term, 1905, of the Supreme Judicial Court, Washington County, for breaking and entering a sardine factory at Eastport and stealing therefrom sardine coppers to the value of ten dollars.

The respondent, Call, was not apprehended but Gilligan and McMasters were arrested and held for trial jointly. The evidence for the state and also for the defense showed that Gilligan and

McMasters were together on the day when the crime was committed. The jury found these two respondents guilty as charged in the indictment.

During the trial of the cause, the state offered in evidence, a paper purporting to be a copy of the record of the Eastport Municipal Court concerning the respondent, McMasters. The said respondent seasonably objected to the admission of the paper aforesaid because it was not properly authenticated and because it exhibited internal evidence that it was not a correct copy of the proceedings of that court. The paper was admitted and the respondent seasonably excepted to its admission.

The state introduced one Eliab A. Murphy, a deputy sheriff, who was present at the trial of the respondents, Gilligan and McMasters, before the Eastport Municipal Court and who testified that these two respondents pleaded guilty in that court. To the admission of this evidence, the respondents seasonably objected and their objection being overruled, excepted to the ruling. No record evidence was introduced with regard to the plea of the respondent, Gilligan, in the court below.

An exception was also taken to a portion of the charge of the presiding Justice but which was afterwards waived.

The pith of the case appears in the opinion.

C. B. Donworth, County Attorney, for the state.

A. D. McFaul, and W. R. Pattangall, for respondents.

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

SAVAGE, J. At the trial of the respondents for breaking and entering and larceny, the state was permitted to show by oral testimony that when they were arraigned for the same offense at the preliminary examination in the municipal court, each pleaded that he was guilty. Further, the state was permitted to introduce a copy of the record of the municipal court showing the same fact as to one of the defendants. To the rulings, admitting these pieces of evidence, the defendants excepted.

The defendants claim that their pleas of guilty in the lower court can properly be shown only by record, and that the copy of record introduced against one was incomplete, and hence that it was not admissible in evidence. The only imperfection we are able to discover in the copy of record is that, in the blank form of record used by the court below, the spaces for the names of witnesses ordered to recognize and the amounts of their recognizances are left blank. Whether any witnesses were ordered to recognize, or whether so much of the copy of record as relates to witnesses is superfluous, does not appear. It is immaterial in either event. The copy of record was clearly sufficient for the purpose for which it was offered.

Nor is there any foundation for the contention that oral testimony was inadmissible to show the pleas of the defendants in the municipal court. A plea of guilty in court is a confession of the crime charged in the complaint or indictment, and it may be proved like any other confession. When a person accused is asked whether he is guilty or not guilty, and answers, any one present and hearing may testify what his answer was, whenever that answer becomes material in later judicial proceedings. It is not necessary to show it by record.

The other exception is waived.

Exceptions overruled. Judgment for the state.

A. E. RUSSELL *vs.* MAINE CENTRAL RAILROAD COMPANY.

Androscoggin. Opinion October 3, 1905.

Railroads. Duty to fence. Horse on Track. Duty of Employees. Liability for Injury. Evidence. R. S., c. 52, § 26.

A railroad company owes no duty of fencing its road as to the owner of a horse being pastured in the pasture of a third person, which does not join the railroad location, even if the owner has a right to lead the horse over the land between the pasture and the railroad.

Where the horse was an estray, unlawfully at large, and a trespasser upon a railroad track, the railroad company did not owe the owner of the horse the duty of exercising reasonable care to avoid injuring the horse. It owed no duty except the negative one that it should not wantonly injure the horse. Its servants were not bound to be on the lookout lest they should run into a trespassing horse. They were not bound to use any care with respect to the horse unless they knew the horse was on the track before them.

In such case, the railroad company is not liable to the owner of the horse, unless it appears that there was reckless and wanton misconduct on the part of its servants in the management of the train, after the horse was known by them to be on the track, and that such misconduct caused the death of the horse. The burden of showing this is on the owner of the horse.

In the opinion of the court, the circumstances relied upon by the plaintiff entirely fail to prove that the defendant's engineer had knowledge that the horse was on the track, and therefore that his conduct in running down the horse was reckless and wanton. They raise a conjecture, but do not amount to proof. The facts ascertained are too uncertain to warrant the inference which the jury drew.

On motion by defendant. Sustained.

Action on the case to recover the value of a horse killed by the defendant company's freight train. Plea, the general issue. Tried at the April term, 1905, of the Supreme Judicial Court, Androscoggin County. Verdict for plaintiff for $157.29. Defendant then filed a general motion to have the verdict set aside.

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

White & Carter, for defendant.

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

SAVAGE, J. The plaintiff sues to recover the value of a horse killed by the defendant's freight train. The horse was being kept for hire in the pasture of a third party. Between the pasture and the railroad location was a field, owned by the same party, through which the plaintiff had a right to lead the horse to and from the pasture, but in which he had no right to turn it loose. The horse broke out of the pasture in the night time, crossed the field and went on to the railroad track, at a place adjoining the field, where there was no fence. It followed the track for nearly two miles, when it was overtaken by the train and killed. The plaintiff's declaration counts on the failure of the defendant to maintain a suitable, legal and sufficient fence along its way adjoining the land used for pasturing. R. S., ch. 52, sect. 26. But the proof in this respect fails, because the pasture where the plaintiff pastured his horse, and where only he had a right to pasture it, did not adjoin the railroad location. Under such circumstances the defendant owed no duty to the plaintiff to fence its road. *Byrnes* v. *B. & M. R. R.*, 181 Mass. 322. Though the owner might lawfully lead his horse across the land between the pasture and the railroad location, he had no right to let the horse go at large across it. And if he did so, the horse was an estray, out of the pasture, and the railroad owed no duty of fencing against the horse so situated.

In his declaration the plaintiff also alleges that the defendant negligently run its locomotive upon the horse, then upon the railroad track, for want of a sufficient fence to prevent it, and upon this ground alone the plaintiff seeks to retain his verdict. Waiving the question whether the declaration as a whole sufficiently sets forth a claim of negligence by the defendant in operating its locomotive and train, we proceed to inquire whether there is sufficient evidence in the record to warrant a jury in finding that the defendant was negligent in this respect.

The plaintiff's horse was an estray, unlawfully at large, and a trespasser upon the defendant's railroad track. The defendant did

not owe to the plaintiff the duty of exercising reasonable care to avoid injuring the horse, as would have been the case if the horse had been lawfully upon the track. It owed no duty except the negative one that it should not wantonly injure the horse. That is the only duty owed to a licensee. *Dixon* v. *Swift*, 98 Maine, 207. No more is owed to a trespasser. *Maynard* v. *B. & M. R. R.*, 115 Mass. 458. The servants of the defendant were not bound to be on the lookout lest they should run onto a trespassing horse. *Davis* v. *B. & M. R. R.*, 70 N. H. 519. They were not bound to use any care with respect to the horse unless they knew the horse was on the track before them. The defendant is not liable to the owner of the horse, unless it appears that there was reckless and wanton misconduct on the part of the defendant's employes in the management of the train, after the horse was known to them to be on the track, and that such misconduct caused the death of the horse. The burden of showing this is on the plaintiff. *Darling* v. *B. & A. R. R. Co.*, 121 Mass. 118; *Chenery* v. *Fitchburg R. R.*, 160 Mass. 211; *Frost* v. *Railroad*, 64 N. H. 220; *Railroad* v. *Godfrey*, 71 Ill. 500.

The train, consisting of thirty-six freight cars, appears to have been moving at a usual and proper rate of speed. It was midnight. There was a nearly full moon. The defendant says the night was cloudy. But this is denied by the plaintiff. We assume that the latter is correct. The head light on the locomotive lighted the track ahead for about one hundred and fifty feet. The engineer testifies that he did not see the horse until it came within the light of the head light, and that he then shut the steam off and blew the whistle. But it was too late to avoid the accident.

On the other hand, the plaintiff shows from the appearance of the tracks of the horse, that it was "on the run" from three-quarters of a mile to a mile before it was struck by the locomotive. It is argued that the horse was frightened by the approach of the train and ran that distance in front of it. It is claimed that the engineer must have seen it, and therefore that it was wanton and reckless conduct in him not to stop the train or slacken its speed before the collision. But we do not think the evidence warrants such a conclusion. We have conjecture, not proof. No one knows, so far as the

case shows, how far ahead the horse was when it was startled into a run by the noise of the approaching train. It is purely conjectural how far ahead of the train the horse ran, until he came to a place where the track crossed over a brook, where the plaintiff claims he was stopped by the brook, and where he was killed. The train was moving at a speed of twenty miles an hour. The horse, as the owner testifies, could "pull a wagon at a 2:40 gait." The horse might for awhile at least keep well ahead of the locomotive. It may be that the horse was near enough to be seen all the time, even by moonlight, and it may be that he was not. To say, upon the evidence, that he was, would be to substitute guess work for proof. It may be that the engineer could have seen the horse if he had looked. It is not enough to show merely that he might have seen. It must be shown that he did see,—for unless he saw, there was no reckless or wanton misconduct on his part. While the circumstances surrounding a man may be such, in some cases, as to warrant reasonable men in believing, in spite of his denial, that he saw some object in question, we do not think the circumstances in this case warrant the finding that the engineer actually saw the horse in season to prevent the accident. See *McTaggart* v. *Maine Central R. R. Co.*, 100 Maine, 223. Jurors may draw legitimate inferences from ascertained facts. But here the facts ascertained are too uncertain to warrant an inference. They are not such as to lead a reasoning mind to a definite conclusion. In other words, they fail to prove.

Motion for a new trial sustained.

MARY H. WHITMORE

vs.

SYLVESTER B. BROWN AND PEDRICK D. GILLEY.

HELON SMALLIDGE, ANNIE E. LINDSEY AND AVELIA HOLMES

vs.

SAME.

Hancock. Opinion October 3, 1905.

Navigable Waters. Owners of Upland. Riparian Rights. Flats. Grant of Upland. Public Lands. Grant. Construction. Description. Deed. "Appurtenances and Privileges." Adverse Possession. Colonial Ordinance, 1641-7.

1. By force of the Colonial Ordinance of Massachusetts, 1641-7, the owner of upland adjoining tidewater prima facie owns to low water mark; and does so own, in fact, unless the presumption is rebutted by proof to the contrary.
2. Flats pass by a grant of the upland, unless excluded by the terms of the grant properly construed.
3. In construing a grant, the intention of the parties is ascertained by giving suitable effect to all the words of the grant, reading them in the light of the circumstances attending the transaction; but the supposed intention of the parties, however fortified by circumstances, cannot be permitted to overcome the effect of the express language of the grant, taken as a whole, and properly construed.
4. The expression in a grant, "to the shore, then the shore round to the first mentioned bounds," or "then follows the shore to the bound first mentioned," is interpreted as meaning "to the shore and then by the shore" to the point of beginning, and this expression, unqualified, excludes the flats.
5. The expression in a grant, "to the head of a cove, thence around the western side of the cove" excludes the cove and the flats.
6. The description in a deed, "Beginning in the N. E. corner of N. S.'s land (which point was in fact at or above high water mark) and proceeding thence by several courses" to the head of Gilpatrick's cove, thence around the western side of the cove to the first mentioned bounds" excludes the flats.
7. The description in a deed, "Beginning at a spruce tree on the shore near the head of Gilpatrick's cove, so called, and running west across the point to the shore; thence southeasterly and northwardly running the shore to the point of beginning, with all the privileges thereto," excludes the flats.

8. When the two ends of a line by the shore are at high water mark, in the absence of other calls or circumstances showing a contrary intention, the boundary will be construed as excluding the shore.
9. The flats do not pass as appurtenant to the upland, when they are outside of the express boundaries in the grant, even if the grant contains the words "together with all the privileges and appurtenances thereto belonging."
10. The evidence in these cases falls far short of proving adverse, exclusive, continuous, open and notorious occupation of the flats for twenty years or more.

On report. Judgment for defendants.

Two real actions to recover certain tide lands or flats in Gilpatrick's Cove on Mt. Desert Island, adjacent to the parcels of upland owned severally by the plaintiffs. The defendants pleaded the general issue and disclaimed as to all the demanded premises except that part of the same embraced within the description contained in a deed from Arthur Gilpatrick to the defendants, dated Feb. 1, 1902, and recorded in the Hancock Registry of Deeds, volume 378, page 332.

It was agreed to report the cases to the Law Court with the stipulation "that the Law Court is to determine whether the plaintiffs are entitled to recover in either or both cases covered by this report, and if the court finds from this report of the cases that the plaintiffs are entitled to recover any portion of the premises described in the writs, then the court is to fix the limits of such portion of the premises in either or both cases which plaintiffs are so found entitled to recover."

The case is sufficiently stated in the opinion.

Hale & Hamlin, for plaintiffs.

Arno W. King, George R. Fuller, and John A. Peters, for defendants.

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

SAVAGE, J. These are real actions, and upon the pleadings the question in issue is the ownership of the flats in Gilpatrick's Cove on Mt. Desert Island, adjacent to the parcels of upland owned severally by the plaintiffs. Both plaintiffs derive their titles from Maria Teresa De Gregoire. The Island of Mt. Desert, prior to 1788, was owned by John Barnard and Madame De Gregoire, in common and undivided. By partition proceedings in 1788, the easterly part of

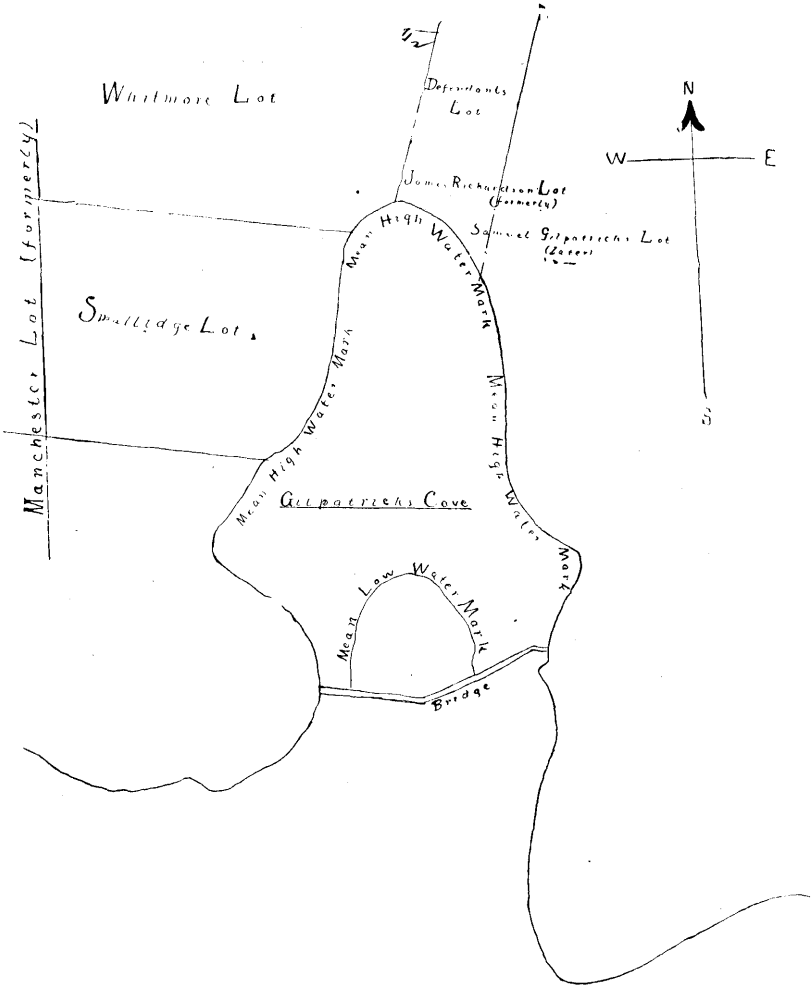
the island was set off to Madame De Gregoire, to hold in severalty. Undoubtedly while Barnard and Madame De Gregoire owned the island in common, their ownership included the flats around it, under the provisions of the Colonial Ordinance of Massachusetts, 1641-7.

It is suggested that the decree of partition set off to Madame De Gregoire the upland only of the easterly part of the island, and excluded the flats. But we think that taking into consideration all of the terms of the partition proceedings, read in the light of existing conditions, the title in severalty to the flats passed to Madame De Gregoire, and the question to be determined is whether that title has come down to the plaintiffs.

In the Colonial Ordinance above referred to, which is a part of the common law of this state, *Barrows* v. *McDermott*, 73 Maine, 441, it is declared "that in all creeks, coves, and other places, about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low water mark, where the sea doth not ebb above one hundred rods, and not more whereso-ever it ebbs further." By force of this ordinance it is held that the owner of upland adjoining tidewater prima facie owns to low water mark; and does so, in fact, unless the presumption is rebutted by proof to the contrary. *Proctor* v. *Maine Central R. R. Co.*, 96 Maine, 458. The grantor may separate the flats, from the upland, and convey the one and retain the other. *Storer* v. *Freeman*, 6 Mass. 435. But unless the flats are excluded by the terms of the grant properly construed, they pass by a grant of the upland. In construing deeds in which the question arises, as in the construction of all other deeds, the court endeavors to give effect, if possible, to the intention of the parties, but it is and must be the intention which is ascertained by applying the legal rules of construction to the language in the deed. In *Proctor* v. *Maine Central R. R. Co.*, supra, we said: "Ordinarily the intent which is effective in a grant is the intent expressed by the language of the grant. It is the expressed, rather than the unexpressed intent. It is ascertained by giving suitable effect to all the words of the grant, reading them in the light of the circumstances attending the transaction, the situation of the parties, the state of the country, and of the estate granted, such as its

condition and occupation." But the supposed intention of the parties, even if fortified by circumstances and conditions, cannot be permitted to overcome the effect of the express language of the grant, taken as a whole, and properly construed.

The provisions in the deeds in the plaintiffs' chains of title to which we shall refer, will, we think, be better understood by reference to the accompanying sketch.



In many of the older deeds in the cases before us, the boundary line is described as running to James Richardson's line, then following the Richardson line southerly "to the shore," "then the shore round to the first mentioned bounds" or "then follows the shore to the bound first mentioned." These expressions we interpret as meaning "to the shore and then by the shore" to the point of beginning. The words "to the shore" is a phrase of exclusion, *Dunton* v. *Parker*, 97 Maine, 461, and it has always been held that the description "to the shore and then by the shore," unqualified, excludes the shore, which is the flats between high and low water mark. *Proctor* v. *Maine Central R. R. Co.*, 96 Maine, 458. But the expression may be qualified by words or phrases in the deed, as for instance, when both the termini of a boundary by a shore are at its outer margin, the shore will be included, unless other calls and circumstances show a contrary intention, although the line may be described as running "to the shore, and then by the shore." *Dunton* v. *Parker*, supra. Even if one of the termini is at high water mark and the other at low water mark, the shore may be included in the conveyance, as it was in *Snow* v. *Mt. Desert Is. R. E. Co.*, 84 Maine, 14.

But in the deeds referred to, it does not clearly appear where the starting point was, whether at high water mark or low water mark. We prefer therefore to rest our conclusion in the Whitmore case upon the consideration of a single deed in the plaintiff's chain of title, namely that of John Manchester to her grantor, for the plaintiff Whitmore has no greater title than was conveyed by that deed.

The Whitmore Case. The boundary in the last named deed is as follows: "Beginning in the N. E. corner of Nathan Smallidge's land; thence running W.' on Smallidge's line to the shore at the mouth of Somes's River; thence N. Westerly to a stake south of Thomas Manchester's wharf; thence E. to Samuel Gilpatrick's line; thence south on Gilpatrick's line to the head of Gilpatrick's Cove; thence around the western side of the cove to the first mentioned bounds." The Gilpatrick line spoken of is the same as the Richardson line in the older deeds.

The question is,—Does the line "to the head of Gilpatrick's Cove," end at high water mark? Or does it extend to or toward

low water mark? We think it ends at high water mark. The words "head of the cove," in their natural significance, seem to us to mean that place farthest up the cove where the water stands at high water, and not down the cove at low water mark, a place which in this case is near the mouth of the cove. Moreover the plans in evidence in this case show that the Gilpatrick line, if extended across the flats in the cove, would strike the upland on the westerly side before it would strike low water mark, and then it would be on the outside of the cove. The words "to the head of the cove" exclude the cove and the flats. The next call in the deed strengthens our conclusion. It is, — "thence around the western side of the cove to the first mentioned bounds." It helps to make clear what was in the minds of the parties. If "the western side of the cove" starts at the Gilpatrick line at high water mark, and proceeds along high water mark, the course seems a reasonable, natural and probable one. On the other hand, if the Gilpatrick line be extended southerly across the flats, the next call, "around the western side of the cove," has little or no meaning. There is no place which it fits. It seems very improbable that the parties actually intended the conveyance to cover anything below high water mark. A glance at the sketch is sufficient to show how improbable it is that such a line was intended. There is another ground which also seems to us conclusive that the deed in question did not convey the flats. The description begins "at the N. E. corner of Nathan Smallidge's land," and it ends at "the first mentioned bounds." As we shall show when we consider the Smallidge case, the Smallidge land did not include flats. The northeast corner of the Smallidge land, therefore, was at or above high water mark. So that the description in the Whitmore deed now in question begins at a point at or above high water mark, proceeds by several courses to the head of Gilpatrick's Cove, thence around the western side of the cove, to the point of beginning, which was at or above high water mark. Such a description, in the absence of other calls or circumstances showing a contrary intention, will be construed as excluding the shore. *Parker* v. *Dunton*, 97 Maine, 461. To hold otherwise would be to ignore all the previous decisions of

this court. The plaintiff's grantor therefore obtained no title to the flats by grant, and conveyed none to her.

The Smallidge Case. The plaintiffs' lot lies next south of the Whitmore lot just considered, and they have the title which was conveyed to Nathan Smallidge by Wentworth Kenniston, by deed dated December 11, 1839. The description in that deed is as follows:—"Beginning at a spruce tree on the shore near the head of Gilpatrick Cove, so called, on Mt. Desert Island and running west across the point to the shore; thence south Eastly and northwardly running the shore to the point of beginning, with all the privileges thereto." It must be considered that the spruce tree which was "near the head of the cove" and which was both the beginning and the ending of the boundary as expressed, was on upland. And although it may properly be held, under some circumstances, that a tree or other object on the bank of a river or cove, which marks the starting point of a boundary line, is intended rather to mark the course of the line than its precise terminus, at water line, and even that flats beyond may pass, *Erskine* v. *Moulton*, 66 Maine, 280, we do not think such a rule can be applied to the description in this case, so as to carry the starting point to low water mark, particularly since the other calls in the deed exclude the shore. They are, "running west across the point *to the shore;* thence . . . running the shore to the point of beginning." As we have already said, "running the shore" means "running by the shore." These calls exclude the shore. *Proctor* v. *Maine Central R. R.*, supra. And the whole description is brought within the rule that where the two ends of a line by the shore are at high water mark, in the absence of other calls or circumstances showing a contrary intention, the boundary will be construed as excluding the shore. Moreover, a glance at the sketch will show the improbability that the parties intended the northeast corner of the lot to be at low water mark.

It is admitted that in all the deeds the words, "together with all the privileges and appurtenances thereto belonging," are inserted in the habendum clause. And in the Smallidge deed the description of the premises granted is followed by the words "with all the privileges thereto." The plaintiffs claim that the flats are appurtenant to

the upland, and that under such descriptions, or clauses, they passed by a conveyance of the upland. It was suggested in *Snow* v. *Mt. Desert Isl. R. E. Co.*, 84 Maine, 14, that flats are in a sense considered as appurtenant to the upland. But it must be remembered that the effect of the Colonial Ordinance upon the construction of deeds is merely to fix boundaries. A deed of the upland prima facie conveys flats,—not appurtenances nor privileges merely, but the land itself, subject to public uses,—to low water mark. On the other hand, we think it must be held that if by the descriptive terms in the deed, the flats are excluded, they do not pass even as appurtenances or privileges. They are outside the boundaries fixed by the deed. No interest in land in the flats passes which is beyond the dividing line.

The plaintiffs also claim title by disseizin. One may obtain title to flats by adverse possession. If, holding under a recorded deed which includes flats as well as upland, he acquires title to the upland by adverse possession, the title will extend to the flats covered by his deed. *Brackett* v. *Persons Unknown*, 53 Maine, 228. *Richardson* v. *Watts*, 94 Maine, 476. But that is not this case. Here the plaintiffs can hold only by proof of adverse possession of the flats, and then not beyond the line of actual occupation. *Thornton* v. *Foss*, 26 Maine, 402. The proof is insufficient. The evidence falls far short of proving adverse, exclusive, continuous, open and notorious possession of the flats for twenty years or more.

The entry in each case must be

Judgment for defendants.

ALBERTA COLOMB, by next friend,

vs.

PORTLAND & BRUNSWICK STREET RAILWAY.

Cumberland. Opinion October 3, 1905.

Street Railways. Personal Injuries. Child Injured on Track. Contributory Negligence. Due Care. Care Required of Infant.

In a case where a child ten years and seven months old, while attempting to cross an electric railway track in a street, was run over by a car, and where it appears that the car, at the time she attempted to cross, was in plain sight of her, and could not have been much more than its own length from her, and where it is manifest, either that she did not look to see if the car was approaching, or that, if she looked, she must have seen the car, *held*, that her contributory negligence is a bar to her recovery against the railway company. Her act can hardly be regarded otherwise than a result of a sudden unthinking impulse, or of reckless daring.

Though children are not by law holden to the exercise of the same extent of care that adults are, and though the age and intelligence of a party are important factors in determining whether due care has been used, yet the plaintiff in this case was bound to use that degree or extent of care which ordinarily prudent children of her age and intelligence are accustomed to use under like circumstances.

Held: that the plaintiff clearly failed to use that care which a child of her intelligence should use.

On motion by defendant. Sustained.

Action on the case brought to recover damages for personal injuries sustained by the plaintiff by reason of being run over by one of the cars of the defendant, in Brunswick village. At the time of the injury, the plaintiff was of the age of ten years and seven months. As one of the results of the injuries sustained by the plaintiff, she lost an arm.

The action was tried at the January term, 1905, Supreme Judicial Court, Cumberland County. Plea, the general issue. Verdict for plaintiff for $2800. Defendant then filed a general motion to have the verdict set aside.

The case is sufficiently stated in the opinion.

McGillicuddy & Morey, and William H. Looney, for plaintiff.

Weston Thompson, for defendant.

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

SAVAGE, J. The plaintiff, then a child of ten years and seven months, was run over by one of the cars of the defendant, in Brunswick village, and received injuries for which she seeks to recover in this action. The accident occurred nearly in front of the place where the plaintiff was attending school, before school hours. At the time many of the school children were playing in the street upon both sides of the defendant's track, and perhaps upon the track. The car was proceeding on a slight down grade. The only witness who claimed that he made any particular observation testified that at the point of collision the track was visible back for a distance of fifteen or sixteen hundred feet. The car was eight wheeled, and forty feet long.

The car was stopped by reversing the motor while going a little more than half its length, after the plaintiff came onto the track.

The plaintiff claims that the defendant was negligent, because the car was being driven at an unreasonable and dangerous rate of speed, because no warning by bell, gong or whistle was given while the car was approaching the place of the accident, and because the motorman allowed his attention to be diverted to a boy standing by the side of the street, instead of looking straight ahead. This boy estimated the speed of the car at sixteen or seventeen miles an hour. The weight of the evidence, and upon some of the propositions the great weight of the evidence, we think negatives these claims.

But if we assume that there was sufficient evidence of the defendant's negligence to go to the jury on that ground, there is another ground which we think presents an insuperable obstacle to the plaintiff's recovery. The plaintiff was bound to show not only the defendant's negligence, but affirmatively that no want of due care on her part contributed to her injury. *McLane* v. *Perkins,* 92 Maine, 39. Here we think she fails. She attempted to cross the track in front

of a moving car, which could not have been many feet from her. For taking any fair estimate of her own speed and the outside estimated speed of the car, she would have crossed the track, in not much more time than it took the car to run its own length. Though a child, she was nevertheless bound to exercise due care. Though children are not by law holden to the exercise of the same extent of care that adults are, though the age and intelligence of a party are important factors in determining whether due care has been used, yet the plaintiff was bound to exercise that degree or extent of care which ordinarily prudent children of her age and intelligence are accustomed to use under like circumstances. *Gleason* v. *Smith*, 180 Mass. 6, the case of a child twelve years old. If children unreasonably, intelligently and intentionally run into danger, they should take the risks. *Collins* v. *South Boston R. R.*, 142 Mass. 301.

Due care required the plaintiff to use some degree of watchfulness before she attempted to cross. That she appreciated the danger of crossing an electric railroad track, and the need of watching, is evident, for she says that she always looked before crossing, so that she should not be struck by a car, and that in this instance she looked on both sides to see if a car was coming. But she says she was not careless in attempting to cross, because she not only looked, but when she looked there was no car in sight, and in this she is supported by one witness who says that he crossed the same track at about the same place, only a few feet in front of her, and that he looked and saw no car. The plaintiff and her witness are undoubtedly mistaken, to say nothing worse. It is clear beyond contradiction that the car was in plain sight at the time they say they looked. They could not have looked as they say they did without seeing the car. The plaintiff either looked and saw the approaching car, or she did not look. In either event she was careless. *Blumenthal* v. *Boston & Maine R. R.*, 97 Maine, 255. Her act can hardly be regarded otherwise than the result of a sudden, unthinking impulse or of reckless daring. To attempt to cross the track in front of a moving car, which could not have been many feet from her, was conduct "such as the judgment of common men universally would condemn as careless in any child of sufficient age and intelligence to be permitted to go alone" across a

street on which electric cars are frequently passing. *Hayes* v. *Norcross*, 162 Mass. 546. See also *Casey* v. *Malden*, 163 Mass. 507; *Mullen* v. *Springfield St. Ry. Co.*, 164 Mass. 450.

Motion for new trial sustained.

CYRUS THOMPSON et al.

vs.

MINNIE A. DYER, AND FRANK L. SHAW, Trustee.

Washington. Opinion October 14, 1905.

Trustee Process. Disclosure of Trustee. Costs. Plea. Accounting by Trustee. Assignment for Benefit of Creditors. Liabilities of Assignee. Statement as Evidence. Insufficient Disclosure. S. J. C., Rule XII. R. S., 1903, c. 88, §§ 19, 30, 31.

1. One summoned as trustee of the principal defendant in an action should file his answer and submit to examination at the return term. If he fails to do so without reasonable excuse he is liable to the plaintiff for all costs afterward arising in the suit, if the judgment in the action be for the plaintiff.
2. The usual formulary statement, even if upon oath, that at the time of the service of the writ upon him the person summoned as trustee did not have in his hands any goods, effects or credits of the principal defendant is not the disclosure, the discovery, but is in the nature of a plea to be sustained or overruled according to the evidence adduced in the disclosure or otherwise.
3. The disclosure of a person summoned as trustee must be complete and explicit, containing statements of facts, and not conclusions of law. Every statement that he desires to have considered as evidence must be direct and under the sanction of his oath, at least that he believes it to be true.
4. In making his disclosure the trustee may refer to books, papers, etc., and thus make their contents part of his disclosure, but the reference must be so definite and specific that the court may know from the disclosure alone what is referred to.
5. He may refer to and adopt the statements of others made to him or in their testimony, but in such case he must make oath that such statements are true or that he believes them to be true.
6. When it is made to appear that before the service of the writ upon him, the trustee had in his hands goods, effects or credits entrusted to him by

the principal defendant, he must fully and particularly account for all such if he would avoid being charged generally.

7. One who accepts an assignment as assignee for the benefit of creditors, becomes the trustee of the assignor as to all goods, effects and credits so assigned, even though he does not take actual personal possession of them. He will be charged as such trustee unless he fully accounts for them.

8. The fact that all such goods, effects and credits so assigned were taken possession of by an attorney appointed by the assignee, and that such attorney undertook the sole management of them under the assignment, does not relieve the assignee from liability to be charged as trustee. All the acts of the attorney in the premises are presumably his acts.

9. A statement, even upon oath, by such attorney showing a full accounting for all such goods, effects and credits cannot be considered upon the question of charging the assignee as trustee, unless the latter makes such statement a part of his disclosure under his oath that at least he believes it to be true, or unless an issue has been formed by some appropriate allegation.

10. A statement in a trustee disclosure is evidence, and not an allegation under the statute R. S., c. 88, sec. 30, 31. The allegation which must be made to let in evidence other than the disclosure must be additional to, outside of, the disclosure proper.

11. In this case the trustee admits that before the service of the writ upon him he had accepted an assignment of certain goods, effects and credits of the principal defendant, and it is *held:*

1. That the statement of his attorney, though upon oath and in the form of a deposition, cannot be received as evidence for want of the statutory allegation by either party.

2. That it cannot be considered as a part of the trustee's disclosure, though referred to in it, because the trustee has not made oath that such statement is true, or that he believes it to be true.

3. That the trustee's disclosure is not sufficiently direct, full and explicit to relieve him from liability as trustee.

4. That he must be charged generally, the amount to be determined on scire facias when he may make further disclosure and perhaps be then relieved except from costs.

On exceptions by plaintiff. Sustained.

Assumpsit on account annexed for merchandise sold and delivered by plaintiffs to principal defendant previous to October 6, 1899, amounting to $276.11 and interest thereon to date of writ, amounting to $6.43, the total amount of the account annexed being $282.54.

Frank L. Shaw of Machias, was alleged in the writ to be trustee of the goods, effects and credits of the principal defendant.

Service was duly made on the trustee on February 9, 1900. The writ was returnable to the April Term, 1900, of the Supreme Judicial Court, in and for Washington County, and was duly entered at said term. The principal defendant was duly defaulted.

No disclosure was filed by the trustee at the return term, and the trustee, although a resident of the County of Washington in which the writ was returnable, neglected without reasonable excuse to appear and submit to examination at the return term.

No disclosure was filed by the trustee until the April term, 1901, of said Court. At the April term, 1902, of said court, said trustee filed a further disclosure, and at the April term, 1903, of said Court, said trustee filed a further disclosure. At the hearing on these disclosures, the deposition and "additional statement" of W. R. Pattangall, attorney for the trustee, were offered and received in evidence against objection. Upon said disclosures, deposition and "additional statement," the presiding Justice discharged the trustee although without costs. Thereupon the plaintiffs excepted to the rulings and decision of the presiding Justice.

The case is sufficiently stated in the opinion.

J. H. Gray and Albert S. Woodman, for plaintiffs.

W. R. Pattangall, for defendant and trustee.

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

EMERY, J. The contest in this case is wholly over the liability of Mr. Shaw summoned as trustee of the principal defendant. The writ was served upon him Feby. 9, 1900, returnable at the next April Term of Court in Washington County where Mr. Shaw resided. He filed no disclosure nor did he appear and submit to examination at that term, and nothing appears to have been done in this case until the April Term, 1901, when Mr. Shaw filed the usual formulary statement that at the time of the service of the writ upon him he had not in his hands any goods, effects or credits of the principal defendant, and thereof submitted himself to examination upon oath. It does not appear that any notice of this was given the plaintiff or his attorney as required by Court Rule XII. *Butler* v. *Starrett*, 52 Maine,

281. Under these circumstances this statement or "denial must be considered in the nature of a plea which is to be sustained by answers to interrogatories propounded by the plaintiff." *Toothaker* v. *Allen*, 41 Maine, 324. The person summoned as trustee is not to determine the question of his liability. *Ibid.*

The principal defendant was defaulted and the case remained on the docket with nothing further done, so far as appears, until the April Term, 1902, when Mr. Shaw filed what is called in the report "a further disclosure" consisting of questions and answers. It is not stated which party put the questions but from their character it would seem that they were put by Mr. Shaw's own attorney. Nothing further appears to have been done till the April Term, 1904, when, the judgment of the Court upon the question of his liability as trustee being asked, Mr. Shaw offered as an additional disclosure a statement of information received from his attorney as to his, the attorney's, doings. This statement was received, and presumably considered, against the plaintiff's objection. Mr. Shaw also offered, as evidence to be considered, the deposition of his attorney, which was admitted against the plaintiff's objection.

The first question is whether this statement of Mr. Shaw can be considered as a disclosure or as evidence in determining the question of his liability as trustee. We think it cannot, for the sufficient reason that it is merely a statement of what a third party had told him. It contains no allegation of fact purporting to be within his own knowledge. If offered as a deposition upon an issue formed no part of it could not be read in evidence for that obvious reason. True, a person summoned as trustee may incorporate in his disclosure the statements of another made to him, but to give them any force or to have them considered, he must adopt them as his own statements on oath, or must at least declare on oath his belief in their truth. *Willard* v. *Sturtevant*, 7 Pick. 194; *Kelley* v. *Bowman*, 12 Pick. 383; *Parker* v. *Wright*, 66 Maine, 392. In this disclosure there is no such incorporation or adoption, nor any allegation in the disclosure or the jurat that Mr. Shaw believes the statement to be true. The jurat is simply "subscribed and sworn to." This is merely an oath that the statements were made to him, not that he believed them.

The law attributes great weight to the disclosure of a trustee properly made and hence the plaintiff is entitled to have the conscience of the trustee thoroughly searched in the fear of spiritual and temporal penalties for perjury. If a trustee be allowed to introduce into his disclosure the statements of others made to him without making oath at least that he believes them to be true, the plaintiff has no benefit from the conscience of the trustee.

The next question is as to the admissibility in evidence of the deposition of the attorney, Mr. Pattangall. We think it was not admissible. Formerly nothing was admissible unless contained in the disclosure or made a part of it under the oath of the trustee. *Hawes* v. *Langton*, 8 Pick. 67. The statute (R. S., Ch. 88, Sec. 30) now provides that either party "may allege and prove any facts material" &c. Such facts must be alleged in some statement or plea before evidence of them outside of the disclosure can be received. *Pease* v. *McKusick*, 25 Maine, 73. *Schwartz* v. *Flaherty*, 99 Maine, 463. In this case there was no issue raised upon which any evidence outside of the disclosure could be received. Nothing in the disclosure had been denied by the plaintiff. No fact outside of the disclosure had been alleged or set up by either party. No question of fact had been put in issue. The only question was what conclusion of law followed from the answers and statements made by Mr. Shaw under the sanction of his oath, leaving out of the account all statements not supported by his oath. The court, as well as the parties, was confined to those sworn answers and statements. *Rundlet* v. *Jordan*, 3 Maine, 47; *Chase* v. *Bradley*, 17 Maine, 89 (on page 94); *Minchin* v. *Moore*, 11 Mass. 90.

It is suggested that the statements in the disclosure may be regarded as an allegation under the statute. We do not think such statement is the allegation contemplated by the statute. The term "allegation" has a fixed technical meaning in law. It is a term in pleading, not a term in evidence. Allegation is not contained in the evidence, but precedes it. Allegation is the formal averment of a party setting forth the issue, and what he proposes to prove. *Schneider* v. *Rochester*, 160 N. Y. 172; Cent. Dict. The disclosure, the answers of the trustee to interrogatories, is not an allegation by

way of pleading. It is a discovery. If the trustee desires to introduce the statements of other persons as evidence he must make them a part of his disclosure by reciting them, or identifying them and by making oath that they are true or, at least, that he believes them to be true, or else he must first make the statutory allegation by way of pleading. The allegation required is distinct from the disclosure. This is made clear by the language of next section of the statute, (sec. 31) which says: "Any question of fact arising upon such *additional* allegations" &c. This language indicates a separate, *additional* allegation in the nature of a plea. Again, no issue of fact to be tried under sec. 31, can be raised by any statement in the disclosure since that statement is to be taken as true until overcome by allegation and evidence to the contrary. If no such allegation be made (and none was made in this case) there is no occasion for additional evidence. It is difficult to see how an issue of fact can be framed for trial under section 31 upon uncontradicted statements in the disclosure.

It is again suggested that the following statement in the disclosure makes the deposition of Mr. Pattangall, the attorney, a part of the disclosure, viz: "So far as I know, the money was all received by W. R. Pattangall to whose testimony I would refer you for the facts in the case." In the first place Mr. Shaw does not state that Mr. Pattangall's testimony is true or that he believes it to be true, neither in the disclosure proper nor in the jurat, which latter is simply "subscribed and sworn to." In the second place the reference is too indefinite. The testimony alluded to is not annexed to the disclosure, nor referred to as an exhibit. Mr. Shaw does not state what that testimony is nor where it can be found. He in no way identifies it, and anything made a part of a disclosure must be identified. *Willard* v. *Sturtevant*, 7 Pick. 194. It does not appear that the testimony had then been given. It might be testimony to be given. It does not appear that the testimony had been filed or even reduced to writing. There is nothing to show what testimony of Mr. Pattangall is to be read as a part of the disclosure. It is a fundamental rule in such procedure as this that the disclosure of a trustee must be full and complete in itself, that the trustee must in his disclosure incorporate,

annex, or distinctly identify any paper or statement he desires to be considered so that the court will need no other identification. For these reasons we think the deposition of Mr. Pattangall cannot be regarded as a part of the disclosure.

The supposed disclosure and the deposition of Mr. Pattangall offered at the April Term, 1904, being thus held inadmissible, the next question is one of law viz: whether upon the answers and statements in his disclosure at the April Term, 1902, supported by his oath Mr. Shaw is chargeable as trustee. In that disclosure he states that prior to the service of the writ upon him, the principal defendant Minnie A. Dyer, then owning and possessing a store, a stock of merchandise and also accounts due her from various parties, made to him a written assignment of all her attachable property for the benefit of her creditors. This assignment Mr. Shaw accepted and signed. The instrument of assignment dated Oct. 6, 1899, was expressly made a part of the disclosure as "Trustee Exhibit 1." By its terms Mr. Shaw engaged to sell and dispose of all the assigned property, collect the accounts and make proportional distribution among such creditors of Mrs. Dyer as should become parties to the assignment and pay the surplus to Mrs. Dyer.

Upon this statement, taken by itself, Mr. Shaw would be chargeable as trustee of Mrs. Dyer, the principal defendant, since by the assignment goods, effects and credits of Mrs. Dyer "were entrusted to and deposited in his possession." *Ward* v. *Lamson*, 6 Pick. 358; *Morse* v. *Bebee*, 2 Allen, 466; *Whitney* v. *Kelley*, 67 Maine, 377. It placed the burden on him to clear himself from liability and to do so by clear, full and direct statements. *Haynes* v. *Thompson*, 80 Maine, 125, 128. "No presumption is to be made in his favor." *Ripley* v. *Severence*, 6 Pick. 47 at p. 477. "Every doubtful statement is to be received as indicative that he could not truly make one which would relieve the case from doubt." *Lamb* v. *Franklin Mfg. Co.*, 18 Maine, at p. 188. "The burden of discharging himself by clear and definite statements devolves upon the trustee." *Whitney* v. *Kelley*, 67 Maine, at p. 379. See also *Fertilizer Co.* v. *Spaulding*, 93 Maine, 97.

Recurring again to the contents of the disclosure, Mr. Shaw simply states that despite the assignment and his engagements under it none

of the property ever came into his possession or under his control. His statement is as follows: "I never took possession of any of the property but immediately after receiving the assignment I, together with Minnie A. Dyer employed Messrs. Pattangall and Leathers as attorneys and we left Minnie A. Dyer's matters entirely with them. About the disposal of the personal property and the accounts I know nothing. . . . I personally never received any money under or by reason of the assignment."

The fact thus stated does not relieve Mr. Shaw from his liability he incurred to Mrs. Dyer and her creditors under the assignment. Messrs. Pattangall and Leathers were his agents appointed by him, though with Mrs. Dyer's approval. Their possession of the property was his possession. Their acts over it were his acts. By the assignment Mrs. Dyer's goods, effects and credits were "entrusted to and deposited in his possession." By permitting or directing his agent or attorneys to take possession and dispose of them, he has not divested himself of his liability to account for them. *Ward* v. *Lamson*, 6 Pick. 358. True, if the agents in this case proved faithless it might perhaps be a defense for Mr. Shaw against Mrs. Dyer that she had approved of their appointment, but no such thing is stated in the disclosure. So far as appears the attorneys still have all the property or its proceeds. It was Mr. Shaw's duty to know and inform the court what had been done by his agents in the premises.

The result is that upon the disclosure to which we are confined Mr. Shaw must be charged generally as trustee. If in fact he had no goods, effects, or credits of Mrs. Dyer in his hands either actually or constructively at the date of the service of the writ upon him, he has not yet shown it by legal evidence adduced in the manner provided by law. He has not yet stated discharging facts in his disclosure, nor has he yet opened any door for the statements of other persons. Upon scire facias he will undoubtedly have the opportunity to make as full and clear and detailed a disclosure as may be required or as he may desire, and to make the statements of Mr. Pattangall a part of that disclosure or to open a door for their admission otherwise. If it shall then appear that he is not really chargeable he will be

discharged. No injustice will be done him if he will take the course prescribed by the law for bringing the facts before the court.

The last question presented by the exception is that of costs. R. S., ch. 88, sec. 19, provides as follows: "Sec. 19. If a person resident in the county in which the writ is returnable, is summoned and neglects to appear and submit to examination at the return term without reasonable excuse, he is liable for all costs afterwards arising in the suit to be paid out of his own goods or estate if judgment is rendered for the plaintiff; unless paid out of the goods or effects in his hands belonging to the principal." Mr. Shaw was resident in the county but did not appear and submit to examination at the return term. This neglect was adjudged by the presiding justice to be "without reasonable excuse." Being charged as trustee he must also be adjudged liable for costs arising after the return term if judgment be finally for plaintiff.

The judgment of the court is,

Exceptions sustained. Trustee charged generally. If plaintiff recovers judgment he shall recover against trustee the costs arising after the return term.

THE ATLANTIC & ST. LAWRENCE RAILROAD COMPANY

AND THE

GRAND TRUNK RAILWAY COMPANY OF CANADA,

APPELLANTS

From Decree of the Railroad Commissioners.

Androscoggin. Opinion November 7, 1905.

Railroads. Land for Station Purposes. What "Station Purposes" Includes.—Law and Fact. Stat. 1883, c. 167, § 1. R. S. (1883), c. 18, § 29; 1903, c. 23, § 31.

1. The land and right of way of railroad corporations used for "station purposes" within the meaning of sec. 29, chap. 18, R. S. 1883 or sec. 31, chap. 23, R. S. 1903, must be determined from the existing conditions in each case.
2. The Statutory designation, "for station purposes," includes such grounds at a station as are convenient, necessary and actually used by the railroad for approaches and exits for the public requiring passenger and freight transportation, for the location of depot buildings, warehouses, platforms, fixtures and apparatus for taking water and fuel supplies, lighting, heating, transmitting messages and giving signals, sidings for passing trains and shifting and storing cars and other property, switches, and space where passengers may get on and off trains, and goods loaded and unloaded.
3. When the facts are clear from undisputed evidence the question whether the place of a proposed crossing of a railroad by a town way or highway is land or right of way used for station purposes may be one of law, but it must generally be considered one of fact.
4. At the hearing in the Supreme Judicial Court on the appeal from the decision of the railroad commissioners evidence somewhat voluminous and conflicting was presented, and the justice refused to rule as matter of law that the *locus in quo* was land and right of way of the railroad corporation used for station purposes, and found otherwise upon the evidence as matter of fact. *Held:* that his ruling was correct and that his finding of facts could not be disturbed.

On exceptions by plaintiff. Overruled.

Appeal from the decree of the Railroad Commissioners determining that a certain public highway within the city of Auburn, Androscoggin County, located by the County Commissioners of said

county over the land and right of way of the appellants, should cross the railroad track of the appellants by an underpass, and apportioning the expense of the construction and maintenance of the crossing.

At the hearing in the appellate court, the appellants requested the presiding Justice to rule as a matter of law that upon the facts presented by the evidence the decree of the Railroad Commissioners must be set aside and the appeal sustained. This ruling was refused but instead thereof the presiding Justice ruled that the aforesaid decree be affirmed with costs and the appeal be dismissed. To this ruling and refusal to rule, the appellants excepted.

All the material facts are fully stated in the opinion.

C. A. & L. L. Hight, for appellants.

Newell & Skelton, for appellees.

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

PEABODY, J. The proceedings in this case originated November 20, 1900, in the petition of various citizens of the City of Auburn in the County of Androscoggin to the County Commissioners asking for the location of a public highway within the City of Auburn over the land and right of way of the Atlantic & St. Lawrence Railroad Co. leased to the Grand Trunk Railway Co. of Canada. The County Commissioners after notice and hearing on the second day of April, 1901, filed with the clerk of the County Commissioners their report for the location of the highway.

On the 23rd day of March, 1903, the municipal officers of the City of Auburn petitioned the board of railroad commissioners to determine the manner and conditions of crossing the railway with said highway and apportion the expense of the crossing. Upon this petition as amended June 13th, 1904, after notice and hearing the railroad commissioners, on the 16th day of August, 1904, made a decree determining that said highway should cross the track by an underpass and apportioning the expense of construction and maintenance of the crossing. An appeal from this decree was duly taken and entered in the Supreme Judicial Court for the County of Androscoggin at the January term, A. D., 1905.

At the hearing on the appeal evidence was introduced showing the location of the intersecting tracks of the Maine Central Railroad and of the Grand Trunk Railway at Danville Junction and of the buildings, signal houses, freight houses, passenger depots, stand-pipes for water, car house and pump house; that the proposed crossing over the land and tracks of the railroad company was north of the depot and from fifty to seventy-five feet north of the northerly switch of the longest siding, and thirteen hundred and forty feet north of the center of the old county highway immediately south of the station, and eight hundred and twenty-three feet north of the northerly end of the station platform; and showing other conditions existing at and in the vicinity at the station and proposed crossing, at the time of the location of the highway in 1901 and subsequently thereto, materially bearing upon the question at issue. The evidence also showed the transfer of freight between the two railroads, that the greater part of the freight transfer business was done south of the old county highway near the junction of the two railroads, and that the cars going west delivered to the Grand Trunk Railway by the Maine Central Railroad were sometimes placed on the westerly siding north of the county highway; that in handling these cars and making them into trains it was frequently necessary to pass over the switch fifty to seventy-five feet south of the proposed crossing and to move them back and forth over the place of the proposed crossing, and for the train men in making up trains and in shunting cars on and off the sidings to work at the place where the crossing is located; that the long siding which runs up to within fifty or seventy-five feet of the proposed crossing was used principally in 1901 as a passing track for trains; that at the crossing and for some distance south is a fill from twenty to twenty-three feet in depth making it unsuitable for the public to go there either for the loading or unloading of freight or in connection with the passenger service; that on the main line and on the passing track trains were at times obliged to stop for water at the station and at times freight trains going east stopping for water extended over the point of the proposed crossing; that on the westerly side of the track was the pump house for the supply of water for the trains and the depot, since moved to a point north of

the crossing on the main line, that it was and is now necessary for coal cars to be hauled upon the main line opposite the pump house, and that the coal therefor was unloaded from the main line; that in 1901 the most westerly track was used for the storage of cars; that shunting was sometimes done on the track next to the main line but this track was principally used as a passing track; and that in 1902 the track next the main line was extended north and has since continued to be used as a passing track.

It was claimed by the appellants that, upon the case presented by the evidence, the proposed crossing was as matter of law through land or right of way of the railroad corporation used for station purposes; that there had been no adjudication by the railroad commissioners as required by statute on the question of public convenience and necessity for said crossing or way, and that therefore the laying out of said way by the county commissioners was illegal and void, and there was no legal foundation for the petition to the railroad commissioners to make the decree. They requested the court to rule as matter of law upon the facts presented by the evidence that the decree of the railroad commissioners must be set aside and the appeal sustained. This ruling the court refused to make, and instead thereof ruled that the decree of the railroad commissioners should be affirmed with costs and that the appeal should be dismissed; to which ruling and refusal to rule the appellants excepted and upon their exceptions the case comes before the law court.

The real question involved in the exceptions is whether the land and right of way of the railroad corporation at the point of the proposed crossing are land and right of way of a railroad corporation used for station purposes within the meaning of section 29, chapter 18, R. S. 1883 or section 31, chapter 23, R. S. 1903. This statute is as follows: "Sec. 31. No way shall be laid out through or across any land or right of way of any railroad corporation, used for station purposes, unless after notice and hearing the railroad commissioners adjudge that public convenience and necessity require it. When the tribunal having jurisdiction over the laying out of such way is satisfied, after hearing, that public convenience and necessity require such laying out, such proceedings shall be suspended and petition

filed by such tribunal with the railroad commissioners for their adjudication hereunder." This provision originated in section 1, chapter 167 of the laws of 1883.

A railroad exercises its franchises in the prosecution of its transportation business subject to the rights of the public to extend highways over its right of way. *Chicago and Alton R. R.* v. *City of Pontiac*, 169 Ill. 155. In this state its track may be crossed by ways laid out in the same manner as other ways, but the manner, condition and expense of the crossing are placed, by statute, under the jurisdiction of the railroad commissioners; and when the proposed location is over or across the right of way or land of any railroad corporation before it is finally established, there must be an adjudication by this tribunal that public convenience and necessity require it, the object being both to guard against the recognized dangers of railroad crossings and to secure the rights of the public when its convenience conflicts with the convenience of the railroad.

It is claimed by the appellants that the term right of way in the statute quoted is significant as implying a more extended use than that of land acquired for station purposes, but we think this construction would logically lead to a harmful limitation of the authority conferred by statute upon municipal officers and county commissioners for laying out town ways and highways. The intention of the legislature in employing both these words was simply to embrace all the property of the railroad constituting station grounds affected by the location of the way.

The legislative intent in the language "land or right of way of any railroad corporation used for station purposes" has not been judicially determined in this state. In the United States the words depot and station as used in connection with railroads are synonymous. *Goyeau* v. *Great Western R. Co.*, 25 Grant's Ch. U. C. 64. The term "station purposes" does not admit of any precise definition. Similar terms have been used in the statutes of other states relating to railroads and we may be aided in ascertaining the meaning of the words quoted in this case by analogous decisions. In the Western and Middle States where railroads have been required by statute to maintain fences on each side of their right of way to keep cattle

therefrom to diminish the hazard to passengers and loss to cattle owners, depot grounds have been either expressly excepted from this requirement or the courts in construing the statutes have determined that fencing out depot grounds was not required where the public was entitled to free access. *Jefferson, Madison and Ind. Railroad Co.* v. *Beatty*, 36 Ind. 15; *Evansville and Terre Haute Railroad Co.* v. *Willis*, 93 Ind. 507; *Morris* v. *St. Louis, Kansas City and Northern Railway Co.*, 58 Mo. 78; *Grosse* v. *Chicago and Northwestern Railway Co.*, 91 Wis. 482.

In *Davis* v. *The Burlington and Mo. River Railroad Co.*, 26 Iowa, 549, under a statute exempting railroads from the duty of fencing in places where the public require access, the term depot grounds was applied to a tract of five or six acres extending along either side of the roadway used for "loading and unloading freight and all purposes incident to the station including switches and sidetracks, elevators and warehouses." In *Smith* v. *C. M. & St. P. Railway Co.*, 60 Iowa, 512, it was held that a place a mile and a quarter from the depot buildings is not presumed to be station grounds, in the absence of proof showing it to be such. In Wisconsin in this class of cases the courts have given as the definition of "depot grounds" "the place where passengers get on and off trains and where goods are loaded and unloaded, and all grounds necessary and convenient and actually used for such purposes by the public and by the railroad company. This includes switching and making up of trains and the use of sidetracks for the storing of cars and the place where the public require open and free access to the road for the purposes of such business." *Grosse* v. *Chicago and Northwestern Railway Co.*, supra.

In Massachusetts the court by Judge Holmes under a statute providing for the taxing of land of railroad companies taken for station purposes, held that all the land described as land "for suitable station purposes and for tracks and yard room to be used in connection therewith" was included in the term "station purposes" and should be taxed. *Norwich & Worcester R. R. Co.*, 151 Mass. 69.

The definitions of station grounds in these decisions may be in their particular application narrower than should be given to the language "the right of way and land used for station purposes" under our

statute, but the reasoning upon which the decisions are based is relevant to the question under consideration. Station grounds or depot grounds at convenient points along the lines of railroads are selected embracing not only the land of the right of way but additional land of such extent as existing and prospective conditions seem to require, but it cannot be considered that the land originally appropriated should be arbitrarily held to limit railroads or the public in the application of statutory provisions. In every case in determining what are station grounds and depot grounds three conditions must concur. The grounds must be necessary, convenient and actually used by the railroads in the transaction of their business. They therefore include sufficient land for safe and convenient approaches and exits for the public requiring passenger and freight transportation, for the location of depot buildings, warehouses, platforms, fixtures and apparatus for taking water and fuel supplies, lighting, heating, transmission of messages and giving signals, sidings for passing trains, shifting and storing cars and other property, switches, and space where passengers may get on and off trains, and goods be loaded and unloaded. An important factor in determining what land may be necessary and convenient for station purposes is the amount and character of the railroad business done at a particular station. *McGrath* v. *Detroit Mack. & Marq. R. R. Co.*, 57 Mich. 555. Within narrow limits where the facts are clear upon undisputed evidence this question is properly one of law, but ordinarily it must be considered one of fact. *Grosse* v. *Chicago & Northwestern Railway Co.*, supra; *Plunkett* v. *The Minn., St. Marie and At. Railway Co.*, 79 Wis. 222; *Rhines* v. *Chicago and Northwestern Railway Co.*, 75 Iowa, 597. It is apparent from the authorities cited that in this case it is one of fact and not of law. The appellate court has rendered a decision based upon the evidence. It is a familiar and well settled rule that this court cannot disturb the findings of the presiding justice upon what might apparently be a preponderance of the evidence. A careful review of the testimony contained in the report fails to show that the findings of the appellate court are erroneous, and the rulings based thereon are clearly correct,

Exceptions overruled.

CARRIE M. MCCLAIN *vs.* CARIBOU NATIONAL BANK.

Aroostook. Opinion November 8, 1905.

Negligence. Licensee. Due Care.

The defendant bank had partially constructed and built a certain walk, about eight feet wide, on the south side of its bank building and on its own premises. Said walk fronted on and adjoined a certain public street south of said bank building. In this walk, about seventeen feet from the east end of the same was a rollway to the cellar of the bank building, about twelve feet long, five feet wide and five or six feet deep. The rollway itself was uncovered and without protection of any kind. But in the space on the walk, both east and west of the rollway there were piled various obstructions such as bricks, barrels, lumber, carpenters' horses and other debris. These obstructions practically prevented entrance upon the walk from either end. The plaintiff, in the night time, while going to a fire, fell into this rollway and was injured and thereupon she brought suit to recover damages for the injuries sustained.

Held: that these various obstructions and unfinished condition of the walk were a plain indication to the plaintiff and the public generally that this walk was not opened for travel and negatived any implied invitation on the part of the defendant bank for travelers to enter upon it, and that the plaintiff in going upon it was at most but a mere licensee to whom the defendant bank owed no duty except not to wantonly injure her.

Also *held* that the plaintiff was guilty of contributory negligence.

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

Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant. Tried at the December term, 1904, of the Supreme Judicial Court, Aroostook County. Plea, the general issue. Verdict for plaintiff for $2500.00. Defendant filed a general motion for a new trial, and also excepted to certain rulings made by the presiding Justice. Case decided on the motion. Exceptions not considered.

The case is sufficiently stated in the opinion.

Memorandum. This cause was argued at the June term, 1905, of the Law Court at Portland. One of the Justices sitting at said term did not sit during the hearing upon this cause, being disqualified

by reason of having ruled therein at nisi prius. See R. S., chapter 79, section 42.

Ira G. Hersey and Geo. H. Smith, for plaintiff.

Louis C. Stearns and Wm. P. Allen, for defendant.

SITTING: EMERY, STROUT, SAVAGE, PEABODY.

STROUT, J. In 1903 defendant erected a building in Caribou on the corner of Washburn Avenue and Vaughan Avenue. October 24, 1903, the walls were up and roofed in, but the structure was not ready for occupation. It was the plan to have on three sides of the building a concrete walk about eight feet wide. On the east side on Vaughan Avenue the walk had been completed, and also on the north side; but on the south side, facing Washburn Avenue, a curb had been put in upon defendant's land adjoining the Avenue and dirt filled in between that and the building, up to within about four inches of the top of the curbing,—that space being left for the concrete that was to be filled in later. About seventeen feet from the southeast corner of the building on Washburn Avenue in this walk was a rollway to the cellar of the building about twelve feet long, five feet wide and five or six feet deep.

On the night of October 24th, or early morning of the 25th, plaintiff, while going to a fire, fell into this rollway which was uncovered and without protection of any kind, and was injured, and this suit is to recover damages for that injury. Plaintiff had a verdict and the case is here upon motion to set the verdict aside, and on exceptions.

The walk on Washburn Avenue was not only in the unfinished condition above stated, but at the southeast corner next to Vaughan Avenue, three or four hundred bricks were piled upon it next to the building, on the curb was a pile of lumber about two feet high, in two tiers, and between them some barrels, which left only a space of about two feet to pass from Vaughan Avenue on to the walk. The lumber was some twenty feet long and extended to the rollway but did not cover it. At the westerly end of the walk there were a large number of barrels and carpenters' horses and other debris, which

nearly or quite prevented access to the walk at that end. These obstructions practically prevented entrance upon the walk from Vaughan Avenue or at the other end. They were a plain indication to the public that the walk on Washburn Avenue was not opened for travel and negatived any implied invitation of defendant for travelers to enter upon it. In going upon it that night, the plaintiff, while perhaps not a trespasser, was at most a mere licensee, to whom the defendant owed no duty except not to wantonly injure her. The principles announced by this court in *Dixon* v. *Swift*, 98 Maine, 207 and *Parker* v. *Portland Publishing Co.*, 69 Maine, 176, apply to this case.

Upon the question of due care of plaintiff, it is difficult to perceive its exercise by her. She says it was dark, and she did not see the rollway, but diagonally across Washburn Avenue and within the distance of less than three hundred feet the Lyndon Hotel was on fire, the flames coming from the roof, and in the opposite direction and one hundred and forty-seven feet distant a street electric light was burning, which it would seem must have given sufficient light to any attentive person to see the rollway. Several witnesses say they could see without difficulty. It is probable that the plaintiff was under excitement from the fire, and her eyes and attention were upon the burning building and no heed taken of her steps. Apparently she could not have entered upon the walk from Vaughan Avenue, but from Washburn Avenue somewhere between the termini of the walk, and not in the line of travel proposed when the walk was completed, perhaps to obtain a better view of the fire, or be away from passers upon the street and the operations of the fire department, rather than to travel upon the walk.

Upon the two grounds, that the defendant had not thrown open that walk to the public and thereby impliedly invited the public to use it, and that the plaintiff was guilty of contributory negligence, this verdict ought not to stand.

Motion sustained; verdict set aside.

EMMA S. GREENLAW *vs.* MARY W. MILLIKEN.

Cumberland. Opinion November 8, 1905.

Negligence. Due Care. Icy Sidewalk. Surface Water. Water from House Roof. Evidence.

The plaintiff slipped upon the ice on the sidewalk in front of the defendant's house and sustained an injury. Thereupon the plaintiff brought suit against the defendant alleging that the defendant wrongfully conducted water from the roof of a part of her house upon the sidewalk which froze and rendered the sidewalk dangerous. *Held:* that to entitle the plaintiff to recover it was necessary for her to show that the icy condition of the sidewalk resulted from water artificially conducted upon the sidewalk, and not from surface water naturally flowing upon the sidewalk, or from melting snow which had fallen upon the sidewalk, and this the evidence fails to show.

Also *held:* that the plaintiff was not in the exercise of due care.

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

Action on the case to recover damages for personal injuries sustained by the plaintiff January 25th, 1904, caused by the alleged carelessness of the defendant in having water improperly drawn off and conducted from the roof of her house or bay window on said house and discharged upon the sidewalk in front of said house, and which froze and rendered the sidewalk dangerous, and upon which the plaintiff slipped and was injured. Tried at the April term, 1905, Supreme Judicial Court, Cumberland County. Plea, the general issue. Verdict for plaintiff for $1,250. Defendant filed a general motion for a new trial, and also excepted to certain rulings made by the presiding Justice. Case decided on the motion. Exceptions not considered.

All the material facts sufficiently appear in the opinion.

Memorandum. This cause was argued at the June term, 1905, of the Law Court at Portland. One of the Justices sitting at said term did not sit during the hearing upon this cause, being disqualified by reason of having ruled therein at nisi prius. See R. S., chapter 79, section 42.

William A. Connellan, for plaintiff.
Symonds, Snow, Cook & Hutchinson, for defendant.

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

STROUT, J. On January 25, 1904, plaintiff slipped upon the ice on the sidewalk in front of the northeasterly corner of defendant's house on State Street, in Portland, and fell and received injury. She claims that the defendant wrongfully conducted water upon the sidewalk, which froze and rendered the walk dangerous. Hence this suit. Plaintiff had a verdict, and the case is here on exceptions and motion to set aside the verdict.

Defendant's house is on the southerly side of the street, the front facing the northeast. The ground has a rise from the sidewalk to the rear line of the house of three feet and one-half inch, and the flow of surface water from defendant's premises is toward the sidewalk and street. The water from the roof of the main house is conducted into the sewer, and does not reach the sidewalk. The house has a bay window, four feet and four-tenths one way and twelve feet and six-tenths the other way. The roof of the bay window pitches each way, half the drainage going south and half north. At either end of the bay window roof is a conductor, with a one inch opening. It is only the northerly half of the bay window roof that by any possibility could discharge water to reach the sidewalk, at the place of injury.

From the front of the bay window to the granite curbing next to the sidewalk is seven feet and seven inches. On the north end of the house a driveway led from the street to the stable in the rear. From the stable to the street the ground descended. The water from the northerly end of the bay window was conducted through an elbow or offset from the bay window to a perpendicular conductor, which terminated in a wooden spout, having its outlet on the private walk from the sidewalk by the north end of the house to its rear. This elbow or set off in the fall of 1903 had rusted out at the bottom, so that the water fell upon the grass plot at the side of the house, and would not flow into the conductor. This condition

remained till October, 1904,—and was in that condition at the time of the accident. The observer at the Weather Bureau testified that from January 15, 1904, to the 26th, there were only two days, the 16th and the 24th, when the maximum temperature rose above thirty-two degrees. Those days were the 16th, when the maximum was thirty-three degrees, and the 24th, when it reached thirty-six degrees, and the day was cloudy. During all this time, including the 25th, the total precipitation was 79-100 of an inch. There was about one foot of snow on the ground. The sidewalk in front of the house was icy, as was also most of the sidewalks having a northerly exposure. Defendant's house was unoccupied at the time of the accident, and had been for the entire winter, and no fire had been in it. If the ice upon the walk was the result of surface water naturally flowing from the higher ground westerly, the defendant would not be liable. To entitle plaintiff to a verdict it was necessary for her to show that the icy condition resulted from water artificially conducted to the walk, and not from surface water naturally flowing there, or from melting snow which had fallen there. We think the evidence failed to show this. It seems incredible that the small surface of one-half of the roof of that bay window could hold and discharge sufficient water that fell through the opening in the rusted out arm or set off upon the snow to permeate through one foot of snow to the curbing, and then through, under or over that to the sidewalk to produce the icy condition. It is much more probable that water flowed down the driveway, not conducted from the bay window, and thus produced the icy condition.

The jury apparently drew an inference not warranted by the evidence. It is also quite apparent that the plaintiff was not in the exercise of due care.

Motion sustained; verdict set aside.

WALTER IRVING PRATT et al. *vs.* WILLIAM ASBURY JOHNSON.

Piscataquis. Opinion November 14, 1905.

Bills and Notes. Contracts. Sales. Contemporaneous Warranty and Guaranty. Breach Thereof. Same Shown in Defense.

The defendant executed and delivered to the plaintiffs his two promissory notes for goods sold and delivered to him by the plaintiffs, and on the same date the plaintiffs gave the defendants a written warranty and guaranty in relation to the same goods. *Held:* That in an action on these notes by the plaintiffs, any breach of the warranty and guaranty by the plaintiffs to the detriment of the defendant can be shown in defense.

On exceptions by defendant. Sustained.

Assumpsit on two promissory notes, each of the amount of twenty-two dollars and thirteen cents, each dated August 7th, 1903, payable in two and four months from date, respectively, signed by defendant under name of Johnson & Co., and payable to plaintiffs.

The action was heard by the presiding Justice, with the right of exception. Plea, the general issue.

On the fourth day of August, 1903, the plaintiffs by their agent F. T. Reed, entered into a contract of sale with the defendant, by which contract the plaintiffs agreed to sell and the defendant under the name of Johnson & Co., agreed to buy, certain toilet articles, amounting to ninety-four dollars and fifty cents, from which amount a freight allowance of six dollars was made. This contract was signed in duplicate, and each party retained a copy.

The contract contained the terms of sale, certain exchange agreements, a memorandum of items of the goods sold, and the price.

There was also a written warranty on each package of the goods.

On the seventh day of August, 1903, the goods were shipped by the plaintiffs to the defendant, and these notes were given by the defendant, dated as August 7th, 1903.

At the trial the defendant claimed that the agreement and warranty were a part of the consideration of the notes, and that the whole transaction constituted one contract, and that there had been a breach

thereof by the plaintiffs and that the defendant was not liable on the notes, and should be allowed to set up this breach in defense of this action.

The plaintiffs on the other hand contended that there was no breach and that said notes and agreement were independent and collateral, and that said agreement could not be construed with said notes as a part of one and the same transaction, as claimed by the defendant, and the breach of said agreement and warranty could not be set up in defense.

The presiding Justice held that said agreement and warranty were independent and collateral to said notes, and could not be construed with said notes as a part of one and the same transaction, and upon that ground gave judgment for the plaintiffs. Thereupon the defendant excepted.

George W. Howe, for plaintiffs.

M. L. Durgin, Hudson & Hudson, and Wm. A. Johnson, for defendant.

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

STROUT, J. August 4, 1903, plaintiffs and defendant made a written contract by which plaintiffs were to sell and defendant to purchase certain toilet articles at specified prices. August 7, 1903, the goods were shipped by plaintiffs, and the notes in suit bearing the same date were given by defendant to plaintiffs for the purchase price. On the same date plaintiffs gave defendant a written guaranty and warranty in relation to the same goods. At the trial defendant claimed a breach of the guaranty and warranty, and proposed to show it in defense, but the Court ruled that the guaranty and warranty were independent and collateral to the notes and could not be construed with the notes, and upon that ground gave judgment for the plaintiffs. Defendant excepted to this ruling.

The exceptions must be sustained. The warranty and guaranty related to the goods for which the notes were given, bore the same date as the notes, and must be regarded as in part consideration for the notes. Any breach thereof by the plaintiffs to the detriment of

the defendant may be shown in defense to a suit upon the notes by the original payee. This is not a case of an independent warranty as to another and different transaction, but relates to the particular goods for which the notes were given. The defendant had the option to sue upon the warranty, or, to avoid circuity of action, to set up a breach thereof in defense to this suit. He elected the latter course, and should have been allowed to make the defense. Such is the settled rule in this state. *Herbert* v. *Ford*, 29 Maine, 546; *Morse* v. *Moore*, 83 Maine, 473; *American Gas & Ventilating Machine Co.* v. *Wood*, 90 Maine, 516; *Hathorn* v. *Wheelwright*, 99 Maine, 351.

Exceptions sustained.

JOHN J. HUNT, PETITIONER,

vs.

COUNTY COMMISSIONERS OF FRANKLIN COUNTY.

Franklin. Opinion November 15, 1905.

County Commissioners. Certiorari. Estoppel. Accord and Satisfaction.

When County Commissioners have allowed a smaller gross sum in full for an itemized bill against their county, and that sum is then drawn by the claimant from the County Treasury, his claim for the remainder of his bill is thereby barred, at least so long as he retains the sum drawn.

On exceptions by plaintiff. Overruled.

Petition for a writ of certiorari against County Commissioners of Franklin County. Heard by the presiding Justice without intervention of a jury, at the February term, 1905, of the Supreme Judicial Court, Franklin County, with the right of exception by each party to rulings of law. Under this stipulation, the plaintiff petitioner excepted to certain rulings made by the presiding Justice. Exceptions as such not considered but case decided on another point.

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

George C. Webber, for plaintiff.

H. S. Wing, for defendants.

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

EMERY, J. The petitioner was an official agent for the prevention of cruelty to animals. In May, 1902, he presented to the County Commissioners of Franklin County for allowance and payment from the county treasury an itemized bill of $152.48 for services and expenses for investigating cases in that county. The Commissioners considered the bill and in the presence of the petitioner allowed a lump sum of $100 in full for the whole bill. The petitioner thereupon drew that amount from the county treasury upon that order for payment.

In April, 1904, petitioner without returning the $100 so drawn by him again presented the bill to the then County Commissioners of Franklin County. The Commissioners refused to allow any part of it, or to make any adjudication upon any separate items, and thereupon this petition was filed for a writ of certiorari to bring up the Commissioners' doing in the matter.

The petitioner urges that the allowance of a lump sum for his itemized bill less than the full amount was illegal, that the Commissioners should have allowed or disallowed each item, and should be compelled to do so now in order that he might bring the disallowed items before the court. On the other hand the respondents claim that certiorari is not the proper remedy for the petitioner.

We have no occasion to consider either of the above contentions since a complete answer to the petition is made by the fact that with knowledge that $100 was allowed him in full for his whole bill he drew that amount from the treasury upon such allowance, and has not returned it. He cannot now reopen the matter. *Perry* v. *Sheboygan*, 55 Mich. 250; *Brick* v. *Plymouth County* (Iowa) 19 N. W. 304; *Murphy* v. *The United States*, 104 U. S. 464. As well might a plaintiff who had recovered and collected a judgment in a common law action for less than his claim stated, afterward maintain an action on the same claim.

Exceptions overruled. Petition dismissed.

STATE OF MAINE

vs.

JAMES A. DUANE, Appellant.

Lincoln. Opinion November 15, 1905.

Search and Seizure Process. Designating three Places in one Warrant. Description of Premises. "General Warrants." Demurrer to Complaint and Warrant. Intoxicating Liquors. Constitution of Maine, Article I, § 5. R. S., c. 133, § 14.

1. A single search warrant cannot be lawfully issued to search more than one place. If the warrant contains a description of more than one place to be searched it is invalid.
2. When a warrant in describing the place to be searched describes, as it reads, three places, each occupied by a different person though all three places are adjoining, the court cannot read into the warrant words not therein written to show that the other two places were named simply as boundaries of the place occupied by the respondent.
3. A demurrer to a complaint and warrant will reach defects in the warrant as well as those in the complaint.

On exceptions by defendant. Sustained.

Under the provisions of section 49 of chapter 29 of the Revised Statutes, on a complaint made by W. R. Walter, a Lincoln County trial justice, issued a search and seizure warrant commanding the officer to search the premises therein designated, for intoxicating liquors alleged to be kept therein and intended for unlawful sale by the defendant, Duane, and, if any such liquors were found, to seize the same and arrest the defendant. The officer made search, as commanded, found certain intoxicating liquors, arrested the defendant and brought him before the trial justice for trial. The trial justice, upon hearing, found the defendant guilty of keeping and intending the liquors for unlawful sale, and ordered the defendant to pay a fine of $100 and costs. The defendant appealed. In the appellate court, the defendant demurred to the complaint and warrant. The

demurrer was overruled by the presiding Justice, and thereupon the defendant excepted.

Further facts are stated in the opinion.

John W. Brackett, County Attorney, for the state.

Wm. H. Miller, for defendant.

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

EMERY, J. The use of what were known as "general warrants" for search had become so oppressive under royal authority the people of Maine, in common with those of other states, undertook to safeguard themselves against them by the constitutional provision that "no warrant to search any place, or seize any person or thing, shall issue without a special designation of the place to be searched." Const. of Maine, Art. I, sec. 5. R. S., c. 133, sec. 14. In the warrant in this case the "special designation of the place to be searched" is as follows: "A certain building and its appurtenances thereunto belonging known as Hotel Davis used and occupied by said Duane (the respondent) as a dwelling house in part and in part as an inn situated on the south side of Main Street in the village of Waldoboro in said Waldoboro, and the premises occupied by Edwin O. Clark on the east south, and the premises occupied by Gardiner J. Nash on the west side of said building." The return of the officer on the warrant is this: "By virtue of the within warrant I have entered the within described premises and searched the said premises," &c.

As it reads, the warrant assumes to authorize and even direct a search of three distinct premises, each occupied by a different person. This makes it a species of general warrant. If a magistrate can lawfully issue a single warrant, upon a single complaint, to search three distinct premises, each occupied by a different person, he can lawfully issue a single warrant for the search of any number of premises each occupied by a different person. This would practically be a return to that system of general warrants so emphatically forbidden by the constitution and statute. This court in *State* v. *Robinson*, 33 Maine, 564, in speaking of search warrants said, per SHEPLEY, C. J.:

"That cannot be considered a special designation of the place (to be searched) which if used in a conveyance would not convey it and which would not confine the search to one building or place." We think this the true interpretation of the constitution and statute.

The counsel for the state contends that really only one place is described in the warrant, the Hotel Davis, and that the Clark and Nash premises were named simply as boundaries of the hotel lot on either side. Unfortunately for this contention there are in the warrant no words, such as "between" or "bounded by" or other words, indicating that the Clark and Nash premises were boundaries merely and were not to be searched. Those premises cannot be excluded from the scope of the warrant without reading into the warrant important words not found there. Even if such words could be read into such a description in a deed without having the deed reformed in equity, they cannot under any rule of criminal pleading be read into so sharp and summary a criminal process as a search warrant.

The demurrer is to the warrant as well as the complaint, and we think it must be sustained.

Exceptions sustained. Demurrer sustained.
Warrant adjudged invalid.

MARY STODDARD *vs.* CHARLES H. CROCKER.

Cumberland. Opinion November 16, 1905.

Warehouseman. Lien for Storage. Sale to Enforce Same. Statutes. Repeal by Implication. Stat. 1897, c. 304. R. S. (1883), c. 31, § 8; c. 91, § § 48–56. R. S. 1903, c. 33, § 10; c. 93, § § 67-75.

1. April 10, 1902, the plaintiff deposited with the defendant, a public warehouseman, a quantity of household goods. Storage being unpaid, the defendant on May 28, 1904, filed his petition in the Municipal Court of Portland for process of sale, under the provisions of chapter 91, sections 48-56, R. S. 1883, which are the same provisions contained in chapter 93, sections 67-75, R. S. 1903. The defendant obtained the order and sold the goods.
2. Chapter 304 of the laws of 1897, re-enacted in the revision of 1903, added a new section to chapter 31, R. S. 1883, relating to warehousemen, by which a public warehouseman having goods in store for one year after the expiration of the time for which the charges had been paid, was authorized to sell the goods subject to the conditions named therein.
3. *Held:* that this provision is the exclusive and only one under which the goods could have been legally sold, and that the proceedings under the statute R. S. 1883, chapter 91, sections 48-56, were unauthorized and the sale illegal.

On report. Judgment for plaintiff.

Trover for the conversion of a quantity of household goods deposited with the defendant for storage. The storage being unpaid, the defendant, by virtue of process issued by the Municipal Court of Portland, sold these goods for the purpose of enforcing his storage lien thereon as a warehouseman. Thereupon the plaintiff brought this action of trover in the Superior Court, Cumberland County. Plea, the general issue. The matter was heard in said court at the February term thereof, 1905. After the evidence was closed, the parties agreed that the case should be reported to the Law Court for determination, with the stipulation that "if decision is for the plaintiff, damages to be assessed at one hundred dollars."

The material facts are sufficiently stated in the opinion.

Dennis A. Meaher, for plaintiff.

George H. Allan, for defendant.

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

STROUT, J. Defendant on April 10, 1902, was a public warehouseman, as defined by R. S. of 1883, c. 31, § 8. On that day John P. Stoddard, husband of plaintiff, deposited with defendant a quantity of household goods for storage. They were deposited in the husband's name, with the consent of plaintiff, but defendant had no knowledge that plaintiff was the owner. Consequently defendant was justified in dealing with them as the property of John P. Stoddard. Plaintiff and her husband shortly thereafter left the state and resided in Massachusetts a while, and then went to St. Andrews, New Brunswick, and did not return to this state till the last week in September, 1904. No storage had been paid. Meantime the goods remained in defendant's warehouse until the eighth day of August, 1904, when they were sold under process issued from the Municipal Court of Portland, upon petition therefor by the defendant filed May 28, 1904. This proceeding for sale was taken under the provisions of c. 91, § § 48 and 56, R. S. of 1883, which are the same provisions as are contained in R. S. of 1903, c. 93, § § 67 and 75.

As warehouseman, defendant had a lien at common law upon the goods for storage, but in the absence of a statute he had no right to sell them, but only a right to hold them till the charges were paid. Jones on Liens, § 976; *Mulliner* v. *Florence*, 3 Q. B. Division, 489; *Jones* v. *Pearle*, 1 Strange, 556.

The statute as to warehousemen, c. 31, R. S. of 1883, made no provision for sale. But c. 91, of the same revision, did provide for a sale in a variety of cases when the claimant had a lien, and that statute was broad enough to include a warehouseman's lien upon goods in storage.

Chap. 304 of the laws of 1897, re-enacted in the Revision of 1903, c. 33, § 10, added a new section to c. 31 of R. S. of 1883, by which a public warehouseman having goods in store for one year after the expiration of the time for which the charges had been paid, was authorized to sell the goods, subject to the conditions named therein.

This provision applies only to the lien of a warehouseman. Other liens fall under the general statute,—c. 91, R. S. of 1883, and c. 93, R. S. of 1903.

The question arises whether this special provision for this class of liens is a substitution for the general provision as to liens, and is the exclusive remedy by way of sale, or whether it is merely cumulative, affording a double remedy at the option of the warehouseman.

Under the general statute the process may be commenced at any time, when anything is due for storage. Under this it cannot be commenced till after one year of unpaid charges.

Under the general statute, if the owner is a resident of the state, the petition may be filed and notice served fourteen days before court, and if owner is unknown, or not a resident of the state, the court may order "reasonable notice of at least fourteen days" by personal service, "or by publication in a newspaper, or both as the court directs," but it is not required that the newspaper shall be published in the city or town where the warehouse is, or even in the county. In the statute of 1897, the notice, where no address of the depositor has been given, must be given by publication thirty days before the time of sale, in a newspaper published in the city or town where the warehouse is,—if no such paper, then in one published in the county. The notice must contain a brief description of the property, with such marks thereon as may serve to identify it, if it had such marks, and give the name of the person depositing the articles, and of the owner, if known, and specify the time after said thirty days and the place of sale, which must be in the city or town where the merchandise is. In that statute a demand by "registered letter directed to the person who shall have deposited such goods" was necessary, if the depositor's address had been left with the warehouseman, and the thirty days notice was to be given after such demand; but if the address had not been given, the demand was dispensed with. In this case Mr. Stoddard said he left his address with defendant's book-keeper, but she emphatically denied it. No similar provision is contained in the general statute relating to liens.

It is said in *United States* v. *Claflin*, 97 U. S. 552, that it is "necessary to the implication of a repeal (of a prior statute) that the objects

of the two statutes are the same, in the absence of any repealing clause." Here the object of the statute of 1897 was to afford a right of sale of the warehoused goods for non-payment of storage, but the rights of the depositor were much more carefully guarded than in the other general statute. Presumably knowing the existing statute, the Legislature deemed it wise to make this new provision applicable only to warehousemen, and must have intended that it should be the exclusive method of obtaining a sale of the goods. Otherwise there was no occasion for its passage. If the two remedies are to co-exist, that provided for in the act of 1897 would probably never be used, as it requires more of the warehouseman than the general statute. It made the right of sale absolutely dependent upon the conditions named in the act, and so negatived any right of sale in any other method. The two provisions are repugnant to each other.

The inference is irresistible that the Legislature intended to repeal the general and prior statute so far as it applied to warehousemen, and substitute in its place the method prescribed in the act of 1897. *Bassett* v. *Carleton*, 32 Maine, 553; *Sudbury Meadows* v. *Middlesex Canal*, 23 Pick. 47; *Starbird* v. *Brown*, 84 Maine, 240.

It follows that the proceedings in the Municipal Court to obtain an order of sale were unauthorized and do not conclude the plaintiff. The sale by defendant of the goods was a conversion, even if no demand had been made by the plaintiff, as there was.

The plaintiff as owner may maintain the action, notwithstanding the deposit was made in her husband's name.

The parties have agreed that if judgment is for plaintiff the damages are to be assessed at one hundred dollars.

Judgment for plaintiff for one hundred dollars and interest from the date of the writ.

MOSES M. CHAPMAN *vs.* MELVIN HAMBLET.

Cumberland. Opinion November 16, 1905.

Deeds. Construction. Description of Land. Monuments. Ambiguity. Intent of Parties. "Prolongation."

1. The description of land conveyed is to be interpreted by reference to all the calls in the deed of conveyance, and every call is to be answered if it can consistently be done.
2. In cases of ambiguity the interpretation is to be sought from the attendant circumstances and the intent of the parties, and the deed must receive a construction most favorable to the grantee.
3. A boundary line is a monument and would by the general rule of construction govern the course in a deed, unless the intention of the parties would be defeated by its adoption.
4. Where uncertainty is introduced in the language of a deed by the word "prolongation," it is held to mean a continued or extended line, though consisting of several angles, where such meaning would be consistent with the other words of description, rather than a direct line which would render the next course in the deed inconsistent with the direction and monuments by which it is described.

On report. Judgment for defendant.

Trespass quare clausum fregit wherein the plaintiff sought to recover damages of the defendant for cutting and removing certain wood and timber from a portion of the plaintiff's premises in Scarborough. The defendant admitted the taking but justified under claim that the premises upon which the alleged trespass was committed were a part of a tract of land on which the trees and wood growth had been conveyed to him by the plaintiff. The action was brought in the Superior Court, Cumberland County. Plea, the general issue. Tried at the February term, 1905, of said court. After the evidence had been closed, it was agreed to report the case 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."

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

The deed mentioned in the opinion and given by the plaintiff to the defendant, is as follows:

"Know all men by these presents, that I, Moses M. Chapman of Westbrook in the County of Cumberland and State of Maine, in consideration of one dollar, and other good and valuable considerations, paid by Melville Hamblet of Portland in said County, the receipt whereof I do hereby acknowledge, do hereby remise, release, bargain, sell and convey, and forever quit-claim unto the said Melville Hamblet, his heirs and assigns forever, the trees and wood growth on the following described parcel of land situated in Scarborough in said County of Cumberland, bounded and described as follows:

Commencing at a point on the County road running from Portland to Buxton, at the corner of Allen T. Reed's land and land of said Chapman; thence following the division line between said Allen T. Reed's and said Chapman's and the prolongation of said Chapman's line until it intersects with the wire fence between said Chapman's land and the land now or formerly of Champaign and Larochelle; thence in an easterly direction by said wire fence between said Champaign land and the land of said Chapman, and by the prolongation of said Chapman's said line, to land now or formerly of McKenney; thence by land of said McKenney and Knight to a logging road; thence by the logging road to a wire fence on said Chapman's land; thence by the wire fence to said Buxton road; reserving and excepting therefrom a small lot of birches near the Buxton road. Provided the said trees and wood growth shall be removed within three years from the date thereof.

Said grantee has the right to pile said wood and timber in the pasture of said Chapman, together with all reasonable rights of way in and to the same, and to said above described premises, for the purpose of removing said trees and wood,—as herein provided.

To have and to hold the same, together with all the privileges and appurtenances thereunto belonging to the said Melville Hamblet, his heirs and assigns forever.

And I do covenant with the said Grantee, his heirs and assigns, that I will warrant and forever defend the premises to him the said Grantee, his heirs and assigns forever, against the lawful claims and demands of all persons claiming by, through or under me.

In witness whereof, I the said Moses M. Chapman, have hereunto

set my hand and seal this eleventh day of November in the year of our Lord one thousand nine hundred and three.

MOSES M. CHAPMAN (L. S.)

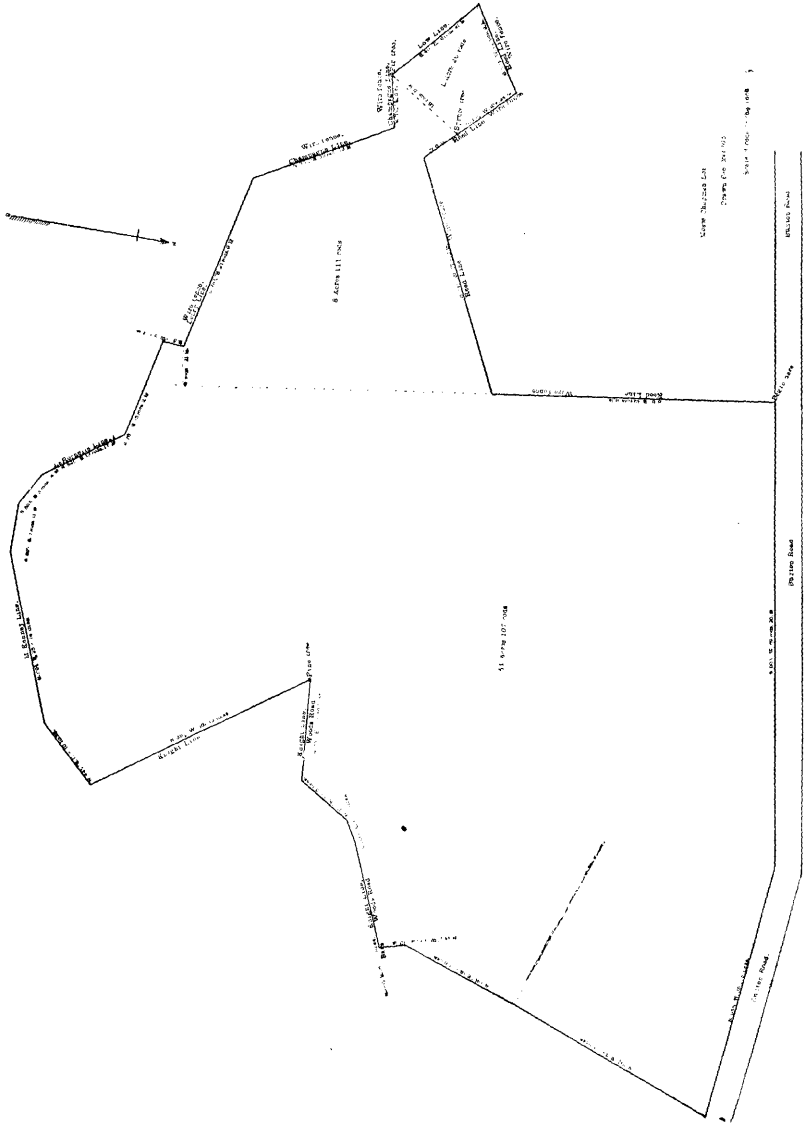
Signed, Sealed and Delivered
in Presence of
ISAAC W. DYER.

STATE OF MAINE, ss. Portland, November 11th, 1903.

Personally appeared the above named Moses M. Chapman and acknowledged the above instrument to be his free act and deed.

Before me,
ISAAC W. DYER,
Justice of the Peace."

SKILLIN PLAN.



A. F. Moulton and William Lyons, for plaintiff.
M. P. Frank, for defendant.

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

PEABODY, J. This was an action of trespass quare clausum. The case comes before the law court on report. The act complained of was the cutting of certain wood and timber from a portion of the plaintiff's farm.

The defendant claims that under the deed of the plaintiff dated November 11, A. D. 1903, he had license to cut all the wood and timber upon the farm except a small lot of birches on another part of the premises not effected by the acts complained of.

The dispute is upon the construction of this deed and especially of the following words in the description of the boundary of the disputed territory: "Commencing at a point on the County Road running from Portland to Buxton, at the corner of Allen T. Reed's land and land of said Chapman; thence following the division line between said Allen T. Reed's and said Chapman's and the prolongation of said Chapman line until it intersects with the wire fence between said Chapman's land and the land now or formerly of Champaign and Larochelle."

The survey and plan made by Augustus E. Skillin subsequent to the date of the deed show that the language describing the lines in dispute is ambiguous. The uncertainty which exists is introduced by the word prolongation in connection with the first course of the Reed boundary line. In common language this word may mean a line produced as claimed by the plaintiff, but it is not infrequently used of a continued or extended line as claimed by the defendant.

The plaintiff's contention is that by the language "prolongation of said Chapman's line", is meant a line produced in the first course of the Chapman-Reed boundary, and that of the defendant is that the word "prolongation" is used in the sense of extension or continuation and is a term merely descriptive of the boundary line beyond the land of Reed and to the Champaign-Larochelle wire fence.

Therefore it is necessary to choose between a line departing from the Chapman-Reed boundary line and one following it but in a new course.

The description of the land is to be interpreted by reference to all the calls in the deed, and every call is to be answered if it can be done. *Herrick* v. *Hopkins*, 23 Maine, 217. The interpretation is to be further sought from the attendant circumstances and the intent of the parties, and the deed must receive a construction most favorable to the grantee. *Erskine* v. *Moulton*, 66 Maine, 276; *Field* v. *Huston*, 21 Maine, 69; *Pike* v. *Monroe*, 36 Maine, 309; *Ames* v. *Hilton*, 70 Maine, 36; *Knowles* v. *Bean*, 87 Maine, 331; *Stoops* v. *Smith*, 100 Mass. 63; *Hastings* v. *Hastings*, 110 Mass. 280.

The Chapman-Reed boundary consists of a broken line of four courses and the Chapman line is continued on still another course. As this boundary line is a monument it would by the general rule of construction govern the course unless the intention of the parties would be defeated by its adoption. *Haynes* v. *Young*, 36 Maine, 557; *Sanborn* v. *Rice*, 129 Mass. 387; *Woodward* v. *Nims*, 130 Mass. 70; *Davis* v. *Rainsford*, 17 Mass. 210; *Percival* v. *Chase*, 182 Mass. 371. By following this boundary line until the end of the Reed land is reached without reference to the several angles in the line, and then following the Chapman line understanding it to be still used as a monument until the Champaign wire fence is reached, there is no confusion in the language of the deed. It will be seen by reference to the Skillin plan that the line which the plaintiff insists answers the second call in the deed introduces into the description two material inaccuracies; it does not intersect "with the wire fence between Chapman's land and land now or formerly of Champaign and Larochelle"; and the next course is inconsistent with the direction and monuments by which it is described.

The force of the argument that the word prolongation in the description implies a direct line is lessened by the use of the word a second time in the deed, namely, "thence in an easterly direction by said wire fence between said Champaign land and the land of said Chapman and by the prolongation of said Chapman's said line to land now or formerly of McKenney," where it could not in the

nature of the case be a direct line; and the course and the names of the adjacent owners in this call of the deed best accord with the boundaries of the land claimed by the defendant.

The defendant's testimony shows that he had in view the purchase of the wood and timber upon the whole of the plaintiff's farm except a small lot of birches which the plaintiff desired to reserve for fencing, that the price which he offered was for this and that no reduction was ever made in the price. This is in conflict with the plaintiff's statement that the intended reservation was the wood and timber on the lot in dispute made definite by a line which he pointed out to the defendant extending south across his land being that designated in the second call in the deed. It appears that the plaintiff during the negotiation requested Lewis P. Knight, who was familiar with the value of wood and timber, to estimate the amount of growth on the premises, and that he in making his estimate examined the whole tract understanding that the plaintiff was to sell all the wood and timber except some small growth of birches. The greater weight of evidence proves that the plaintiff did not as he testifies point out this line to the defendant, but an assumed division line between his land and that of John O. Knight which he marked upon the face of the earth by spotting trees between a spruce tree near the Reed line and a fir tree near the corner of the adjoining lands of Champaign and Lowe.

Under these circumstances and rules governing the construction of deeds it must be held that the deed between the parties included the disputed premises.

Judgment for defendant.

In Equity.

W. R. LYNN SHOE COMPANY

vs.

THE AUBURN-LYNN SHOE COMPANY et als.

Androscoggin. Opinion November 16, 1905.

Trade-Marks. Simulation Thereof. Infringement. Trade-Name. Unfair Competition. Accounting. Rule of Damages. Evidence.

The general common law proposition upon which all the courts unite is that any words, letters, figures, marks or devices, or combinations of any of these, affixed to a commercial article and used primarily to indicate the origin or ownership of it, either by its own meaning or by association with the article, and not employed merely as descriptive of such article to designate its quality or ingredient only, or solely as a geographical name without any secondary signification, must be recognized as a valid trade-mark.

All the courts agree that one man shall not be permitted, by imitating such distinctive name or mark already employed by another to designate a commercial article, to impose upon the public an article of his own manufacture as the genuine article of another, for the reason that it would be a fraud upon the manufacturer first appropriating such mark, and also a fraud upon the consumers who have a right to be protected against such imposition.

But while it is undoubtedly the general rule that a geographical name when used alone and affixed to a manufactured article for the purpose of designating the place of its manufacture, or the address of the manufacturer, cannot be appropriated as a trade-mark, it has been held that a geographical name which has long been used to indicate a particular manufactured article, may acquire a secondary meaning as the designation of a particular class of such articles, or the product of a particular manufacturer, and thus either become entitled to protection against infringement as a valid trade-mark, or serve as the basis of a proceeding to prevent unfair competition.

The leading characteristic which distinguishes the trade-mark under consideration in the case at bar from the ordinary appropriation of a personal name or geographical term alone as a trade-mark is the fact that in the plaintiff's trade-mark, the geographical and personal names were both

combined in an original device bearing the words "Auburn-Lynn Shoes, Auburn, Maine."

This arbitrary composite name of the plaintiff's product, with the location of the manufactory, expressly added, constituted an impersonal trade-mark. It was a trade-mark which others could not use with equal right and equal truth for the same purpose. The plaintiff had acquired the exclusive right to the use of it, and the adoption by the defendant of the phrase "Auburn-Lynn Shoe Co." as a trade-mark, and corporate name was an unauthorized simulation of the plaintiff's trade-mark and constituted an infringement of the plaintiff's property right without other proof of a fraudulent intent on the part of the defendant.

In contemplation of law two trade-marks are substantially the same if the resemblance between them is so close that it deceives a customer exercising ordinary caution in his dealing and induces him to purchase the goods of one manufacturer for those of another. A critical comparison of two trade-marks placed side by side might disclose differences in both words and devices, but if the similarity is of such a character as to convey a false impression to the minds of ordinarily careful purchasers, respecting the identity of the manufactory or of the goods, it is sufficient to afford ground for redress.

The defendant's aggressions upon the rights of the plaintiff prior to the change of its name to "Lunn & Lynn Shoe Co." constituted not only a violation of the general law covering unfair competition, but also a specific and positive infringement of the plaintiff's exclusive right to the use of a technical trade-mark and trade-name. The law of trade-marks, it is true, is but a special feature of the general law of unfair competition in trade which rests upon the elementary principle that no person has the right to sell his goods for those of another, but there are important distinctions to be observed between them. Unfair competition, unlike the infringement of technical trade-marks, does not necessarily involve the violation of any exclusive right in the plaintiff to the use of the names or symbols employed by the defendant, but there may be unfair competition resulting from an unauthorized and improper use of such names and symbols, although the plaintiff has no property right in them as a trade-mark. Any conduct designed and having a natural tendency to deceive the public and enable one man to dispose of his goods for those of another may be unfair competition and be enjoined, although it is not expressly shown that any particular person was thereby actually deceived. Again, in cases of technical trade-mark, the fraudulent intent to deceive is presumed, while in cases of unfair competition, the plaintiff must prove this intent or show facts and circumstances from which it may be reasonably inferred.

Held: That the findings and conclusions of the Justice of the first instance were justified by the facts reported. Therefore all of the provisions of the decree signed by the Justice of the first instance are affirmed without modification except the sixth paragraph in regard to the extent of the accounting to which the plaintiff is entitled.

ACCOUNTING. The rule which now prevails in the equity courts respecting the wrongdoer's accountability for the "profits and damages" resulting from his unlawful acts, requires the master not only to take an account of all profits made by the defendant, but also to make an inquiry in regard to all damages sustained by the plaintiff on account of the defendant's wrongful acts, and since it cannot be ascertained with any reasonable certainty how much of the profit is due to the trade-mark and how much to the intrinsic value of the commodity the whole will be awarded to the plaintiff. It is well settled that the profits recoverable in equity for unfair competition are governed by the same rule as in cases of infringement of trade-marks.

It is therefore further *held:* that the plaintiff is entitled to an accounting not only for the profits realized by the defendant company, from sales of shoes upon which was impressed the trade-mark of the Auburn-Lynn Shoe Company, or any simulated trade-mark using the name "Auburn-Lynn," but also for the profits resulting from the wrongful acts committed by the defendant company in its unfair competition with the plaintiff between the time of its change of name to Lunn & Lynn Shoe Co., and the date of the decree.

In Equity. On appeal by defendants and on exceptions by plaintiff. Appeal dismissed. Exceptions sustained. Cause remanded for a modification of decree in accordance with opinion.

Bill in equity brought by the plaintiff seeking to enjoin the defendants from the use of the name Auburn-Lynn Shoe Company, as an infringement of the trade-mark and trade-name of Auburn-Lynn Shoes adopted by the plaintiff and claimed by it as its exclusive property, and to further restrain the defendants from the use of the name Lunn & Lynn Shoe Company, adopted and used by it subsequent to the commencement of the bill, and from the use of any name similar to either of the above names. This cause was heard on bill, answer and proof, after which a final decree was filed enjoining the defendants from an unlawful use of plaintiff's trade-mark and trade-name. From this decree the defendants appealed. Also the plaintiff took exceptions to that portion of the decree respecting the *extent* of the liability of the defendant company to account for the profits of its business.

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

Oakes, Pulsifer & Ludden, and Enoch Foster, for plaintiff.

George C. Wing, George C. Wing, Jr., and White & Carter, for defendants.

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

WHITEHOUSE, J. This cause in equity comes to the law court upon the appeal of the defendant corporation from a final decree enjoining it from an unlawful use of the plaintiff's trade-mark and trade-name, and upon the plaintiff's exceptions to that portion of the decree respecting the extent of the liability of the defendant corporation to account for the profits of its business.

The material facts established by the finding of the court are as follows:

The plaintiff corporation has been engaged in business in Auburn, Maine, since 1898, manufacturing ladies' boots and shoes under several styles, among which are "Comfort" and "Common Sense." The corporation was named for W. R. Lynn, who was an experienced manufacturer of shoes, a stockholder in the company until about the first of 1903, and the superintendent of manufacture for several years. He continued his services with the corporation until June 5, 1903. In November, 1899, the corporation adopted the name, "Auburn Lynn Shoes," as the name of a part of its product, and that name was used as a general name for the entire product, for two or three years prior to the bringing of this bill, and became the trade-name of the plaintiff's manufactured product. In June, 1903, the plaintiff adopted a trade-mark in the form of the following device:

A cut was made and the trade-mark printed in a booklet in the early part of 1903, and five thousand copies of it were sent out for the use of the trade. The trade-mark stamp was applied to the plaintiff's shoes for the first time in June, 1903. The plaintiff also extensively used the term "Auburn Lynn Shoes" upon its labels, postal cards, envelopes, bill heads, letter heads, orders, blanks, circulars and

slips, upon which the words Auburn-Lynn Shoes, made by the W. R. Lynn Shoe Co., Auburn, Maine," were made very prominent. In the trade-mark and trade-name, "Auburn-Lynn Shoes," the word "Auburn" signified the city of Auburn, the place of manufacture, and the word "Lynn" signified W. R. Lynn, the superintendent of manufacture in the plaintiff corporation. The defendants Lunn and Reed were salesmen for the plaintiff, each having assigned to him certain territory in the western states.

July 9, 1903, the defendants, Lunn, Lynn and one Sweet, organized the defendant corporation under the name of "The Auburn-Lynn Shoe Company." Lynn was President, Lunn, Treasurer, and Lynn, Lunn, and Sweet directors. The Auburn-Lynn Shoe Company entered into business in Auburn near the place of business of the W. R. Lynn Shoe Company. The names "Auburn" and "Lynn" in the name of the corporation, were intended to represent the name of the city of Auburn, Maine, and the name "Lynn" the defendant W. R. Lynn, who was known as a manufacturer. The defendant company, soon after its organization, adopted the following trade-mark:

and used it upon the first goods sent out under date of September 4, 1903. The Auburn-Lynn Shoe Company made styles of goods similar to those manufactured by the W. R. Lynn Shoe Co., under the name of "Common Sense" and "Old Ladies" shoes, etc., but they were not identical, though many styles were not readily distinguishable. The Auburn-Lynn Shoe Company in July and August, sent letters to the old customers of the plaintiff calling attention to the fact that W. R. Lynn had ceased to be connected with the plaintiff company, and that a new corporation had been formed. Reference was made, however, to the "improved styles" to be manufactured by

the Auburn-Lynn Shoe Company. Circulars, made after this bill was filed and served, were put in the first cartons shipped by the defendant company, and were also sent by mail to the former customers of the W. R. Lynn Shoe Co. They were headed with the trademark of the Auburn-Lynn Shoe Co., and contained no reference to the fact that Mr. Lynn had ceased to be connected with the W. R. Lynn Shoe Co., or that the Auburn-Lynn Shoe Company was not the same manufacturer as the plaintiff. But they contained the following sentence: "Our Common Sense shoes are noted for softness and excellent wearing qualities, and have brought comfort to thousands of women troubled with aching and tender feet." At the time this circular was first issued, the Auburn-Lynn Shoe Company had sold no goods.

As a result of these circumstances, the plaintiff in the fall of 1903 found unusual difficulty in selling in its old territory. Many of its old customers gave orders to the new company, and also much confusion arose in regard to the mail intended to be addressed to the plaintiff. Before the organization of the defendant company, letters intended for the plaintiff had been addressed to the W. R. Lynn Shoe Company and the Auburn-Lynn Shoe Company; but after the new company was organized, it claimed to receive and did receive and open all letters addressed to the Auburn-Lynn Shoe Company. When the Auburn-Lynn Shoe Company commenced business it provided the old customers of the W. R. Lynn Shoe Co., with envelopes addressed to "the Auburn-Lynn Shoe Company," and apparently some of those envelopes were used by the customers of the plaintiff in sending orders and remittances. At least thirty-two letters, between August 4, 1903, and the time of hearing this bill in March, 1904, intended for the plaintiff, but addressed to the Auburn-Lynn Shoe Company, came into the hands of the defendant corporation. They contained orders, checks and general correspondence, some on the defendant's printed, addressed envelopes, and some in writing. They were mostly from old customers, and from the letters the defendant company obtained information concerning the business of the plaintiff.

On the fifteenth day of September, 1903, after this bill was brought, the defendant corporation changed its name to the "Lunn & Lynn

Shoe Co," but it continued to use the old stationery and copies of the printed trade-mark, substituting "Lunn &" for "Auburn," in red ink, the word "Auburn" being crossed, but not obliterated.

The defendant Reed was employed by the defendant company as salesman, and has covered practically the same territory as he did with the old company. It was the understanding that he should visit the old customers of the plaintiff and he did so. The defendant Lunn acted as salesman for the defendant company from September until into November, covering his old territory. After September 22, 1903, no goods were billed by the defendant company under the name of the Auburn-Lynn Shoe Co., but under the name of the Lunn & Lynn Shoe Co. After the change of name one order only appears to have been taken by the defendant's salesman on the order blanks of the Auburn-Lynn Shoe Co.

The inference and legal conclusions deducible from the findings of fact are thus stated by the presiding Judge before whom the testimony was taken. "I rule that the term "Auburn-Lynn Shoes," adopted by the plaintiff and affixed by it to its goods, as a combination was a valid trade-mark, and trade-name, though it was in part geographical. I hold that the plaintiff had acquired by use an exclusive right to the name "Auburn-Lynn shoes" as a trade-mark and trade-name.

I hold that the conduct of the defendant company, in adopting the phrase "Auburn-Lynn Shoe Co." as its trade-mark, and in conducting a shoe business under that corporate name, manufacturing goods similar in style and character to those manufactured by the plaintiff and so nearly so as not to be distinguishable by ordinary observers, advertising and selling those goods in the territory covered by Lunn and Reed, when they were acting for the plaintiff company, in the sale of Auburn-Lynn shoes, constituted unfair competition. I think it was well calculated to mislead customers, notwithstanding the correspondence of the defendant company and its officers to the old customers, in which they stated that a new corporation had been formed, and that Mr. Lynn had ceased to be connected with the plaintiff company. And although the trade customers of the plaintiff might even generally be informed of the situation, the purchasing public, so far

as it appears, was not informed, and could not well be informed, and were liable to be deceived, and the plaintiff, at the same time, injured thereby. Those who had been in the habit of dealing in and purchasing the Auburn-Lynn Shoes might well understand that the product of the Auburn-Lynn Shoe Company represented the plaintiff's manufacture. And even after the change of name to Lunn & Lynn Shoe Company, the use of the old literature, so changed as only to indicate that the Lunn and Lynn Shoe Co. was the successor of the Auburn-Lynn Shoe Company, did not help the matter. If customers could be led to believe that the Auburn-Lynn Shoe Company was the manufacturer of shoes which they had formerly bought as "Auburn-Lynn Shoes," they would not be undeceived by seeing literature in which "Auburn" was changed to "Lunn &" in such a way as to give the impression that the Lunn & Lynn Shoe Company was a successor of the "Auburn-Lynn Shoe Company."

I do not, however, find that the use of the words "Lunn & Lynn Shoe Company" is an infringement upon the plaintiff's rights, except so far as it may, by the manner of use, directly or indirectly, give any impression that it is the successor of the Auburn-Lynn Shoe Company, or had, or has ever had, anything to do with the manufacture of the "Auburn-Lynn Shoes." I think the defendant company may lawfully make use of the composite name Lunn-Lynn, although Lunn was formerly the salesman, and Lynn the manufacturer of the Auburn-Lynn shoes, and although Lynn is the person for whom the Auburn-Lynn shoes were named in part. The defendant company must not use its corporate name or conduct its business so as to convey to the trade the impression that its manufactured product is the Auburn-Lynn shoe product of the plaintiff, or that it is the successor of the plaintiff or of the Auburn-Lynn Shoe Company, and it must so conduct its business in this respect that persons of ordinary intelligence may not be deceived. I think the duty is upon it to take such measures as may be necessary to clearly avoid confusion.

I think the defendant company, its officers, agents and servants, should be enjoined from the use in any way of the trade-mark and trade-name, "Auburn-Lynn Shoes," as applied to its product, and from the use of the name "Auburn-Lynn Shoe Company" in the

manufacture and sale of "Comfort", "Common Sense", "Old Ladies", and other similar shoes, or in business and correspondence connected therewith, and from the use of the name "Lunn & Lynn Shoe Company" as the successors of the Auburn-Lynn Shoe Company, unless in each instance it states clearly that it is not the manufacture of the Auburn-Lynn Shoes.

Thereupon the presiding Justice sustained the bill against the defendant corporation and entered the following decree:

1. That the plaintiff is entitled to the exclusive use of the name "Auburn-Lynn Shoes" as a trade-mark and a trade-name.

2. That the defendant corporation, its officers, agents and servants, be and are hereby perpetually enjoined from the use in any way of the trade-mark or trade-name "Auburn-Lynn Shoes" as applied to its product.

3. That the defendant company, its officers, agents and servants, be and are hereby perpetually enjoined from the use of the name "Auburn-Lynn Shoe Company" in the manufacture and sale of "Comfort" "Common Sense" "Old Ladies" and other similar shoes, and from the use of said name, "Auburn-Lynn Shoe Company" in its business and its correspondence connected therewith.

4. That the said defendant company, its officers, agents and servants, be and are hereby perpetually enjoined from the use of the name "Lunn & Lynn Shoe Company" as the successor of the "Auburn-Lynn Shoe Company," unless in each instance it states clearly that it is not the manufacturer of the "Auburn-Lynn Shoes."

5. That the defendant company, its officers, agents and servants, be and are hereby perpetually enjoined from the use of its corporate name or the conduct of its business so as to convey to the trade the impression that its manufactured product is the Auburn-Lynn Shoe product of the plaintiff, or that it is the successor of the plaintiff, or of the Auburn-Lynn Shoe Co., and from so conducting its business in this respect that persons of ordinary intelligence would be deceived thereby.

6. That it be referred to John A. Morrill, Esq., of Auburn, a master in Chancery, to take an account of all the profits of the business of the defendant corporation, growing out of sales of shoes upon

which was impressed the trade-mark of the Auburn-Lynn Shoe Company, or any simulated trade-mark using the name "Auburn-Lynn," from the ninth day of July, A. D. 1903, to the date of this decree, and ascertain and report the amount of such profits, together with all damages sustained by the plaintiff during said period by the wrongful use of the plaintiff's trade-mark and trade-name, and by the unfair competition of the defendant corporation during said period."

The bill was dismissed without costs as to the defendants, Lunn and Reed.

It is the opinion of the court that these deductions and conclusions were clearly warranted by the findings of fact, and that the defendant's appeal must be dismissed.

It is contended in behalf of the defendant company that as the word "Auburn" in the plaintiff's trade-name indicated the place of manufacture, and the word "Lynn" signified the name of the manufacturer, the phrase "Auburn-Lynn Shoes" could not become the subject of an exclusive property right of the plaintiff, and was therefore incapable of being a valid trade-mark. But this contention cannot be sustained.

It may be difficult to reconcile the conclusions reached by different courts upon the facts reported in the multitude of decisions relating to this subject and impracticable to give an exact statement of what a trade-mark may consist under all circumstances, but an analysis of the leading cases shows that they are all in substantial accord upon the equitable principles and fundamental propositions respecting the nature and protection of trade-marks. "It is equitable," says Judge Putman in *The Le Page Co.* v. *Russia Cement Co.*, 51 Fed. Rep. 941, "that a manufacturer who has given reputation to any article should have the privilege of realizing the fruits of his labors by transmitting his business and establishment, with the reputation which has attached to them, on his decease to his legatees or executors, or during his lifetime to purchasers; and it is also in accordance with the principles of law and justice to the community that any trade-mark, including a surname, may be sold with the business or the establishment to which it is incident; because while it may be that individual efforts give them their value at the outside, yet afterwards this is ordinarily

made permanent as a part of the entire organization, or as appurtenant to the locality in which the business is established, and thenceforward, depends less on the individual efforts of the originator than on the combined result of all which he created." The general common law proposition upon which all the courts unite is that any words, letters, figures, marks or devices, or combination of any of these, affixed to a commercial article and used primarily to indicate the origin or ownership of it, either by its own meaning or by association with the article, and not employed merely as descriptive of such article to designate its quality or ingredient only, or solely as a geographical name without any secondary signification, must be recognized as a valid trade-mark. All the courts agree that one man shall not be permitted, by imitating such distinctive name or mark already employed by another to designate a commercial article, to impose upon the public an article of his own manufacture as the genuine article of another, for the obvious reason that it would in the first place be a fraud upon the manufacturer first appropriating such mark, and secondly, a fraud upon the consumers who have a right to be protected against such imposition. In *Symonds et al.* v. *Jones*, 82 Maine, 302, the court say: "The public come to associate their names, labels and marks with the products of some particular origin or ownership, or of some particular factory, farm, etc. It is clear that such names thus become convenient for the consumer and valuable to the producer and that both the consumer and the producer should be protected against their use by other parties upon other similar products. They become valuable according to the familiarity of the public with them, and the excellence of the product designated by them. The law justly recognizes such names, labels and marks as important attributes or appurtenances of a business, and as proper to be transferred with any sale or transfer of the business and its plant." See also *Canal Co.* v. *Clark*, 13 Wall. 311; *Brown Chem. Co.* v. *Meyer*, 139 U. S. 540; *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460. *Elgin Natl. Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665. In the last named case, Ch. J. Fuller says in the opinion: "The term has been in use from a very early date and generally speaking means a distinctive mark of authenticity through which the

commodities of particular merchants may be distinguished from those of others. It may consist in any symbol or in any form of words, but as its office is to point out distinctively the origin or ownership of the articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trade-mark, which from the nature of the fact conveyed by its primary meaning, others may employ with equal truth and with equal right for the same purpose."

"And the general rule is thoroughly established that words that do not in and of themselves indicate anything in the nature of origin, manufacture or ownership, but are merely descriptive of the place where an article is manufactured or produced, cannot be monopolized as a trade-mark." But while it is undoubtedly the general rule that a geographical name when used alone and affixed to a manufactured article for the purpose of designating the place of its manufacture, or the address of the manufacturer, cannot be appropriated as a trade-mark, it has been held in numerous well considered cases that a geographical name which has long been used to indicate a particular manufactured article, may acquire a secondary meaning as the designation of a particular class of such articles, or the product of a particular manufacturer, and thus either become entitled to protection against infringement as a valid trade-mark, or serve as the basis of a proceeding to prevent unfair competition. In *American Waltham Watch Co.* v. *U. S. Watch Co.*, 173 Mass. 85, it was held that while the name "Waltham" on watches was originally used, in a geographical sense, by long use in connection with the plaintiff's watches, it had acquired a secondary meaning as a designation of the watches which the public had become accustomed to associate with the name. In *Montgomery* v. *Thompson*, 1891 App. Cases, 217, it was decided by the house of lords that the term "Stone Ale," which had been applied to a particular quality of beer manufactured by the defendants at the town of Stone, was entitled to the protection of the court and the plaintiff was enjoined from selling any ale, not manufactured by the plaintiff under the name of "Stone Ale." In *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508, it was held that the word "Glenfield" as applied to starch had acquired a secondary meaning

and indicated to the public the starch made by the appellants. It was therefore decided that the word "Glenfield" as a denomination of starch had become the property of the appellants. See also *Reddeway* v. *Banham*, App. cases, 1896, p. 199; *Carlsbad* v. *Kutnow*, 71 Fed. Rep. 167; *Viano* v. *Baccigalupo*, 183 Mass. 160; *Metcalfe* v. *Brand*, 86 Ky. 331. Paul on Trade-marks, section 59, and cases cited.

It is also conceded to be a general rule that a personal name alone cannot be appropriated as a technical trade-mark, although it may receive protection from the courts when it is so used by another as to render him answerable to the charge of unfair competition. Every person has a right to the honest use of his own name in his own business, but he will not be permitted by imitative and unfair devices to mislead the public in regard to the identity of the firm or corporation, or the goods manufactured by it. But a trade-mark that is originally personal, indicating that the article to which it is affixed is manufactured by a particular person, often comes by usage to indicate merely that the article was manufactured in the establishment with which he was formerly connected.

But it has been seen that there is a leading characteristic which distinguishes the trade-mark under consideration in the case at bar from the ordinary appropriation of a personal name or geographical term alone as a trade-mark. In the plaintiff's trade-mark, the geographical and personal names were both combined in an original device bearing the words "Auburn-Lynn Shoes, Auburn, Maine."

This arbitrary composite name of the plaintiff's product, with the location of the manufactory expressly added, undoubtedly constituted an impersonal trade-mark. It will be found to respond to all of the recognized tests of a valid trade-mark. It did not describe the stock and different materials which entered into the manufacture of the shoes to which it was affixed. It did not necessarily signify that the shoes were the product of Lynn's personal skill, but by long use of the trade-mark in connection with the shoes, it had come to indicate that they were the product of the manufactory with which he was connected, and thus through the reputation which they had acquired in the market, to operate as an assurance that they possessed certain

general qualities and merits. It did not describe the shoes, but it indicated their origin and ownership. It was a trade-mark which others could not use with equal right and equal truth for the same purpose. The plaintiff had acquired the exclusive right to the use of it, and the adoption by the defendant of the phrase "Auburn-Lynn Shoe Co." as a trade-mark, and corporate name was an unauthorized simulation of the plaintiff's trade-mark and constituted an infringement of the plaintiff's property right without other proof of a fraudulent intent on the part of the defendant. *Elgin Natl. Watch Co.* v. *Ill. Watch Co.*, 179 U. S. 674; Paul on Trade-marks, sections 183-185. The prompt abandonment of the defendant's trade-mark with the change of its corporate name to "Lunn & Lynn Shoe Co." after the commencement of this bill, was a practical admission of this infringement. It is not indispensable that the words and devices of the two trade-marks should be in fact identical in order to constitute an infringement. In contemplation of law two trade-marks are substantially the same if the resemblance between them is so close that it deceives a customer exercising ordinary caution in his dealing and induces him to purchase the goods of one manufacturer for those of another. *McLean* v. *Fleming*, 96 U. S. 256; *Amoskeag Mfg. Co.* v. *Trainer*, 101 U. S. 63. A critical comparison of two trade-marks placed side by side might disclose differences in both words and devices, but if the similarity is of such a character as to convey a false impression to the minds of ordinarily careful purchasers, respecting the identity of the manufactory or of the goods, it is sufficient to afford ground for redress.

Again it has been seen that the defendant corporation unnecessarily and without authority adopted the words of the plaintiff's trade-mark comprising the name of Lynn, for its corporate name. In *William Rogers Mfg. Co.* v. *R. W. Rogers Co.*, 66 Fed Rep. p. 56, the court say: "Although the case of a personal name as a trade-mark will not be protected against its use in good faith by a defendant who has the same name, the reason of the rule ceases and the rule no longer applies when the defendant, as in case of a corporation, selects its own name, especially where it appears that such name is selected with an intention to mislead." In *Holmes B. & H.* v. *The Holmes B. & A. Mfg.*

Co., 37 Conn. 278, it was held that where a corporation has, with their consent, embodied the names of its principal stockholders in the corporate name, the right to use the name so adopted will continue during the existence of the corporation, and that the use of these names by a rival company subsequently formed and embracing such stockholders, in such a manner as to mislead customers into the belief that the two companies were the same, was in violation of the plaintiff's right and should be enjoined. See also *Royal* v. *Royal*, 122 Fed. Rep. 337; *Bissell* v. *Bissell*, 121 Fed. Rep. 355.

In the light of both principle and authority it thus appears that the defendant's aggressions upon the rights of the plaintiff prior to the change of its name to "Lunn and Lynn Shoe Co." constituted not only a violation of the general law covering unfair competition, but a specific and positive infringement of the plaintiff's exclusive right to the use of a technical trade-mark and trade-name. The law of trade-marks, it is true, is but a special feature of the general law of unfair competition in trade which rests upon the elementary principle that no person has the right to sell his goods for those of another. But as already indicated there are important distinctions to be observed between them. In the first place unfair competition, unlike the infringement of technical trade-marks, does not necessarily involve the violation of any exclusive rights in the plaintiff to the use of the names or symbols employed by the defendant. There may be unfair competiton resulting from an unauthorized and improper use of such names and symbols, although the plaintiff has no property right in them as a trade-mark. Any conduct designed and having a natural tendency to deceive the public and enable one man to dispose of his goods for those of another may be unfair competition and be enjoined, although it is not expressly shown that any particular person was thereby actually deceived. *McLean* v. *Fleming*, 96 U. S. 245; *Samuels* v. *Spitzer*, 177 Mass. 226.

Again it is frequently stated that in cases of technical trade-mark, the fraudulent intent to deceive is presumed, while in cases of unfair competition, the plaintiff must prove this intent or show facts and circumstances from which it may be reasonably inferred. But upon this question of intent there is a great diversity of opinion, or of

expression, in different courts, and it has been held in some cases that there is no practical distinction in this respect between cases of trade-mark infringement and unfair competition, since the reasons often given for not requiring proof of fraudulent intent in cases of technical trade-mark are equally applicable to cases of unfair competition. 28 Am. Eng. Enc. of Law, 419, and cases cited. The rule adopted in the U. S. Supreme Court is thus stated by Ch. Justice Fuller in *Elgin Natl. Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 674. "If a plaintiff has the absolute right to the use of a particular word or words as a trade-mark, then if an infringement is shown, the wrongful or fraudulent intent is presumed, and although allowed to be rebutted in exemption of damages, the further violation of the right of property will nevertheless be restrained. But where an alleged trade-mark is not in itself a good trade-mark, yet the use of the word has come to denote the particular manufacturer or vendor, relief against unfair competition or perfidious dealing will be awarded by requiring the use of the word by another to be confined to its primary sense by such limitations as will prevent misapprehension on the question of origin. In the latter class of cases such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of. *Lawrence Manufacturing Company* v. *Tennessee Manufacturing Co.*, 138 U. S. 537, 549; *Coats* v. *Merrick Thread Co.*, 149 U. S. 562; *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169."

It has accordingly been held that a court of equity will enjoin the infringement of a technical trade-mark which has been occasioned by accident or mistake without proof of actual fraud on the part of the defendant, but it will not enjoin the imitations of labels, bill heads and commercial names of a rival trader, unless it satisfactorily appears that such imitations are fraudulently designed and have a tendency to occasion damage. *McLean* v. *Fleming*, 96 U. S. 245.

In the case at bar after the plaintiff's bill was commenced, the defendant corporation changed its name to "Lunn and Lynn Shoe Co." but continued to use the old stationery and copies of the printed trade-mark, substituting "Lunn" for Auburn in red ink, the word Auburn being era-ed but not obliterated. It has been seen that the

presiding Judge found and held that the "conduct of the defendant company, in adopting the phrase "Auburn-Lynn Shoe Company" as its trade-mark, and in conducting a shoe business under that corporate name, manufacturing goods similar in style and character to those manufactured by the plaintiff, and so nearly so as not to be distinguishable by ordinary observers, advertising and selling those goods in the territory covered by Lunn and Reed, when they were acting for the plaintiff company, in the sale of Auburn-Lynn Shoes, constituted unfair competition. . . . . Those who had been in the habit of dealing in and purchasing the Auburn-Lynn Shoes might well understand that the product of the Auburn-Lynn Shoe Co. represented the plaintiff's manufacture. And even after the change of name to the Lunn and Lynn Shoe Co., the use of the old literature, so changed as only to indicate that the Lunn and Lynn Shoe Co. was the successor of the Auburn-Lynn Shoe Co. did not help the matter. If customers could be led to believe that the Auburn-Lynn Shoe Co. was the manufacturer of shoes which they had formerly bought as "Auburn-Lynn Shoes" they would not be undeceived by seeing literature in which "Auburn" was changed to "Lunn and" in such a way as to give the impression that the Lunn & Lynn Shoe Co. was a successor of the Auburn-Lynn Shoe Co.

It has been seen that in the light of the decisions the unauthorized simulation of the plaintiff's trade-mark and trade-name by the defendant corporation, constituted an infringement of the plaintiff's exclusive right to the use of a technical trade-mark, without other proof of a fraudulent intent on the part of the defendants; but the decision of the presiding Judge that such conduct on the part of the defendant corporation, prior to the change of its name to Lunn & Lynn Shoe Co., constituted unfair competition involved a finding that there was in fact a fraudulent intent on its part to convey to the trade an impression that its shoes were the Auburn-Lynn shoe product of the plaintiff. This finding was not required to authorize the injunction against the use of the plaintiff's trade-mark by the defendant corporation, but it was nevertheless relevant and material upon the question of damages; since the presumption of wrongful intent in cases of technical trade-mark may be rebutted upon the question of

liability for profits and damages. *Elgin Natl. Watch Co.* v. *Ill. Watch Co.*, 179 U. S. 674.

But the presiding Judge further found that even after the change of name to Lunn and Lynn Shoe Co., the use of the old advertising literature, with changes only indicating that the Lunn and Lynn Shoe Co. was the successor of the Auburn-Lynn Shoe Co., "did not help the matter," for the reason that customers would continue to receive the false impression that the shoes placed on the market by the Lunn & Lynn Shoe Co., were the Auburn-Lynn Shoes of the plaintiff. This was in effect a finding that the conduct of the Lunn & Lynn Co. in using the old literature, unaccompanied by any explicit statement that this company was not the manufacturer of Auburn-Lynn Shoes, still constituted unfair competition.

These findings and conclusions of the presiding Judge were justified by the facts reported. The entire history of the conduct of the shoe business by the defendant corporation after the retirement of W. R. Lynn from the plaintiff company, discloses a manifest intention and persistent effort on the part of the management to beguile the old customers of the plaintiff company into purchasing the defendant's shoes under the impression that they were the Auburn-Lynn product manufactured by the plaintiff and thereby to appropriate the value of the reputation which the latter had acquired. It shows a determination to continue such efforts until compelled by the courts to forbear. Its change of name to Lunn and Lynn Shoe Co. considered in the light of its subsequent conduct in the use of the old trade literature, indicated an ingenious attempt to disguise the true nature of its methods and conduct, rather than a genuine purpose to desist from the pursuit of its course of unfair competition. All of the provisions of the decree signed by the presiding Judge are therefore affirmed without modification except the sixth paragraph in regard to the extent of the accounting to which the plaintiff is entitled. This question is raised by the plaintiff's exceptions.

It has been seen that by the sixth paragraph of the decree the cause was referred to a master to take an account of all the profits of the business of the defendant corporation, "growing out of sales of shoes, upon which was impressed the trade-mark of the Auburn-Lynn

Shoe Co., or any simulated trade-mark using the name Auburn-Lynn" from the time of the organization of the defendant corporation to the date of the decree, with all damages sustained by the plaintiff during that period by the wrongful use of the plaintiff's trade-mark and trade-name, and by the unfair competition of the defendant corporation during that period.

The words in quotation marks were introduced by the presiding Judge in the decree filed by the plaintiff's attorney, and to this limitation upon his right to an accounting for the profits of the defendant's business, the plaintiff took exceptions.

The rule which now prevails in the equity courts respecting the wrongdoer's accountability for the "profits and damages" resulting from his unlawful acts, requires the master not only to take an account of all profits made by the defendant, but also to make an inquiry in regard to all damages sustained by the plaintiff on account of the defendant's wrongful acts, and since it cannot be ascertained with any reasonable certainty how much of the profit is due to the trade-mark and how much to the intrinsic value of the commodity, the whole will be awarded to the plaintiff. It is equally well settled that the profits recoverable in equity for unfair competition are governed by the same rule as in cases of infringement of trade-marks, and are not limited to such as accrue from sales in which it is shown that the customer is actually deceived, but include all made on the goods sold in the simulated dress or package, and in violation of the rights of the original proprietor. *Fairbank Co.* v. *Windsor*, 118 Fed. Rep. 96; *Benkert* v. *Feder*, 39 Fed. Rep. 534; *Williams* v. *Mitchell*, 106 Fed. Rep. 168; *Sawyer* v. *Kellogg*, 9 Fed. Rep. 601; *Saxlehner* v. *Eisner & Mendelson Co.*, 179 U. S. 19; *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169; *Graham* v. *Plate*, 40 Cal. 593; *Avery* v. *Meikle*, 85 Ky. 435; *McLean* v. *Fleming*, 96 U. S. p. 437.

In *Singer Mfg. Co.* v. *June Mfg. Co.*, supra, it was held that on the expiration of the plaintiff's patent, the right to make the patented article and to use the generic name "Singer" passed to the public, but that the defendant was guilty of unfair competition in failing to indicate that the machines made by him were not the product of the Singer Manufacturing Company, and the defendant corporation was

accordingly directed to "account" for any profits which may have been realized by it, because of the wrongful acts committed by it while engaged in such unfair competition, although there had been no infringement of a technical trade-mark.

In the case at bar it appears that between August 4, 1903, and the time of the hearing of the bill in March, 1904, thirty-two letters intended for the plaintiff but addressed to the Auburn-Lynn Shoe Co., came into the hands of the defendant corporation. They contained orders, checks, and general correspondence, some in the defendant's printed addressed envelopes and some in writing. They were mostly from old customers, and from these letters, the defendant company obtained information concerning the plaintiff's business. It expressly appears that after the defendant's change of name, one order was taken by the defendant's salesman on the order blanks of the Auburn-Lynn Shoe Co.

It is accordingly the opinion of the court that the plaintiff is entitled to an accounting not only for the profits realized by the defendant company, from sales of shoes upon which was impressed the trade-mark of the Auburn-Lynn Shoe Company, or any simulated trade-mark using the name "Auburn-Lynn," but also for the profits resulting from the wrongful acts committed by the defendant company in its unfair competition with the plaintiff between the time of its change of name to Lunn and Lynn Shoe Co., and the date of the decree.

Defendant's appeal dismissed. Plaintiff's exceptions sustained. Cause remanded for a modification of the decree in accordance with this opinion.

WILLIS J. KNOWLTON

vs.

PATRONS ANDROSCOGGIN FIRE INSURANCE COMPANY.

Waldo. Opinion November 16, 1905.

Fire Insurance. Standard Policy. Dwelling House. Non-Occupancy. Increase of Risk. Waiver. Contract. Stat. 1895, c. 18, § 3. R. S. 1883, c. 49, § § 20, 25. R. S. 1903, c. 49, § § 4, 26, 27, 31.

The legislative enactment of 1895, chapter 18, prescribed a form for a standard policy of insurance, prohibited insurance companies doing business in this state from issuing policies of fire insurance in any other form, and by section three of the act expressly repealed all provisions of law inconsistent with the terms of the policy thus enacted. This standard policy, by its terms, is declared void if the premises become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days, without the assent of the company, in writing, or in print, irrespective of the question whether such vacancy materially increases the risk or not. This provision is clearly inconsistent with the statute of 1883, declaring that a change in the occupation of the property should not affect the policy unless it materially increased the risk. *Held:* that the earlier enactment of 1883 was expressly repealed by the terms of section three of chapter 18 of the laws of 1895.

The question of material increase of the risk from vacancy or non-occupancy is not open under the provisions of the standard policy itself as prescribed by chapter 18 of the laws of 1895.

Furthermore in the case at bar these provisions of the standard policy relating to the vacancy of the premises, are modified by the separate slip or rider attached to the policy according to the general authority therefor given by section four of chapter 49, R. S. By this modified contract the parties definitely stipulated that the policy should be rendered void for vacancy or non-occupancy continued for more than ten days. This is the contract which the parties themselves made and the court is not authorized to substitute for it another and a different contract which the parties did not make.

In the case at bar the property insured, a set of connected farm buildings situated about one mile from Liberty Village where the plaintiff resided, was destroyed by fire April 19, 1903. The house was not occupied by the

plaintiff himself, but had been occupied by his tenant Albert Turner and his family. A stock of cattle and also some hay and farming tools, the property of the plaintiff, were kept in the barn and cared for by Turner. On the 28th day of March preceding the fire, Turner hired a tenement in Liberty Village and removed from the house in question sufficient furniture and goods to furnish it. On the fourth day of April following, his wife and family moved into this tenement in Liberty Village, but he continued to pay rent for the plaintiff's house up to the time of the fire. He continued to work upon the farm pleasant days, leaving his family in the village in the morning, taking his dinner with him to the farm, and returning to his family in the village at night. Rainy days and Sundays, he was not at the farm. On these days the stock was cared for by a neighbor, one Weed. Turner was not at the farm on the day of the fire, Weed caring for the stock on that day. He intended to return to the Knowlton place with his family in about two months.

Held: that upon these facts the plaintiff's buildings insured by the policy in suit, must be deemed to have become "personally unoccupied" without the consent of the company, for more than ten days immediately preceding their destruction by fire.

Subsequent to the date of the fire, the defendant company sent to the plaintiff an "assessment card" for the 28th assessment made by the company dated July 30, 1903, informing the plaintiff that the assessment on his premium note was one dollar, and requesting payment on the same. This general assessment covered eight losses that occurred prior to the fire, and ten that occurred after the fire. The plaintiff paid this sum of one dollar, assessed on his premium note, some time in August, 1903. The plaintiff contended that the acceptance by the defendant company of the plaintiff's proportional part of this assessment operated as a waiver of the forfeiture resulting from such non-occupancy.

In two previous decisions of this court questions of waiver were raised precisely analogous to that in the case at bar and were decided adversely to the plaintiff's contention. In each of these cases the provisions of the charter of the company relating to membership, the obligation of every member to pay his proportion of all losses happening during his connection with the company, and the existence of the lien on the buildings for the security of the deposit note were in effect precisely identical with the statutory provisions in force at the date of the plaintiff's policy in this suit. These authorities must be deemed decisive of the case at bar.

On the question of waiver, *Held:* that the forfeiture resulting from the non-occupancy of the plaintiff's buildings, was not waived by the company in accepting payment of an assessment upon the plaintiff's premium note under the circumstances stated.

On report. Judgment for defendant.

Assumpsit upon a policy of fire insurance in the standard form, issued by the defendant company upon the buildings of the plaintiff,

situated in Montville. Plea, the general issue with the following brief statement:

"That the buildings insured by the policy declared upon in the plaintiff's writ had become vacant by the removal of the occupant, and had so remained vacant for more than ten days prior to their destruction by fire, without the consent in writing of the company certified on the back of the policy by the president and secretary or by two of the directors, whereby said policy became void.

"That the buildings insured by the policy declared upon in the plaintiff's writ had become personally unoccupied, and had so remained personally unoccupied for more than ten days prior to their destruction by fire, without the consent in writing of the company certified on the back of the policy by the president and secretary or by two of the directors, whereby said policy became void."

Tried at the April term, 1905, of the Supreme Judicial Court, Waldo County. After the evidence in behalf of the plaintiff had been fully taken out, the defendant notified the court that it did not propose to offer any evidence, and did not question the facts as proved by the plaintiff. Thereupon it was agreed that the case be reported to the Law Court "for the Law Court to pass upon and decide all questions of law involved and all questions of fact, if any, and inferences from facts, if any, involved in the case, and to order such judgment as the law and facts may require."

The facts, so far as material, appear in the opinion.

Arthur Ritchie, for plaintiff.

John A. Morrill, for defendant.

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

WHITEHOUSE, J. This is an action upon a policy of fire insurance in the standard form, dated March 26, 1902, issued by the defendant company upon the buildings of the plaintiff, situated in Montville, as follows: on dwelling house and L $200; on barn, $125; on wood-shed, $25; on hen-shed, $25; on silo, $25, $400.

All the buildings except the silo which had not then been constructed but the lumber for which was then on the premises, were totally destroyed by fire on the night of Sunday, the nineteenth of April, 1903, between ten and eleven o'clock.

Attached to the policy was a "rider" or additional paper containing the following stipulation: "It is also a part of the consideration of this policy, and it is especially agreed that this policy shall be void and the whole amount of premium paid forfeited to the company if the buildings hereby insured shall become vacant by the removal of the owner or occupant or shall become personally unoccupied for more than ten days without the consent in writing of the company certified on the back of the policy by the President and Secretary or by two of the Directors."

Section 20 of chapter 49 of the Revised Statutes of 1883, reads as follows: "A change in the property insured or in its use or occupation, or a breach of any of the terms of the policy by the insured, do not affect the policy unless they materially increase the risk."

But the legislative enactment of 1895, chap. 18, prescribed a form for a standard policy of insurance, prohibited insurance companies doing business in this state from issuing policies of fire insurance in any other form and by section 3 of the act expressly repealed all provisions of law inconsistent with the terms of the policy thus enacted. This standard policy, by its terms, is declared void if the premises become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days, without the assent in writing or in print of the company, irrespective of the question whether such vacancy materially increases the risk or not. This provision is clearly inconsistent with the statute of 1883 above quoted, declaring that a change in the occupation of the property should not affect the policy unless it materially increased the risk. It is accordingly claimed in behalf of the defendant company that the earlier enactment of 1883 was expressly repealed by the terms of section three of chapter 18 of the laws of 1895.

In accordance with this view the clause above quoted from section 20 of chapter 49 of the revised statutes of 1883, was omitted from the revision of 1903.

But it is contended in behalf of the plaintiff that the question of material increase of the risk from vacancy or non-occupancy, is still open under the provisions of the standard policy itself as prescribed by chapter 18 of the laws of 1895. It is there provided that the policy shall be void if without the assent in writing or in print of the company "the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency or consent of the insured, be so altered as to cause an increase of such risks." It will be seen however that this provision relied on by the plaintiff is one of eleven independent clauses in the policy by each of which the policy is declared to be void upon the conditions therein specified, and it is immediately followed by these two clauses, viz: "or if without such assent, the said property shall be sold, or this policy assigned, or if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without such assent."

It was impossible for the legislature to anticipate and specify the infinite variety of changes in the situation and circumstances that might cause an increase of the risk. It therefore inserted the comprehensive provision relied upon by the plaintiff. In the light of experience, however, it was practicable to specify ten conditions or changes in the situation of the property, each of which would render the policy void without opening to actual inquiry the question of the increase of the risk. The language of the standard policy is not to be construed to mean that an issue of fact is to be raised upon the question of increase of risk under each of the independent clauses in question. It would not be reasonable to suppose that the legislature contemplated a judicial inquiry under the clause relating to the keeping of gun-powder, or naptha, or under the clause respecting other insurance on the property, or the clause in regard to the sale of the property and the assignment of the policy without the assent of the company as there specified. With no greater or better reason can it be claimed that the question of increase of risk is open under the clause rendering the policy void for vacancy or non-occupancy. It is an independent and absolute stipulation that the policy shall be void if the premises become vacant, and remain so for more than

thirty days as there specified. It is not qualified by any other clause in the policy.

Furthermore in the case at bar these provisions of the standard policy relating to the vacancy of the premises, are modified by the separate slip or rider attached to the policy according to the general authority therefor, given by section 4 of chapter 49, R. S. By this modified contract the parties definitely stipulated that the policy should be rendered void for vacancy or non-occupancy continued for more than ten days. This is the contract which the parties themselves made and the court is not authorized to substitute for it another and a different contract which the parties did not make.

The case comes to this court upon a report of the uncontroverted evidence of the plaintiff and the question arises in the first place whether upon the facts thus disclosed, the buildings did become vacant by the removal of the owner or occupant or did become personally unoccupied and so remain vacant or personally unoccupied for more than ten days without the consent in writing of the company. It has been suggested that the two words vacant and unoccupied are synonymous, and there are doubtless conditions of a dwelling house when either word applied to it or both words applied to it, will express a like condition of it. But as stated by the court in *Herman* v. *Adriatic Fire Insurance Co.*, 85 N. Y. 162: "A dwelling-house is chiefly designed for the abode of mankind. For the comfort of the dwellers in it, many kinds of chattel property are gathered in it. So that, in the use of it, it is a place of deposit of things inanimate and a place of resort and tarrying of beings animate. With those animate far away from it, but with those inanimate still in it, it would not be vacant, for it would not be empty and void. And as a possible case with all inanimate things taken out, but with those animate still remaining in it, it would not be unoccupied, for it would still be used for shelter and repose. And it is because, in our experience of the purpose and use of a dwelling house, we have come to associate our notion of the occupation of it with the habitual presence and continued abode of human beings within it, that that word applied to a dwelling always raises that conception in the mind. Sometimes, indeed, the use of the word "vacant" as applied to a

dwelling, carries the notion that there is no dweller therein; and we should not be sure always to get or convey the idea of an empty house, by the words "vacant dwelling" applied to it. But when the phrase "vacant or unoccupied" is applied to a dwelling-house, plainly there is a purpose—an attempt to give a different statement of the condition thereof; by the first word, as an empty house, by the second word, as one in which there is not habitually the presence of human beings." See also *Sonneborne* v. *Ins. Company*, 44 N. J. L. 220.

In the case at bar the property insured was a set of connected farm buildings situated in a farming community in the town of Montville, about one mile from Liberty village where the plaintiff resided. The nearest house was from 500 to 700 feet distant. The house was not occupied by the plaintiff himself, but had been occupied by his tenant Albert Turner and his family, consisting of a wife and three children. A stock of cattle and also some hay and farming tools the property of the plaintiff were kept in the barn and cared for by Turner. On the 28th day of March preceding the fire, Turner hired a tenement in Liberty village and removed from the house in question sufficient furniture and goods to furnish it. On the fourth day of April following, his wife and family moved into this tenement in Liberty village, but he continued to pay rent for the plaintiff's house up to the time of the fire. He continued to work upon the farm pleasant days, leaving his family in the village in the morning, taking his dinner with him to the farm, eating it in the house there and lying on the couch while the horses were feeding. At night he returned to his family in the village. Rainy days and Sundays, he was not at the farm. On these days the stock was cared for by a neighbor, one Weed. Turner was not at the farm on the day of the fire, Weed caring for the stock on that day. The removal to Liberty village was occasioned by the approaching confinement of his wife, and he intended to return to the Knowlton place after his wife became able to do so. Her confinement occurred on the twenty-second day of May, following the fire. A few articles in the house belonged to Turner's mother, and he had made arrangements

for their removal, because, as he says, he was afraid some might be stolen.

Upon these facts, it is contended in behalf of the defendant company that the premises had become vacant or personally unoccupied by the removal of Turner, and remained so for more than ten days prior to their destruction by fire, without the consent of the company in writing and that the policy by the terms on the rider attached to it, had therefore become void.

In *Corrigan* v. *Conn. Fire Ins. Co.*, 122 Mass. 298, a policy of insurance upon a house provided that the policy "shall be void if the house shall remain vacant or unoccupied for the space of ten days, without written notice to and the consent of the company"; and it was held that if the house had not been used as a dwelling place by some one within ten days of the loss, the policy would be void; and that if the former occupant had moved with his family into another house where they slept and took their meals, the fact that some of his furniture remained in the house and the key had not been surrendered to the landlord until within the ten days, would not constitute an occupancy of the premises. The fact that the plaintiff left a dwelling house furnished and in charge of his farmer who kept the farm house near by, and whose wife visited and aired the dwelling every few days, will not satisfy the condition of occupancy. For a dwelling house to be occupied, it must be used by human beings as their customary place of abode. *Herman* v. *Ins. Company*, 85 New York, 162.

In *Hanscom* v. *Insurance Company*, 90 Maine, 338, the court say: "The fact that the furniture remained in the house and that the plaintiff's hired man made a frequent inspection of the household goods and had a general oversight of the buildings during the day, is not a full equivalent for the constant supervision involved in the occupancy of the premises as a customary place of abode, and the actual presence in the building of those who are living in it and using it as a dwelling house day and night." *Ashworth* v. *Builders Ins. Co.*, 112 Mass. 422; *Herman* v. *Adriatic Ins. Co.*, 85 N. Y. 162; *Bonenfant* v. *Ins. Co.*, 76 Mich. 654; May on Ins. 249, A; Wood on Insurance, page 180. A purpose to move into a house, though

partly executed by filling it with furniture, will not aid the insured unless the purpose is rendered complete by actual occupancy. If the premises become unoccupied and remained so up to and at the time of the fire, the condition is broken. 1 May on Insurance, 502. The mere presence of goods in the house and a supervision over it, is not "occupancy"; that requires "living" in it. *Moore* v. *Phoenix Ins. Company*, 64 N. H. 140. *Sonneborn* v. *Ins. Company*, 44 N. J. L. 220. A house in which no one lives but in which a former occupant had left some trifling articles of furniture, not of such character as to be valuable for use elsewhere is "vacant and unoccupied" within the meaning of those terms as used in a fire insurance policy. *Moore* v. *Phoenix Ins. Company*, 64 N. H. 140.

In *Sleeper* v. *Insurance Company*, 56 N. H. 401, the policy provided: "If the premises hereby insured become vacant by the removal of the owner or occupant without immediate notice to the company and consent endorsed hereon . . . . . this policy shall be void." The tenant paid for rent up to May, 1872; he left in April, 1871, and went to Laconia, his family having left a short time previous. The wearing apparel of himself and family had all been taken away and a portion of what little furniture they possessed. He intended to return the next spring, or earlier, if business should be dull in Laconia. No person lived in the buildings after he left. The buildings were totally destroyed by fire October 30, 1871, up to which time he had not decided to return at any definite period; neither plaintiffs nor defendants had any notice that the tenant had vacated the premises until after the fire. *Held*, that the premises were vacant. The court says: "I think when the occupant of a dwelling house moves out with his family, taking a part of his furniture and all the wearing apparel of the family, and makes his place of abode in another town, although he may have an intention of returning in eight or ten months, such dwelling house while thus deserted must be regarded as unoccupied,—that is, vacated according to the natural and ordinarily received import of those terms." Where the occupant moved out leaving only a bed-stead and strip of carpet, and one of his sons slept in the house for a month after, but afterwards the house was entirely abandoned for six or seven weeks before

the fire, the court held the premises unoccupied and the policy void, not only as to the house, but also as to all farm buildings insured, since the condition as to vacancy of the premises belonged to all the subjects of the contract and is a potent influence on the assumption of the entire risk. *Hartshorne* v. *Ins. Company*, 50 N. J. L. 427-9. See also *Sonneborn* v. *Insurance Co.*, 44 N. J. L. 220.

The plaintiff's buildings insured by the policy in suit, must therefore be deemed to have become "personally unoccupied" without the consent of the company, for more than ten days immediately preceding their destruction by fire.

It is finally contended in behalf of the plaintiff, however, that the acceptance by the company, of the plaintiff's proportional part of the assessment of July 30, 1903, operated as a waiver of the forfeiture resulting from such non-occupancy.

It is not in controversy that a representative of the company had an interview with the plaintiff four or five days after the fire, and was then fully informed of the situation and circumstances connected with the loss of the buildings. Subsequently on the 20th day of July, 1903, the secretary of the company addressed to the plaintiff the following letter, which was recived in due course of mail, viz :

"Dear Sir:—

The Directors of this Co. to a man would be glad to include your loss with our assessment, but our Attorney, after being made acquainted with the facts as stated by you, says to do so would invalidate our whole assessment which of course we cannot do. He cited us to "May on Insurance," page 502, which seems to fit your case, and when in some Attorney's office, I wish you would have them refer to it so you can see for yourself.

I am very sorry to have to write this letter for I had hoped we might pay you."

It appears from the plaintiff's testimony that he understood this to be a letter "denying the risk."

Subsequently the treasurer of the company sent to the plaintiff an "assessment card" for the 28th assessment made by the company dated July 30, 1903, informing him that the assessment on his premium note was one dollar, and requesting payment of the same.

This general assessment of the company covered eight losses that occurred prior to April 19, 1903, and ten that occurred after that time. The plaintiff paid this sum of one dollar, assessed on his premium note some time in August, 1903.

The following provisions are found in chapter 49 of the revised statutes of 1883, relating to Mutual Fire Insurance Companies, viz: Section 25. "Every person insured by such company, or its legal representatives or assigns continuing to be insured therein, is a member of the company during the term specified in his policy and no longer."

Section 26. (As amended by chapter 95 of the laws of 1895); "The insured before receiving his policy, shall deposit his note for the sum determined by the directors, which shall not be less than five per cent of the amount insured, and such part of it as the by-laws require, shall be immediately paid and endorsed thereon; and the remainder in such installments as the directors from time to time require for the payment of losses and other expenses, to be assessed on all who are members when such losses or expenses happen, in proportion to the amounts of their notes." . . . . .

Section 28. The company shall have a lien against the assured on the buildings insured and the land appurtenant thereto, for the amount at any time due on said note, to commence from the time of the recording of the same, as hereinafter provided, and to continue sixty days after the expiration of the policy on which the note was given." . . . . .

These statutory provisions were in force at the date of the policy in suit, and are retained in chapter 49 of the Revised Statutes of 1903, in sections 26, 27 and 31, respectively.

In *Philbrook* v. *N. E. Mutual Fire Ins. Co.*, 37 Maine, 137, a question of waiver was raised precisely analogous to that in the case at bar and was decided adversely to the plaintiff's contention. In that case there was a forfeiture of the policy resulting from the act of the plaintiff in obtaining other insurance without the consent of the company, in violation of the provisions of the charter, and the plaintiff contended that the collection of an assessment on the plaintiff's premium note, ordered by the company within the life of the

policy but after the fire, operated as a waiver of the forfeiture. All of the losses covered by the assessment in that case occurred after the forfeiture, and a part of them after the fire and after the denial of liability. The provisions of the charter of that company relating to membership, the obligation of every member to pay his proportion of all losses happening during his connection with the company, and the existence of the lien on the buildings for the security of the deposit note were in effect precisely identical with the statutory provisions above quoted in force at the date of the plaintiff's policy in suit. In the opinion the court say: "No provisions in the Act of incorporation exonerate a member from his obligations; or put an end to his connection with the company by a rejection of his claim for a loss, which may occur; neither does it provide, that when a policy is made void, by the holder's voluntary act, he is excused from the payment of assessments made afterwards. If it were so, it would be in the power of the party assured, to relieve himself of his obligations at pleasure, if he should choose to give up the benefit of his insurance by conduct of his own. The most satisfactory reasons may exist for a rejection of a claim by the directors. Par. 1, of the Act, refers to such; and is it to be supposed, that by the refusal to pay for a loss, not covered by the policy, the premium note of the person, who sustained the loss, is thereby cancelled?"

A waiver, in such a case, is quite unlike a waiver of strict compliance with the charter and by-laws in certain preliminary steps, in order to make a valid policy available. Here the foundation of the claim is an insurance followed by a loss, and the defense is upon the ground that the insurance ceased utterly before the loss, and consequently, if it be so, the claim is baseless. *Heath et al.* v. *Franklin Insurance Company*, 1 Cush. 257. The evidence in this case fails to satisfy us that the directors designed to exercise the power, not possessed by them, and gave their consent to a second insurance; or that they did anything which gave validity to a policy which had become void by the plaintiff's acts and omissions."

This decision was affirmed in *Gardiner* v. *Piscataquis Mutual Fire Ins. Co.*, 38 Maine, 439. In that case a forfeiture had resulted from the plaintiff's failure to give notice of a material increase in the risk

happening after the receipt of his policy, and it was contended that by making and collecting an assessment upon the plaintiff after the fire, covering losses which occurred after the forfeiture, the defendant company was "estopped from treating the policy as void." But the court said: "The making of such assessments by the defendants, for subsequent losses, would not revive the policy, nor was it inconsistent with the legal right of the company to treat it as void. *Neely* v. *Onondaga M. Ins. Co.*, 7 Hill. 49; *Smith* v. *M. F. Ins. Co.*, 3 Hill. 508; *Philbrook* v. *N. E. M. F. Ins. Co.*, 37 Maine, 137."

In *Neely* v. *Onondaga Mutual Ins. Co.*, supra, the court say: "Although the plaintiff's policy became void by the alienation of the property insured, it does not follow that his deposit note was also void. On the contrary, until he surrendered his policy, and paid his proportion of all losses which accrued "prior to such surrender", the deposited note remained obligatory upon him. He does not pretend that he surrendered his policy previous to the assessment mentioned in the replication; and he was therefore liable to pay his proportion of the losses for which that assessment was made. The replication shows that the defendants have enforced this liability; but their acts, instead of evincing an intention to affirm the existence of the policy, are perfectly consistent with their right to treat it as void."

These authorities must be deemed decisive of the case at bar. The cases cited by the defendant are clearly distinguishable from it.

It is accordingly the opinion of the court that the forfeiture resulting from the non-occupancy of the plaintiff's buildings, was not waived by the company in accepting payment of an assessment upon the plaintiff's premium note under the circumstances stated, and that the entry must be,

Judgment for the defendant.

In Equity.

PISCATAQUIS SAVINGS BANK.

vs.

ELIZABETH L. HERRICK et als.

Piscataquis. Opinion November 20, 1905.

Reference in Equity. Powers of Referee. Report of Referee. When Objections Thereto Should be Made.

A referee has full power to decide all questions arising, both of law and of fact. And in the absence of fraud, prejudice or mistake on his part, objections for which should be made when the report is offered for acceptance, his decision is final.

Where a bill in equity was referred by a rule of court, without conditions or limitations, and the referee, having heard the parties, reported the facts found by him, and his conclusions thereon, to the court, and his report was accepted, an appeal from a final decree, made in accordance with the terms of the report, cannot be sustained.

In Equity. On appeal by defendants. Appeal dismissed. Decree below affirmed.

The case is sufficiently stated in the opinion.

Frank E. Guernsey, for plaintiff.

Joseph B. Peaks, for defendant.

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

SAVAGE, J. The plaintiff claimed to be the equitable owner of certain notes and a mortgage securing them, which it took as collateral security for loans made by it to the owner of the notes and mortgage, and brought this bill in equity to obtain an equitable foreclosure of the right to redeem the same. The bill and answer disclose that the parties were at issue upon questions of fact and also upon questions of law. After the pleadings were completed, the cause was

referred, by agreement of parties, by a rule of court, which contained the stipulation that judgment on the report of the referee should be final. The rule contained no other stipulation material to the present consideration of the case. The referee heard the parties and reported the facts found by him and his conclusions thereon to the court. His report was accepted. Subsequently a justice of the court made a final decree in accordance with the terms of the report, and from that decree one of the defendants seasonably appealed. The cause is now before us upon that appeal.

Of the many questions argued, we need to consider but one. The cause was referred without any conditions or limitations as to the powers of the referee. And in such case, it is well settled that the referee has full power to decide all questions arising, both of law and of fact, and in the absence of fraud, prejudice or mistake on the part of the referee, objections for which should be made when the report is offered for acceptance, his decision is final. *Sweetsir* v. *Kenney*, 32 Maine, 464; *Hall* v. *Decker*, 51 Maine, 31; *Long* v. *Rhodes*, 36 Maine, 108; *Hatch* v. *Hatch*, 57 Maine, 283. By agreement the parties submitted the cause to a tribunal of their own choosing. To that tribunal was transferred all the powers of the court. Having chosen to go to that tribunal, the parties cannot now be heard upon the merits by the court. As was said in *Sweetsir* v. *Kenney*, supra,— "Whatever we might think of the law . . . . it is not in our power to control the decision of that tribunal, to which the parties submitted both the law and the facts."

The result is that the appeal from a decree made in accordance with the report of the referee is not sustainable.

Appeal dismissed. Decree below affirmed with additional costs.

CHESTER W. ROBBINS, Petitioner for Mandamus,

vs.

BANGOR RAILWAY AND ELECTRIC COMPANY.

Penobscot. Opinion November 20, 1905.

Mandamus. When Same Lies by an Individual. Public Service Corporations. Water Company. Reasonable Regulations. Water Rates. Meters and Meter Rates. Adoption of Contract. Dwelling House.

The promoters of a water company contracted with the town for water for municipal purposes. The contract provided that the promoters should organize a corporation to which the contract should be assigned. It was also provided in the contract, among other things, that "the rates for water used in dwelling houses shall not exceed the following: For each dwelling house containing a family of not more than four persons, with one faucet for use within the tenement, five dollars per annum; for each additional person in the family, fifty cents per annum; for the first wash hand basin set, two dollars per annum; for each additional hand basin, one dollar per annum; for one bathing tub, three dollars per annum; for one additional bathing tub, one dollar per annum; for one water closet, three dollars per annum; for each additional water closet, one dollar per annum; for a dwelling house occupied by two or more families, each family to pay three-quarters of the above rate per annum." The corporation thus provided for was organized, accepted the assignment, and assumed and agreed to perform all the duties and obligations which the promoters had agreed to perform, according to the terms of the contract. The corporation built a system of water works and entered upon the business of supplying water to the town, under its contract, and to the inhabitants for power and for domestic purposes. It charged annual, or flat rates, payable semi-annually in advance, for the supply of water to dwelling houses, according to the terms of the promoter's contract, and to hotels, boarding houses and other buildings, at other varying amounts. All the franchises and other property of the water company have now come to the defendant. Before this petition was brought, the corporation owning the plant revised its schedule of rates, and thereafter charged customers meter rates, monthly, for all water services, except to "dwelling houses containing families," the rates for which were left unchanged. The corporation then classified the petitioner's house as a boarding house, and for that reason, and also because of an alleged waste of water, put in a meter, and thereafter charged the petitioner with meter rates. The petitioner,

claiming the building to be a "dwelling house containing a family," declined to pay at meter rates, but tendered the full amount due according to the flat rates for dwelling houses. Thereupon the company shut off the water.

Upon a petition for mandamus, praying for restoration of the service, it is *held*:

1. While a town is not an agent of the individual citizens, and authorized to make contracts binding upon them personally, yet when a person or corporation, as a consideration, or even as a mere inducement for the making of a hydrant contracts with a town for fire purposes, engages to supply water to the inhabitants, at rates not exceeding certain specified sums, and so obtains the contract and its benefits, the contractor is under obligations to fulfil the agreement as to services and rates to individual water takers.

2. If a corporation expressly or impliedly adopts a contract made by its promoters, and thereby obtains its benefits, it must take it with its obligations and burdens. It must do what the promoters agreed to do, and so must all its successors, taking its property rights and franchises by conveyance.

3. Mandamus lies by an individual to compel a water company which is a public service corporation, to supply water to him.

4. A public service corporation, like a water company, may adopt reasonable rules and regulations for the conduct of its business, to which individual water takers must conform. It may require payment for a reasonable time in advance; and it may cut off water from a customer who refuses or neglects to pay reasonable rates.

5. A public service corporation, like a water company, may revise or change its schedule of rates, if no contract prevents, provided that the new rates are reasonable and do not discriminate. Within these limitations a water company may change from an annual or flat rate to a meter rate.

6. In case of unnecessary waste, a water company may apply a meter and charge reasonable meter rates.

7. A house occupied as a place for carrying on the business of keeping boarders, although while prosecuting the business, and as a means of prosecuting the business, the occupant, and his wife and children live in the house also, is not a "dwelling house containing a family", within the meaning of a water contract fixing a rate for dwelling houses containing families, but is a boarding house.

8. Under this definition the court finds that the plaintiff's house was not "a dwelling house containing a family" within the meaning of the contract, and his petition based upon that contention must be dismissed.

9. The petition in this case is not framed to raise the question nor are there sufficient data shown to enable the court to determine, whether the meter rates charged to the petitioner for the house as a boarding house are

excessive or not. Nor does the court say that the rates which the defendant demands are or are not unjust, by reason of unlawful discrimination, in the classification made by it, and in the charges made to the several classes; nor that the defendant has or has not the right to demand as much of the petitioner as it does for the unpaid water service.

On report. Petition dismissed.

Petition for a writ of mandamus to require the defendant company to furnish water to the petitioner at a house owned by him in Old Town, and occupied by a tenant. Heard upon the petition and answer, as upon an alternative writ and return, and at the conclusion of the evidence the case was reported to the Law Court for "determination as to whether a peremptory writ of mandamus shall issue or the petition be dismissed."

All the material facts are stated in the opinion.

Clarence Scott, for petitioner.

E. C. Ryder, for defendant.

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

SAVAGE, J. Petition for a writ of mandamus to require the defendant company to furnish water to the petitioner at a house owned by him, and occupied by a tenant, in Old Town. The case was heard upon the petition and answer, as upon an alternative writ and return, and at the conclusion of the evidence the case was reported to this court for its "determination as to whether a peremptory writ of mandamus shall issue, or the petition be dismissed." Some technical questions of procedure and pleading have been argued, but as the case comes up on report, it is unnecessary to consider them. *Pillsbury* v. *Brown*, 82 Maine, 450; *Elm City Club* v. *Howes*, 92 Maine, 211; *Rush* v. *Buckley*, 100 Maine, 322.

The essential facts are these. On October 16, 1889, Laughton and Clergue were promoters of a water company to be incorporated in Old Town. In fact the organization had been partly perfected at that time, but the approval of the certificate of incorporation by the Attorney General was not given until October 24, 1889. October 12, the inhabitants of Old Town in town meeting assembled appointed a committee to make a contract with "Laughton & Clergue, or such

corporation as Laughton & Clergue may organize, or with any other party or parties, to furnish and supply the town of Old Town with water for proper municipal purposes." October 16, the committee, acting for the town, entered into a contract with Laughton & Clergue which provided that Laughton & Clergue should organize a corporation, which should accept an assignment of the contract and undertake to carry it out. In the contract the promoters also agreed, among other things, to put in 60 hydrants for the use of the town for fire purposes for a rental named and to be paid by the town. They also agreed to furnish water for a display fountain and for certain other public purposes. The fifth paragraph of the contract reads as follows:

"Said First Party (the promoters) agrees that the rates for water used in dwelling houses shall not exceed the following:—For each dwelling house containing a family of not more than four persons with one faucet for use within the tenement, five dollars per annum. For each additional person in the family fifty cents per annum. For the first wash hand basin set two dollars per annum. For each additional hand basin one dollar per annum. For one bathing tub three dollars per annum. For each additional bathing tub one dollar per annum. For one water closet three dollars per annum. For each additional closet one dollar per annum. For a dwelling house occupied by two or more families, each family to pay three-fourths of the above rate per annum." Thereupon Laughton & Clergue completed the organization of the corporation known as the Penobscot Water & Power Company, to which they assigned the contract. The corporation accepted the assignment and assumed and agreed to perform "all the duties and obligations by said Laughton & Clergue to be performed according to the terms of said contract." Among the corporate purposes of the Penobscot Water & Power Co. was "the construction of water works and laying of pipes in any place or places, and buying, selling or leasing of water." The corporation built a system of water works in Old Town, and entered upon the business of supplying water to the town under its contract, and to the inhabitants for power and for domestic purposes. Annual or flat rates were fixed by the corporation payable semi-annually in advance, for

the supply of water to dwelling houses according to the terms of the Laughton & Clergue contract, and to hotels, boarding houses, and other buildings and places at other and varying amounts.

June 1, 1891, the Penobscot Water & Power Co. conveyed all its franchises and other property to the Public Works Company, by which they were conveyed, April 7, 1905, to the defendant corporation. The business of supplying water to the town or city of Old Town has been carried on continuously by these corporations in succession to the present time. And the water system referred to has been the only source of public water supply for the city or its inhabitants during all this time.

About the beginning of the year 1903 the Public Works Company, then owning the plant, revised and changed its schedule of rates, and thereafter charged customers according to the new schedule. For water supplied to dwelling houses containing families the rates were left unchanged, being the same annual amounts provided for in the Laughton & Clergue contract. All other services were metered, and were charged for monthly according to the amount of water supplied. The charge for water used for power was 11 cents for the first 10,000 cubic feet, 8 cents for the second 10,000 feet and 6 cents per 10,000 feet for all water in excess of 20,000 feet in each month. For all other metered service, including hotels and boarding houses, the charge was 25 cents per one hundred feet for the first 2,000 feet, 20 cents per one hundred feet for the second 2,000 feet and 15 cents per one hundred feet for all water in excess of 4,000 feet in each month.

The petitioner, an inhabitant of Old Town, owned a house on Main street, which was piped for water and connected with the water company's mains. The house was occupied from time to time by tenants, who kept boarders. From the outset down to 1904 this house was classed as a dwelling house, and the company charged and the petitioner paid the annual flat rates for dwelling houses, which were named in the Laughton & Clergue contract. In the later years the tenant's own family consisted of five persons. The number of boarders varied, but was estimated by the company. The company charged and the petitioner paid for 15 persons in the family, boarders and all,

$5 semi-annually. In 1902 or 1903 a water closet was put into the house for which the petitioner paid at the rate of $5 per annum. Prior to January, 1904, the company complained to the owner of waste of water, through defects in piping or plumbing. It also claimed that the house should properly be classed as a boarding house and pay according to the meter rates established for boarding houses. About the beginning of 1904 the company notified the petitioner of its intention to put in a meter. A meter was put in April 6, 1904. In May following a bill was rendered to the petitioner for flat rates from January 1, 1904, to April 1, 1904, and for 3,003 feet of water in April at meter rates for boarding houses. From that time on the petitioner was charged at meter rates. He declined to pay. And on September 10, 1904, the company shut the water off. There was then due according to its rates the sum of $23.71 for water from January 1, 1904. Both before and after the water was shut off the petitioner tendered the full amount due according to the flat rates for dwelling houses, and now offers to pay the same. He prays that the company be commanded to restore his service.

Upon these facts, concerning which there is little dispute, the defendant contends that the petitioner is not entitled to mandamus against it, as a matter of law. It says that the petitioner's rights, if any, rest in contract,—and so far as alleged in the petition,—in the Laughton & Clergue contract, that the contract was made by the town and that the petitioner was not a party to it, or in any privity with the parties, and that mandamus will not lie to enforce contractual duties in any event. Furthermore it is argued that the defendant is not bound by the Laughton & Clergue contract. We will consider the last proposition first.

It is not necessary to inquire when and how far and in what manner a corporation is bound by the engagements entered into by its promoters. It is at least settled that if the corporation adopts such a contract expressly or impliedly, and obtains its benefits, it must take it with its obligations and burdens, cum onere. It must do what the promoters agreed to do. 23 Am. & Eng. Ency. 241; 10 Cyc. 262; note to *Pittsburg Mining Co.* v. *Spooner*, 17 Am. St. Rep. 161. In this case the Penobscot Water & Power Company

took an assignment of the Laughton & Clergue contract and its benefits and expressly assumed its obligations. That contract limited the rates for water supplied to dwelling houses containing families. The corporation became bound by that limitation. While a town is not an agent of the individual citizens and authorized to make contracts binding upon them personally, we have no hesitation in saying that when a person or corporation as a consideration, or even as a mere inducement for the making of a hydrant contract with a town for fire purposes, engages to supply water for the inhabitants at rates not exceeding certain specified sums, and so obtains the contract and its benefits, the contractor is under obligations to fulfil the agreement as to service and rates to individual water takers. And the rights of the Penobscot Water & Power Company, with the corresponding duties and obligations, have come to the defendant.

It is true that mandamus is not the proper remedy for the enforcement of mere contractual duties. It does not lie to enforce rights of a private or personal character, or obligations resting entirely upon contract, and not involving any question of trust or official duty, or growing out of public relations. 2 Spelling on Extraordinary Relief, sect. 1379. But that is not the situation in this case. The defendant is a public service corporation. By undertaking a public service, namely that of furnishing a supply of water for the public, it comes under obligations to the public, not only to the public as a whole, but to the public as individuals, and that independent of its contract duties. It must serve impartially, or on equal terms and at reasonable rates, all who apply for service. Indeed, from the existence of such a public duty, the law will imply a contract, if necessary, with each of the inhabitants served. *McEntee* v. *Kingston Water Co.*, 165 N. Y. 27. It is the duty of the defendant as a public service corporation to supply water to this petitioner at reasonable rates, fairly and without discrimination. *Kennebec Water District* v. *Waterville*, 97 Maine, 185. The duty is a public one which does not depend on the Laughton & Clergue contract, although that limits the maximum rate in some instances, but it arises from the character of the service it undertakes to perform. Because a duty of this kind is public each owner of a building which may be served is entitled

to have the water served to him. That is his particular, personal right, and is independent of the rights that others or the general public may have. He does not hold that particular right in common with the public. Mandamus lies to enforce the performance of public duties. It does not lie at the suit of an individual for the enforcement of those rights which he holds in common with the public at large, but it does lie when his personal and particular rights have been invaded beyond those that he enjoys as a part of the public and that are common to everyone. *Sangerville* v. *County Commissioners*, 25 Maine, 291; *Baker* v. *Johnson*, 41 Maine, 15; *Weeks* v. *Smith*, 81 Maine, 538; *Knight* v. *Thomas*, 93 Maine, 494. The petitioner therefore, may prosecute the writ.

It is not questioned but that a public service corporation, like a water company, may adopt reasonable rules and regulations for the conduct of its business, to which the individual water takers must conform, that it may require payment for a reasonable time in advance, or that it may cut off water from a customer who refuses or neglects to pay reasonable rates. *Wood* v. *Auburn*, 87 Maine, 287. And we think there can be no question of the right of such a corporation to revise and change its schedule of rates, if no contract prevents, provided that the new rates are reasonable and do not discriminate. Within these limitations it may change from an annual or flat rate to a meter rate. In fact a reasonable meter rate seems the more equitable and just. We have recently discussed what are reasonable rates in *Kennebec Water District* v. *Waterville*, 97 Maine, 185 and *Brunswick & Topsham Water District* v. *Maine Water Co.*, 99 Maine, 371, and this case calls for no further discussion. Nor do we think there can be any doubt that in case of unnecessary waste the company may apply a meter, and charge reasonable meter rates. Again while it may be lawful to classify water takers, not arbitrarily, but upon reasonable grounds, as for instance as between boarding houses and private dwelling houses, and while it may be true in instances that a charge to small customers is not necessarily unreasonable because in excess of what a large customer would have to pay, for the same amount of water, still as bearing upon the question of discrimination it must be true that the quantity of water used and the cost of the individual

service are the principle elements for consideration in fixing the charges as between individual water takers or classes of takers. And it has been held that a public service company cannot make a difference in price according to the use made by the customer, nor is a discrimination proper based on the value of the service to the customer, *Bailey* v. *Gas-Fuel Co.*, 193 Pa. St. 175; *Richmond Nat. Gas. Co.* v. *Clawson*, 155 Ind. 659; 51 L. R. A. 744. And, of course, the water company had the right to establish reasonable rates for service to all customers not provided for in the Laughton & Clergue contract.

An application of these principles will eliminate from further consideration all essential questions except two, and these are questions of fact. The petitioner bases his claim upon the dwelling house clause in the Laughton & Clergue contract. He says that his house was a "dwelling house containing a family" within the meaning of that contract and therefore, that the maximum charge for a family of fifteen exclusive of the water closet was $10 a year, and further that the family in the house did not exceed fifteen in number. All his tenders and his offer in the petition to pay are limited upon that theory. And if it were otherwise, the record does not disclose sufficient data to enable the court to pass upon the reasonableness of the meter rates themselves. The defendant on the other hand claims that the building is not a dwelling house within the meaning of the contract, but is a boarding house, and further that its predecessor was justified in putting in a meter, by reason of the unreasonable waste of water.

The decisive question, and the only one we need to consider, is whether the petitioner's building was a "dwelling house containing a family" as specified in the original contract, or was a boarding house. It is urged in the first place that the company itself has so classified it for quite a long period of years, and that in consequence its status is now fixed beyond the power of the company to change. The construction which the parties by their acts place upon a contract frequently is, in cases of doubt, of great value in determining what the contract meant. And when by long continued usage they have given a practical construction to it, it may be beyond the power of one party to change it. *West Hartford* v. *Water Commissioners of*

Hartford, 68 Conn. 323. But if we were to assume that such a usage should control, it ought to be a usage which has been practically fixed and unvarying. The case shows that all three of the tenants who have occupied the house since the petitioner bought it have kept boarders, but to what extent and under what conditions the two earlier tenants kept them does not appear. And as we shall hereafter see, the mere fact that boarders are kept in a house is not necessarily inconsistent with the claim that it is a "dwelling house containing a family." Moreover the house was first classified at a time earlier than the petitioner's ownership, and the record shows nothing in regard to the nature of the occupancy at that time, except that boarders were kept. This ground therefore is not tenable, and we must inquire further.

The building itself seems to have been built originally for family use. But it had been used by tenants for keeping boarders and was being so used when the meter was put on. The tenant, his wife and three sons lived there. The number of boarders was as low as three at times, and at others as high as ten, and perhaps more. The boarders were not transients. They stayed more or less permanently. The word "dwelling-house" does not always have the same sense in all cases. It may mean one thing under an indictment for burglary or arson, and another under a homestead law, and another under a pauper law, and another under a contract or devise. A boarding house certainly is a dwelling house. So is a hotel. Or a jail. *People* v. *Van Balrcum*, 2 Johns. 105. Or a single room. *People* v. *Horrigan*, 68 Mich. 491.

But the Laughton & Clergue contract limited the meaning which might be given to the word dwelling house. The phrase there is "dwelling house containing a family." The word family is also of flexible meaning. The meaning varies as the question arises under homestead laws, or exemption laws, or pauper laws, or under insurance policies or wills, or other conditions. Its primary meaning is a collection of persons who live in one house and under one head or management. *Dodge* v. *Boston & Prov. R. R.*, 154 Mass. 299. In that sense it has frequently been defined as synonymous with household. Webster gives the primary meaning as "persons collectively

who live together in a house or under one head or manager; a household, including parents, children, and servants, and as the case may be, lodgers or boarders." This definition is sometimes quoted in the cases, but we have found no case sustaining the definition as to boarders in which the matter of boarders was in issue or decided, except two, and they were decided on grounds not involved here. *Oystead* v. *Shed*, 13 Mass. 520; *Race* v. *Oldridge*, 90 Ill. 250; 32 Am. Rep. 27. To constitute the family relation between persons so living together it must be of a permanent and domestic character, and not of those abiding together temporarily as strangers. *Tyson* v. *Reynolds*, 52 Iowa, 431. They must be living in one domestic establishment. *Pearson* v. *Miller*, 42 Am. St. Rep. 470. Family means all whose domicil or home is ordinarily in the same house and under the same management or head. *Cheshire* v. *Burlington*, 31 Conn. 326. It is all the individuals who live together under the control of another, including the servants. *Poor* v. *Hudson Ins. Co.*, 2 Fed. 422. It embraces a household composed of parents or children, or other relatives, or domestics. In short every collective body of persons living together within one curtilage, subsisting in common and directing their attention to a common object, the promotion of their mutual interests and social happiness. *Wilson* v. *Cochran*, 98 Am. Dec. 553. It may mean the husband and wife, having no children, or it may mean children, or wife and children, or any group constituting a distinct domestic or social body. *Grand Lodge* v. *McKinstry*, 67 Mo. Appeals, 82. Lord Kenyon said "In common parlance the family consists of those who live under the same roof with the pater familias; those who form (if I may use the expression) his fireside." *The King* v. *Darlington*, 4 Term Rep. 800. The relation is one of social status, not of mere contract, and usually is held to include a legal or moral obligation on the head of the family to support the other members, and a corresponding state of dependence on the part of the other members for their support. 3 Words and Phrases, 2673 and cases, cited.

If the foregoing definitions gathered from the cases give a correct view of the various phrases of a family relationship as applicable to this case, from the judicial point of view, as we think they do, it is

clear that boarders do not constitute the family or a part of it. A family living together in a house as a home is none the less a family because incidentally there are boarders in the same house, and perchance eating at the same table. But a boarding house is none the less a boarding house, when used as such, because the boarding house keeper and his wife and children live in it while the business of keeping a boarding house is being carried on. The Laughton & Clergue contract limited the rates for "a dwelling house containing a family" to annual flat rates for specified amounts. It contemplated as we think a dwelling house containing a family living together in domestic and social relations in the house as a home, and not as a place of carrying on the business of keeping boarders. The test is whether the petitioner's tenant occupied the house as a home for himself and his wife and children, and incidentally kept boarders also, or whether he occupied it as a place for carrying on the business of keeping boarders, although while prosecuting the business and as a means of prosecuting the business, he and his wife and children live in the house also. Under this test, neither the size of the house, nor the number of the boarders are of importance, except as evidence that may have weight in determining which is the principle use for which the building is occupied.

Applying this test to the evidence in this case, we are satisfied that the petitioner's house should be classed as a boarding house, and that it is not within the limitation for dwelling houses in the Laughton & Clergue contract. The tenant used the house for carrying on the business of keeping boarders, and his living there was incidental to that business. That was his business, and his only business of any consequence, as he testified.

Accordingly the petitioner's claim is not sustained, and his petition must be dismissed. But we decide nothing more. The petition is not framed to raise the question whether the rates charged to the petitioner for the house as a boarding house are excessive or not. Neither as we have already said is there sufficient evidence upon which to answer such a question. Nor do we say that the rates which the defendant demands are or are not unjust by reason of unlawful discrimination in the classification made by it, and in the

charges made to the several classes, nor that the defendant has or has not the right to demand as much of the petitioner as it does, for the unpaid water service. When a customer charges 25 cents a hundred feet to one customer for one use, and only 11 cents for ten thousand feet to another customer for another use, if the water be supplied from the same source, by the same system, in the same pipes, there is an apparent discrimination, but whether it is real or not cannot now be said. See *Bailey* v. *Fayette Gas-Fuel Co.* and *Richmond Nat. Gas Co.* v. *Clawson*, supra.

Petition dismissed.

JAMES S. WRIGHT, Admr., *vs.* LAURA I. HOLMES.

Oxford. Opinion November 22, 1905.

Pleading. Administrator Proper Party to Sue, When. Husband and Wife. Gifts. Husband no Vested Interest in Wife's Estate. Wife's Right to Dispose of her Personal Property in her Lifetime. P. L., 1895, c. 157; 1903, c. 160. R. S., c. 63, § 1; R. S., c. 77.

1. An administrator is the proper party to sue for the goods which once belonged to his intestate, but which were disposed of by the latter, by a fraudulent and void transfer or gift.
2. In this state, prior to June 1, 1903, when chap. 160 of the Public Laws of that year took effect, a married woman might make such disposition by gift, voluntary conveyance or otherwise, of her personal property during her lifetime, as she wished, even though her husband was thereby deprived of the distributive share therein, which would otherwise fall to him upon her death; and even though such disposition was made with intent to prevent his receiving such a distributive share.
3. Whether this rule will apply as to gifts causa mortis, since chapter 160 of the Public Laws of 1903, permitting a widower to waive the provisions of his wife's will, and take his distributive share in her personal estate, as if she had died intestate, is not decided.

On report. Judgment for defendant.

Trover brought by the plaintiff as administrator of the estate of Emma M. Swift, deceased, to recover damages for the conversion of deposits in three savings banks and one national bank, amounting to

$5767.25, transferred by plaintiff's intestate to the defendant on the ninth day of May, 1903. Emma M. Swift, the deceased, died July 19, 1903, leaving a husband, Chandler Swift, to whom she was married August 5, 1902. Writ dated Sept. 22, 1904. Plea, the general issue. Facts agreed upon and case reported to the Law Court with the stipulation that the Law Court "should pass such judgment as the law and the facts warrant."

The case is sufficiently stated in the opinion.

James S. Wright and Alton C. Wheeler, for plaintiff.

Robert F. Dunton, for defendant.

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

SAVAGE, J. The plaintiff's decedent, a widow possessed of about ten thousand dollars and living at Belfast, married Chandler Swift of Paris, August 5, 1902, and in the same month went to his home to live with him. In the December following, being then ill and probably apprehensive of a fatal result, Mrs. Swift made a will by which she gave her husband $500, and the income of $2000 more. Later she went to the hospital for treatment. After remaining there for seventeen days, she returned to her husband's home, and stayed there until April 5, 1903, at which time she went back to Belfast, her former home. She continued to live in Belfast until she died of tuberculosis of the lungs, July 17, 1903. On May 9, 1903, she assigned to the defendant deposits in various savings banks amounting to $5767.25, and transferred to her her household furniture and certain other goods and chattels, of small value. At the same time she gave away to others practically all of her remaining property, but she gave nothing to her husband. The will above referred to she then destroyed. Subsequently she caused the savings bank books representing the deposits assigned to the defendant to be surrendered to the banks. The deposit accounts were transferred to the defendant, and new books were issued in her name. These books were sent by the banks to Mrs. Swift, who delivered them to the defendant. So far as forms are concerned, these transactions constituted a valid transfer of the deposits to the defendant. The agreed case

states that the transfers were "made in contemplation of death," and that Mrs. Swift died of the incurable disease from which she was suffering at the time the transfer was made. The parties are not agreed as to whether the transfer was a gift or a contract; and if a gift, whether it was absolute and irrevocable, although made in expectation of death, and so a gift inter vivos, *Dresser* v. *Dresser*, 46 Maine, 48; or whether it was ambulatory and revocable, at her will, or in case of her recovery, and so a gift causa mortis, *Bickford* v. *Mattocks*, 95 Maine, 547; *Chase* v. *Redding*, 13 Gray, 418. As the ground upon which the case will be decided is applicable to both classes of gifts, it will not be necessary to scrutinize the gift closely to ascertain to which class it belongs.

The plaintiff, as administrator, brings this action of trover for the savings bank deposits, which were given to the defendant. And as the case makes no mention of debts, we assume that it is brought for the benefit of the husband, as statutory distributee. And as such a case, it has been argued by the learned counsel for the plaintiff.

The defendant presents various objections to the maintenance of the suit, and first, that the plaintiff is not the proper party. It is claimed that if the gift was fraudulent as to the husband, and hence void, as the plaintiff urges, the husband only was injured, and that he only can obtain relief in some appropriate form of action. But we incline to think otherwise. The title to an intestate's personal estate does not pass to his distributees, except through proper probate administration. Distribution, or a right to distribution, presupposes administration. The distributee's share is his proportionate part of whatever fund is left after the debts and expenses of administration have been paid. The distributee is not entitled to a share of the specific rights and credits, and goods and chattels which came into the administrator's hands, but only to a share of the fund produced by administering them, that is, by reducing them to money. This conclusion seems to be sustained by *Dole* v. *Lincoln*, 31 Maine, 422, where the court used this language: "The notes claimed in this suit were formerly the property of the intestate, and they must still be regarded as belonging to his estate, unless he made a *legal* disposition of them during life." The reasoning of the court in *McLean* v.

Weeks, 65 Maine, 411, also seems to support the right of the administrator in this respect. See *Abbott* v. *Tenney*, 18 N. H. 109; *Emery* v. *Clough*, 63 N. H. 552.

The defendant further objects that trover will not lie in this case. The declaration in the case counts on the conversion of certain "large sums of money then on deposit" in certain savings banks. It may well be held that trover will not lie for "money deposited" in a savings bank. A depositor is not the owner of any specific money in the bank. He is simply the owner of a right and credit against the bank.

But we will not pursue these technical objections further. The case comes up on report, and we think it is wiser to decide the vital questions at issue between the parties, rather than to send the case off on a question of pleadings.

Upon the merits, the defendant contends that the transactions which we have stated between Mrs. Swift and the defendant are not to be viewed merely as a voluntary gift, but that they are to be supported rather as a contract based upon valuable consideration. The case states that the defendant "verbally agreed to take care of Mrs. Swift as long as she should live, pay her funeral expenses, do some cemetery work on her lot, and provide for the perpetual care of the same," but it does not state that the transfers to the defendant were made in consideration of her agreement to do these things, nor is there sufficient evidence to warrant a finding to that effect. We think the transfers must be treated as a gift.

We are accordingly led to inquire whether a married woman can give away her personal estate, when the obvious effect, and therefore the presumed intent, in part at least, is to deprive her husband of that share in her property which he would otherwise be entitled to after her death, as distributee. It cannot be doubted that under the "married women's" statutes of this state, a married woman may own, manage, sell, dispose of and give away her personal property as freely and absolutely as a married man may do. She may do so without her husband's assent to the same extent that a married man may do so without his wife's assent. R. S., ch. 63, sect. 1; *Allen* v. *Hooper*, 50 Maine, 375; *Hanson* v. *Millett*, 55 Maine, 189; *Haggett* v.

Hurley, 91 Maine, 552. It is obvious that the provision which first appeared in R. S., ch. 63, sect. 1, in the general revision of 1903, that "such conveyance without the joinder or assent of the husband shall not bar his right and interest by descent in the estate so conveyed" is to be limited to conveyances of real estate. The phrase "right and interest by descent" was adopted in P. L. 1895, ch. 157, to express the right which a surviving husband or wife should have in the real estate of a deceased wife or husband, in the place of dower or curtesy, R. S., ch. 77. It had no reference to the interest in the personal estate which comes through distribution. The same meaning is evidently intended to be given to the same phrase in R. S., ch. 63, sect. 1. Besides, the revision of 1903 was not adopted until several months after the gift was made, and Mrs. Swift had died.

But the plaintiff contends that it is contrary alike to the dictates of justice and to the policy of the law to permit a husband or wife to make a voluntary gift of substantially all of his or her personal property, with the intent and necessary effect of depriving the surviving wife or husband of a distributive share. He claims that this gift was a donatio causa mortis, that it is to be likened to a will, and that it cannot be permitted to do what a will would be ineffectual to do. He argues that if Mrs. Swift had given the defendant this property by will, the husband nevertheless might have waived the will and received a distributive share, and he cites upon this point *Jones* v. *Brown*, 34 N. H. 439; *Baker* v. *Smith*, 66 N. H. 422; *Hatcher* v. *Buford* (Ark.), 27 L. R. A. 507; *Headly* v. *Kirby*, 18 Pa. St. 326; Schouler on Wills, sect. 63; 3 Redfield on Wills, 324. The doctrine of these authorities is stated in *Baker* v. *Smith*, supra, after citing the New Hampshire statute of wills, as follows: "What she cannot do in this respect by will she cannot do by another form of testamentary disposition (donatio causa mortis) which is of the nature of a legacy, and becomes a valid gift only upon the decease of the donor." Redfield doubts whether such a gift should stand "where the statute expressly provides that a widow may waive the provisions of the will and come in for her share of the personal estate under the statute by way of distribution."

Unfortunately, however, for this line of argument, in this state, prior to June 1, 1903, when Chapter 160 of the Laws of that year took effect, there was no provision of statute which gave a distributive share of the personal estate to a widower who had waived his wife's will. *Stewart* v. *Skolfield*, 99 Maine, 65. Widows, but not widowers, were permitted to waive provisions of wills, and claim distributive shares, or to claim such shares, when left unprovided for in wills. The statute of 1903 was not in effect when this gift was made. What would have been the result, if that statute had been in effect, we have no occasion to consider. Prior to that statute, a married woman could, by will, place her entire personal estate beyond the reach of her husband. *Stewart* v. *Skolfield*, supra.

Could she do so by gift? The cases in which this question has arisen, as might be expected, have usually been those where a widow has sought to have gifts made by her husband declared invalid. And those in which the question has been answered in the negative have generally been decided upon one or more of the four grounds following:

1. That the gift, being causa mortis, was ambulatory and testamentary in character, and that it was against the policy of the law to permit a donor to override the law and defeat his wife's claim upon his personal estate, by gift, when he could not do it by will. This ground we have already examined and found it not applicable to this case.

2. That the gift was colorable; a gift in form, but not in fact. Substantially all authority is to the effect that where the transfer is a mere device or contrivance by which the husband, retaining to himself the use and benefit of the property during his life, and not parting with the absolute dominion over it, seeks at his death to deprive his widow of her distributive share, it is to be regarded as fraudulent as to the wife, and void. *Brown* v. *Crafts*, 98 Maine, 40; *Thayer* v. *Thayer*, 14 Vt. 107; *Walker* v. *Walker*, 66 N. H. 390; *Hays* v. *Henry*, 1 Md. Ch. 337; *Dunnock* v. *Dunnock*, 3 Md. Ch. 140; *Tucker* v. *Tucker*, 29 Mo. 350; *Brown* v. *Bronson*, 35 Mich. 415; *Smith* v. *Smith*, (Colo.) 34 L. R. A. 49.

3. That the husband is under a legal obligation to support and maintain his wife during his life, and therefore that it is his duty to provide for her as long as he lives. *Thayer* v. *Thayer*, 14 Vt. 107. The force of this argument is lost, however, when, as in this case, the donor is the wife, and not the husband.

4. That the gift was in fraud of the wife's right to a separate maintenance, or to alimony. *Draper* v. *Draper*, 68 Ill. 17; *Tyler* v. *Tyler*, 126 Ill. 525; *Feigley* v. *Feigley*, 7 Md. 537; *Bouslough* v. *Bouslough*, 68 Pa. St. 495; *Green* v. *Adams*, 59 Vt. 602. This principle however does not apply until the parties have separated and have assumed extra-marital relations towards each other. In such cases the wife may be regarded as a quasi creditor, and is to be distinguished from a widow seeking a distributive share. *Small* v. *Small*, 56 Kans. 1, 30 L. R. A. 243.

Some courts have gone to the extent of declaring that a wife, because she is a wife, has a tangible and valuable interest in her husband's estate, springing from the marriage itself, which the law recognizes and protects, *Nichols* v. *Nichols*, 61 Vt. 426; and that a voluntary gift by the husband to a third party may be a fraud upon that interest, and upon her claim to a distributive share. *Thayer* v. *Thayer*, 14 Vt. 107; *Walker* v. *Walker*, 66 N. H. 390; *Manikee Admr.* v. *Beard*, 85 Ky. 20; *Stone* v. *Stone*, 8 Mo. 389; *Murray* v. *Murray*, 90 Ky. 1.

But the almost overwhelming weight of authority is to the contrary. And we think that by that weight of authority the rule is established that the law places no restriction or limitation on the power of the husband to make such disposition by gift, voluntary conveyance or otherwise, of his personal property during his lifetime, as he may wish, even though his wife is thereby deprived of the distributive share therein, which would otherwise fall to her upon his death. He may by gift dispose of his personal property absolutely, without the concurrence and against the will of his wife, exonerated from all claim by her, provided the transaction is not merely colorable, and is unattended by facts indicative of some other fraud upon her than that arising from his absolute transfer, to prevent her having an interest therein after his death. To hold that a wife has a vested

interest in her husband's personal estate that he is unable to divest in his lifetime, would be disastrous to trade and commerce. *Padfield* v. *Padfield*, 78 Ill. 16; *Hays* v. *Henry*, 1 Md. Ch. 337. He may even beggar himself and his family. When he dies, and then only, do the rights of the wife attach to the personal estate. She then becomes entitled to her distributive share. *Lines* v. *Lines*, 142 Pa. St. 149, and note to same case, 24 Am. St. Rep. 490. It was tersely declared in *Small* v. *Small*, 56 Kans. 1; 30 L. R. A. 243, that if the disposition by the husband be bona fide, and no right is reserved to him, though made to defeat the right of the wife, it will be good against her. *Hays* v. *Henry*, supra; *Cameron* v. *Cameron*, 10 Smedes & M. (Miss.) 394. In *Holmes* v. *Holmes*, 3 Paige, Ch 363, it is said that the owner of personal property, as against everybody but creditors, may make such disposition thereof as he pleases, either by will or otherwise. He cannot therefore commit a fraud upon his wife or children by disposing of it, before his death, in any manner he may think proper, by gift inter vivos, or causa mortis, or by will. Neither the wife nor the children have any interest in the property, except as far as the husband or father may be liable for their support during his life. It is therefore impossible that he should defraud either by any disposition he may make of his property to take effect after his death. *Stewart* v. *Stewart*, 5 Conn. 317; *Williams* v. *Williams*, 40 Fed. Rep. 521. The power of the husband over his personal property by gift inter vivos is absolute. A man's wife and children have no legal right to any part of his goods, and no fraud can be predicated of any act of his to deprive them of the succession. *Pringle* v. *Pringle*, 59 Pa. St. 281; *Dunnock* v. *Dunnock*, 3 Md. Ch. 140; *Tucker* v. *Tucker*, 29 Mo. 350; *Cranson* v. *Cranson*, 4 Mich. 230; *Marshall* v. *Berry*, 13 Allen, 43. In the last case the court said:—"In the absence of any provision of statute inconsistent with the right of the wife to dispose of her personal property in this manner, (by gift causa mortis) we must hold that she has the power." "These gifts," say the court in *Chase* v. *Redding*, 13 Gray, 418, "if confirmed and held good do not impair the rights of the widow. Her right is to the property of which the husband died seized or possessed. These gifts have their full effect in the lifetime of the

donor, and the property is not in his possession at the time of his decease, and does not come under the administration of the executor." A deed of real estate, reserving the life estate in the grantor, made principally for the purpose of depriving the wife of her statutory share in the grantor's estate, but also given in consideration of care bestowed and to be bestowed upon the grantor as long as he lived, was held valid as against the grantor's widow in *Leonard* v. *Leonard*, 181 Mass. 458. "The intent to defeat a claim which otherwise a wife might have is not enough to defeat the deed." The alienation or gift by a husband is held to be valid, even though his intent and purpose in making it was to deprive her of dower, provided there be no fraudulent participation on the part of the grantee or donee in such intent or purpose. *Rabbitt* v. *Gaither*, 67 Md. 95. Mr. Thomson in his work on Gifts and Advancements says in sect. 488: "A husband may make a gift of his personal property, and thereby deprive his wife and children of all interest therein. She and they have no interest in such property until his death, and therefore he may wholly disregard her and them, and make a gift of his property, either inter vivos, or mortis causa." To the same effect are *Richards* v. *Richards*, 11 Humph. (Tenn.) 429; *Smith* v. *Hines*, 10 Fla. 258; *Hatcher* v. *Buford*, 60 Ark. 169; *Lightfoot's Executors* v. *Colgin*, 5 Munf. (Va.) 42; *Ford* v. *Ford*, 4 Ala. 142; *Ellmaker* v. *Ellmaker*, 4 Watts, 89; *Poe* v. *Brownrigg*, 55 Texas, 133; *Samson* v. *Samson*, 67 Iowa, 253; and Dickerson's Appeal, 115 Pa. St. 199. These rules which have for the most part been applied in cases where gifts by the husband have been in question, must, we think, apply with at least equal force in this state to gifts by a married woman.

Applying these rules, to which we agree, to the facts in this case, there is no room left for controversy but that the gift from Mrs. Swift to the defendant must be held valid as against her husband. The plaintiff has presented no other basis for his claim.

Judgment for the defendant.

ANNETTE M. MCLAUGHLIN *vs.* ALTON JOY.

Kennebec. Opinion November 29, 1905.

Bastardy. Evidence.

1. While perhaps not necessary, the original complaint and magistrate's record in a bastardy process may be put in evidence before the jury, upon the trial of the issue whether the defendant begat the child, for the purpose of showing compliance with the preliminary statutory requirements.
2. If a party in a jury trial is apprehensive that evidence admitted upon one proposition only may be applied by the jury to other propositions, he should request instructions to the jury to disregard that evidence in considering such other propositions. Without such request he has no cause for complaint as to the effect of the evidence upon these propositions.

On exceptions by defendant. Overruled.

Bastardy complaint, under the provisions of chapter 99 of the Revised Statutes. Tried to a jury in the Superior Court, Kennebec County. Plea, not guilty. Verdict, guilty. During the trial, the plaintiff offered in evidence her original accusation and examination before the magistrate, and also the magistrate's record in the matter, which were admitted against the objection of the defendant, and thereupon the defendant excepted.

The case sufficiently appears in the opinion.

Williamson & Burleigh, for plaintiff.

Sheldon & Sawtelle and A. M. Goddard, for defendant.

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

EMERY, J. This was a case of bastardy tried in the Superior Court for Kennebec County before a jury, in which the defendant pleaded not guilty and made no other defense than a denial of the paternity of the child. At the trial the plaintiff offered in evidence her original accusation and examination before the magistrate, and also the magistrate's record in the matter. Upon the defendant objecting to the papers, the plaintiff's counsel stated that they were

not offered as evidence of anything stated in them, but to show that the plaintiff had complied with the statute requiring such proceedings. They were by the court "admitted to show that the preliminary statutory requirements are complied with." These statements of counsel and court were made in the presence and hearing of the jury, but the court did not give any further instructions to the jury as to the use to be made of the papers, and no further instructions regarding them were requested.

While perhaps the question of compliance with the statute so far as preliminary papers were concerned was for the court rather than for the jury, it has been the practice to permit them to go to the jury. *Sidelinger* v. *Bucklin*, 64 Maine, 371.

The defendant urges, nevertheless, that he was in fact prejudiced by these papers going to the jury. He argues that inasmuch as self-serving oral statements made by the plaintiff out of court would not be admissible in support of her testimony in court, her written statement on oath made out of court should not be allowed to go to the jury; that the latter is even more prejudicial than the former.

We do not see, in this case at least, that the admission of the papers named was prejudicial to the defendant. It must be assumed that the jury knew the law, knew that such papers must have been made before the case could have been lawfully opened for trial before them, and also that the accusation and examination must have been in substantial harmony with the declaration already read to them. The actual production of the papers added nothing to the knowledge they must be assumed to have had.

Again in this case it was stated before the jury by counsel and court that the papers were offered and admitted, not as evidence of anything stated in them, but to show that the preliminary statutory proceedings were complied with. It must be assumed, upon exceptions, that the jury heeded the statement and the ruling and gave the papers no other effect. If the defendant feared that the matter had not been made sufficiently plain to the jury, he should have requested the court to make it more plain. Not having done so, he has no legal ground for complaint on that score.

Exceptions overruled.

FREELAND J. GERRY et al.

vs.

THE AMERICAN EXPRESS COMPANY.

Penobscot. Opinion December 1, 1905.

Common Carriers. Contract. Limited Liability Thereunder. Failure to Read Terms of Contract no Answer.

A common carrier may limit his responsibility for property entrusted to him by a notice containing reasonable and suitable restrictions, if brought home to the owner of the goods delivered for transportation, and assented to clearly and unequivocally by him, if it also appears that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties, according to which the service of the carrier was to be rendered.

In the case at bar, the defendant furnished the plaintiffs a book of blank receipts in which the plaintiffs entered their shipments. At the top of each sheet of these receipts there was printed the following: "The property hereinafter described to be forwarded subject to the terms and conditions of the company's regular form of receipt printed on the inside cover of this book." Below this were entered the date, amount and destination of each shipment, and receipted by the defendant's agent when the goods were taken by him.

On the inside cover was a notice to shippers, not involved in this case, and at the bottom in larger type the following: "The liability of this company is limited to $50.00, at which sum the property is hereby valued, unless the just and true value is stated in this receipt." In the receipt for the shipment of the goods by the plaintiffs in this suit, no value of the goods was stated. The goods injured, however, were of a much greater value than fifty dollars, and the loss by reason of the injury was more than fifty dollars. The plaintiffs claimed that they did not read the terms and conditions in the shipping book given them by the defendant.

Held: That the receipt in this case incorporated into it the limitation of liability contained in the conditions printed in the books of receipts used by the plaintiffs. Upon that receipt and under its conditions the defendant received the goods, and upon it the plaintiffs delivered the goods. This constituted the contract between the parties, and, in the absence of fraud or misrepresentation, the plaintiffs are bound by its expressed terms. They cannot be permitted to say that, by their own inattention, they did not read the terms and conditions, and thereby impose upon the defendant a greater value than that expressed in the contract.

Further *held:* That the ruling of the presiding Justice in directing a verdict for the plaintiffs based upon the limited liability of the defendant, was correct.

On motion and exceptions by plaintiffs. Overruled.

Action on the case to recover compensation for damage to sixty-one cans of cream alleged to have been frozen by reason of the negligence of the defendant while the defendant was transporting same from Belfast, Maine, to Boston.

The case is sufficiently stated in the opinion.

Calvin W. Brown, for plaintiffs.

C. F. Woodard, for defendant.

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

STROUT, J. Plaintiffs shipped by defendant company 61 cans of cream from Belfast to Boston. Before delivery it became frozen and was injured, and plaintiffs claim damages therefor. Defendant admits a limited liability only, and on the eighteenth day of October, 1904, tendered plaintiffs fifty-five dollars in full for its liability, and brought the amount into court. Plaintiffs refused to accept it, and claim to recover the value of the cream, stated to be four hundred and fifty-seven dollars and fifty cents, less amount realized from the butter made therefrom, which left a net loss of one hundred and fourteen dollars and eighteen cents, which plaintiffs seek to recover in this action.

Plaintiffs were presented by defendant with a book of blank receipts in which plaintiffs entered their shipments. At the top of each sheet of these receipts there was printed "the property hereinafter described to be forwarded subject to the terms and conditions of the company's regular form of receipt printed on inside cover of this book." Below this were entered the date, amount and destination of each shipment, and receipted by defendant's agent when the goods were taken by him. Pasted on the inside cover of the book was a notice to shippers not involved here, and at the bottom in larger type the following,— "The liability of this company is limited to $50. at which sum the property is hereby valued, unless the just and true value is stated

in this receipt." In the receipt for the shipment of this cream no value was stated. Defense claims that plaintiffs are bound by this limitation. The presiding Justice ordered a verdict for plaintiff for fifty-two dollars and twenty-five cents, that being for fifty dollars and interest thereon from the date of shipment to the date of the tender. To this ruling exception was taken. There is also the general motion for a new trial.

It is well settled that a common carrier may "limit his responsibility for property entrusted to him by a notice containing reasonable and suitable restrictions, if brought home to the owner of goods delivered for transportation, and assented to clearly and unequivocally by him," and if it appears "that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties, according to which the service of the carrier was to be rendered." *Fillebrown* v. *Grand Trunk Railway*, 55 Maine, 468. The limitation in defendant's receipts in this case cannot be considered unreasonable. The rate for transportation and the care to be bestowed upon them depends very largely upon their value,—and the carrier may well require the value to be stated, if he is to be held responsible to the extent of the common law liability of common carriers. Plaintiffs had been shipping cream by the defendant and having their receipts in the same book of receipts almost daily from January 24, 1902, and in all or nearly all the shipments the receipts were filled out by the plaintiffs or their agent, and signed by defendant's receiving agent. In no case did they give the value of the shipment to defendant. They say they did not read the terms and conditions in the shipping book, but it seems incredible that using that book almost daily for nearly two years, and filling in the blanks at every shipment, the eye could have failed to catch the distinct notice of limitation of liability. Lapse of memory is much more probable.

The receipt in this case in express terms incorporated into it the limitation of liability contained in the conditions printed in the book of receipts used by plaintiffs. Upon that receipt and under its conditions defendant received the goods, and upon it plaintiffs delivered them. That constituted the contract between the parties, and, in the absence of fraud or misrepresentation, which are not claimed, the

plaintiffs are bound by its expressed terms. They cannot be permitted to say that, by their own inattention, they did not read the terms and conditions, and thereby impose upon defendant a greater liability than that expressed in the contract. *Squire* v. *New York Central Railroad*, 98 Mass. 239.

The receipt did not state the rate for transportation. Consequently the rate would be that agreed upon, if any, otherwise a reasonable rate.

But it is strongly urged that the rate per can for transportation had been specially agreed upon by the parties, and therefore there was no occasion for giving the value. One of the plaintiffs rather vaguely says it was agreed, and the other plaintiff says the rate was asked for and given, and that was all. But this argument overlooks the consideration that upon the value of the goods largely depends the degree of care defendant would exercise to protect the property. If the value was large, and liability for loss great, defendant would naturally use much greater care to protect from loss than if the value was trifling.

It is the opinion of the court that the ruling was right, and the entry must be,

Motion and exceptions overruled.

ANNIE J. HEWEY

vs.

METROPOLITAN LIFE INSURANCE COMPANY.

Androscoggin. Opinion December 6, 1905.

Policy of Life Insurance. Application Therefor signed in Blank. Agent Filled in Blank Spaces. When Applicant is Bound by the Statements Therein. When not Bound. Such Application Construed more Favorably to Applicant. Mistakes and Misrepresentations. Evidence.

An application for a policy of life insurance was signed in blank by the applicant and delivered in this condition to the agent of the defendant company with the understanding that the agent should fill in the answers to the questions from information contained in a previous application for insurance which had been made out in the applicant's presence and signed by him. The second application as filled out by the agent was forwarded to the company and the policy in suit was issued thereon and afterwards delivered to the applicant now deceased and was accepted by him.

Held: that if the agent of the company filled in the second application in accordance with the terms of the first one, then the applicant would be bound by it; but if the agent filled in the second application with answers that were not contained in the first one or put them in differently from what they were in the first, then the applicant would not be bound by them, because they would be the answers of the agent and not the answers of the applicant.

It is a sound rule of law that an application for life insurance signed in blank by one desiring insurance and filled in by the company or its agents should be construed more favorably to the applicant.

Upon an analysis of the two applications, the most that can be said with respect to their identity is that if the applicant had read or been personally interrogated with respect to the questions and answers in the second application he might have answered the same as he did in the first, and he might have answered in an entirely different way. The answers in the second application cannot therefore be said to be such necessary inferences from those contained in the first as to be regarded as a statement of the applicant and therefore binding upon him.

In order to defeat the claim of a person insured, who has paid the consideration required for the insurance received, upon the ground that the insured made misrepresentations as to the risk in his application, it is incumbent upon the company to show that the misrepresentations were his and not mistakes or misrepresentations of its own.

When an insurance company or its agents undertake to fill in an application from a previous application or statement made by the applicant, it should be held to the strictest adherence to the terms of such application or statement made, otherwise it would be in the power of the company or its agents in such a case to fraudulently destroy the legal status of the policy so obtained.

On exceptions by defendant. Overruled.

Assumpsit on a policy of life insurance for $500 issued by defendant on the life of Robert Hewey, now deceased, brought by the plaintiff, the wife of said deceased and the beneficiary named in said policy. Tried at the January term, 1905, Supreme Judicial Court, Androscoggin County. Verdict for plaintiff. Defendant filed a motion for a new trial which was afterwards abandoned. Defendant also excepted to certain rulings made by the presiding Justice during the trial.

The case appears in the opinion.

Memorandum. This case was argued at the June term, 1905, of the Law Court at Portland. One of the Justices sitting at said term, did not sit in this case being disqualified under the statute by reason of having ruled in said case at nisi prius.

Harry Manser, for plaintiff.

White & Carter, for defendant.

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

SPEAR, J. This is an action on the case upon a policy of life insurance. The deceased made an application for a policy for $1000 in the defendant company which was dated October 18, 1902, followed by a medical examination the same day. This application was filled out by an agent of the company in the presence of the deceased from information furnished by him and was then signed by him and witnessed by the agent. The company declined to write a policy on the class applied for but intimated that it would write one of a different class to the amount of $500. Upon this information Robert Hewey, the deceased, signed a new application on the 8th day of November, 1902, in which the answers to the questions had not been filled in, and delivered it in this condition to the agent of the defendant company with the understanding that the agent should

fill in the answers to the questions from the information contained in the first application which had been made out in Hewey's presence and signed by him. There was no new medical examination at the time the second application was made. The second application as filled out by the agent was forwarded to the company and the policy in suit was issued thereon and afterwards delivered to Robert Hewey, the deceased, and was accepted by him. Upon this branch of the case, the court instructed the jury as follows: "So that in this case any answer in this second application, assuming that Mrs. Hewey's statement is true, that they left it as she says and that the agents were to fill in the blanks from the old application or from the knowledge which they got in the old application, so far as they filled in those blanks in accordance with the old application, they would then be filling in the blanks for him and the answers made would be his answers, because that was what he agreed to. But so far as they filled in the application with answers that he had not made in the old application—put in things that were not referred to in the old application—put them in differently from what they were in the old application—then he would not be bound by them because they would be the answers of the agents and not the answers of Mr. Hewey." This is undoubtedly the correct statement of the law governing this case and as we understand, is so conceded by the defendants. The two applications upon which the above instruction was based contained among other questions and answers the following which are material in this case.

"6. A. Name and residence of your usual medical attendant. Dr. H. H. Cleveland. 6. B. When and for what have his services been required? 9 mos. ago. "Cold." "7. Have you consulted any other physician? If so, when and for what? No, exc. as in No. 3." No. 3 referred to is as follows: "3. Give full particulars of any illness you may have had since childhood and name of medical attendant or attendants. Grippe 4 yrs. ago. Dr. J. A. Leader." The second application contained the following: "5. The following is the name of the physician who last attended me, the date of the attendance, and name of the complaint for which he attended me. Dr. Cleveland. Feb. 1902. Grippe." "6. I have not been under

the care of any physician within two years, unless as stated in previous line except none."

Dr. Cleveland testified that he treated the deceased in the winter of 1902 at Hewey's home for a bad cold or grippe. He also testified that subsequent to this treatment and prior to the making of the first application, on October 18, 1902, he treated Hewey at his office for liver disease. The defendant contended that the answers to questions 5 and 6 in the second application were fully authorized by the statements made by Hewey in answer to questions 6 and 7 in the first application and that the facts testified to by Dr. Cleveland, if true, constituted a breach of the warranty contained in the second application as to the truth of the facts therein stated. The plaintiff contended that the answers to questions 5 and 6 in the second application were not authorized by the facts stated in the first application and hence were not the answers of the deceased and were not binding upon him or upon this plaintiff.

Upon the comparative identity in meaning of the two applications, the court having analyzed them charged the jury as follows: "I think gentlemen, upon comparing these two applications, I shall instruct you thus: — If you find it to be true as Mrs. Hewey says, that that answer with the others was agreed to be filled in from the old application and if having the old application, they attempted to fill it in from that, but filled it in in the way which they did, that it was an unauthorized answer, that is to say, there is nothing in the former application with reference to Dr. Cleveland which made this answer true or proper and therefore it was not his answer. It was the answer which the agent put in." The answer referred to by the court was number 5 in the second application.

It is to this instruction that the answers in the second application are not warranted from those contained in the first that the defendants particularly object and say, "The court should have instructed the jury that the answers in the second application were fully authorized from those made in the first and that if they were untrue, the plaintiff could not recover." In this class of cases we think it a sound rule of law that an application for life insurance, signed in blank by one desiring insurance and filled in by the company or its agents,

should be construed more favorably to the applicant. Upon this view of the law, the construction of the presiding Justice should be sustained. The question in the first application "name and residence of your usual medical attendant, when and for what have his services been required," and the assertion contained in the second "the following is the name of the physician who last attended me, the date of the attendance and name of the complaint for which he attended me" cannot be fairly construed to mean one and the same thing or to require one and the same answer. If we were to stop right here, the two inquiries might elicit entirely different answers. The "usual medical attendant" might not be "the physician who last attended the applicant." He might be ill, in need of medical attendance, and a variety of causes intervene to make it impracticable or even impossible for him to secure the services of his usual physician and consequently be under the necessity of employing some other physician. If this occasion happened to be the last time he needed medical attendance before making an application for insurance, then it is clear that the last medical attendant was not the usual one. But a fair analysis of the two applications requires us to go further. These questions and answers in the first application in the form of a statement are as follows: My usual medical attendant is Dr. Cleveland,—He attended me nine months ago for a cold,—I have not *consulted* any other physician since childhood for any illness except Dr. Leader four years ago for grippe.

In the second application the applicant is made to say, Dr. Cleveland was the physician who last attended him, the date was February 9, 1902, and the complaint for which he attended him was grippe;—also that he had not been under the *care* of any physician within two years unless as stated in the previous answer.

Now the defendants contend that by the observance of the proper rules of logic to their interpretation the two applications mean precisely the same thing. They say that the first application shows that Dr. Cleveland attended the applicant in 1902 and was the only physician that had attended him for four years as stated in No. 3; if he was the only physician he must necessarily have been the last one, as stated in the second application. Also that the answer numbered

6 that he had not been under the care of any physician for two years was fully authorized by the statement in the first application that Dr. Cleveland's services had been required only for the cold or grippe in the winter and further that he had not even consulted any physician for four years except Dr. Cleveland at the time he had this cold or grippe. If we admit that by the defendant's process of reasoning the above conclusions may be drawn, yet, is the applicant to be subjected to the test of reasoning by the process of induction and deduction in order to make the application made by the company agree with the application made by himself?

But the logical conclusions are not necessarily true. A different conclusion may also be drawn. In the first application he says he has not consulted any physician. In the second, filled in by the agent, he is made to say: I have not been under the care of any other physician, etc. "Consulting" a physician and being "under the care" of a physician, not only in the technical use of the terms but to the common mind may mean very different things. A man may consult a physician without ever being under his care at all. To consult is defined "to apply to for direction or information; "ask the advice of; as to consult a lawyer, to discuss something together; to deliberate." Care is defined, "responsibility, charge or oversight, watchful regard and attention." Hence the first answer might, in the mind of the applicant, be correct, and the second one not. We think the most that can be said with respect to the identity of the two applications is that if the applicant had read or been personally interrogated with respect to the questions and answers in the second application, he might have answered the same as he did in the first and he might have answered in an entirely different way. The answers in the second application cannot therefore be said to be such necessary inferences from those contained in the first as to be regarded as the statement of the applicant and therefore binding upon him. In order to defeat the claim of the person insured, who has paid the consideration required for the insurance received, upon the ground that the insured made misrepresentations as to the risk in his application, it is incumbent upon the company to show that the misrepresentations were his and not mistakes or misrepresentations of its own. When an

insurance company or its agents undertake to fill in an application from a previous application or statement made by the applicant, it should be held to the strictest adherence to the terms of such application or statement made, otherwise it would be in the power of the company or its agents in such a case to fraudulently destroy the legal status of the policy so obtained.

Exceptions overruled.

ADA I. RAYMOND *vs.* PORTLAND RAILROAD COMPANY.

Cumberland. Opinion December 6, 1905.

Street Railways. Negligence. "Great Care." "Due Care." "Ordinary Care." Reasonable Care.

The plaintiff was a passenger on one of the street railway cars of the defendant. There was evidence tending to show that the car, an open one, had come to a stop near the point of intersection with the tracks of a steam railroad, that it was the practice and custom of the defendant to stop there, but that the only purpose of the stop was to safeguard the crossing of said tracks, it not being a place where a stop was regularly made for passengers to get off or on the defendant's cars, although it was also in evidence that passengers did sometimes get off or on the cars while so stopping. There was likewise evidence tending to show that while the car was stopping at said point of intersection that the plaintiff undertook to alight therefrom but that while she was in the act of alighting and before she had reasonable time to alight that the car was started whereby she was thrown and injured.

At the trial of this action, the presiding Justice, at the request of the plaintiff's counsel, gave the following instruction to the jury: "If you believe that this was the crossing of tracks, and that under the practice and custom of the company, the cars stop at this crossing and believe that people get on or off at this place, while cars are stopped, then it was the duty of the conductor in charge of the car to ascertain for himself whether passengers wanted to get on or off; and if he could by great care discover who wanted to get off, whether they wanted to get off, that would be equivalent to actual knowledge on the subject."

This instruction imposed upon the conductor the duty of exercising "great care" to discover if anyone wanted to get off the car. It is not modified by any other clause in the charge but rather emphasized by a statement

made immediately before it that "the railroad was bound to use greater than ordinary care."

The law requires that the conductor should have acted only in the exercise of reasonable care. The phrase "great care" as used in the instruction was without limitation. It was left entirely to the jury to say what meaning should be attached to it. Under it the jury may have said that it was the duty of the conductor to inquire of every passenger upon his car if they wished to alight and that if he failed to do this in the exercise of the duty requiring "great care," he was negligent. Or if so strenuous a duty as to inquire of each passenger was not deemed necessary in the exercise of "great care," the jury might have found that some other burdensome duty was imposed by the instruction given.

The rule of law now generally recognized by the great weight of authority is that the legal measure of duty, except that made absolute by law, with respect to almost all legal relations, is better expressed by the phrases "due care," "reasonable care," or "ordinary care," terms used interchangeably. Reasonable care may be defined as such care as an ordinarily reasonable and prudent person exercises with respect to his own affairs, under like circumstances. In this definition it is the phrase "under like circumstances" that imposes upon the term "reasonable care" both its limitations and its elasticity. The term is a relative one; the same act under one set of circumstances might be considered due care and under different conditions a want of due care, or negligence. Therefore the duty intended by the use of the phrase "ordinary care," is always referable to the circumstances and conditions, under which the act or omission to act is required to be performed. These limit or define the scope of the situation within which the performance of the same act may be called reasonable or unreasonable.

Held: That the exceptions to the requested instruction given as aforesaid must be sustained.

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

Action on the case for negligence to recover for personal injuries to the plaintiff while a passenger on one of the cars of the defendant, a street railway corporation. Tried at the October term, 1904, Supreme Judicial Court, Cumberland County. Verdict for plaintiff for $969. Defendant excepted to a certain instruction given by the presiding Justice at the request of the plaintiff's counsel, and also filed a general motion for a new trial. Exceptions sustained. Motion not considered.

The case appears in the opinion.

Memorandum. This case was argued at the June term, 1905, of the Law Court at Portland. One of the Justices sitting at said

term did not sit in this case being disqualified under the statute by reason of having ruled therein at nisi prius.

Charles E. Gurney, for plaintiff.

Libby, Robinson, Turner & Ives, for defendant.

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

SPEAR, J. This is an action on the case for negligence to recover for personal injuries to the plaintiff while a passenger on one of the cars of the defendant, a street railway corporation. The case comes up on motion and exceptions. It was alleged in the plaintiff's declaration and evidence was introduced by the plaintiff tending to show that the defendant's car had been brought to a full stop near the tracks of a steam railroad, that the car was started again while the plaintiff was in the act of alighting therefrom, and before she had had sufficient and reasonable time to alight, whereby she was thrown and injured.

The defendants offered evidence tending to show that the car, an open one, had come to a stop near the point of intersection with the tracks of the steam railroad; that it was the practice and custom of the defendant to stop there, but the only purpose of the stop was to safeguard the crossing of the said tracks, it not being a station or place where a stop was regularly made for passengers to get off the defendant's cars, although it was in evidence that passengers did sometimes get off or on the defendant's cars there; that throughout the stop the conductor of the car remained upon the car and was standing all the time on the running board on plaintiff's side of the car but a few feet behind her and with his attention upon his passengers of whom he had an unobstructed view; that another employee of the defendant left the car and went forward to see if the crossing could be made in safety, and upon finding the way clear gave the signal for the car to proceed; that the plaintiff never made any movement to leave her seat until the car was again in motion after having made it stop to safeguard the crossing of the tracks, when without giving any indication by signal or otherwise to the conductor or anybody else, that she desired or intended to alight, she suddenly slid down from

her seat to the running board and thence off the car while it was in motion and gathering headway to cross the tracks of the steam railroad. The report of the evidence shows that the contention of the respective parties as above set forth is correctly stated.

Upon these contentions, at the request of the plaintiff's counsel, the presiding Justice gave the following instruction to the jury: "If you believe that this was the crossing of tracks, and that under the practice and custom of the company, the cars stop at this crossing and believe people get on or off at this place, while cars are stopped, then it was the duty of the conductor in charge of the car to ascertain for himself whether passengers wanted to get on or off; and if he could by great care discover who wanted to get off — whether they wanted to get off, that would be equivalent to actual knowledge on the subject." To this instruction the defendant seasonably excepted. The defendant also requested certain instructions but in view of the conclusion necessarily arrived at with respect to the above instruction, it becomes unnecessary to consider this request by the defendant. We think the exception must be sustained. The instruction imposed upon the conductor the duty of exercising "great care" to discover if any one wanted to get off the car. This instruction is not modified by any other clause in the charge but rather emphasized by the statement made immediately before it that "the railroad was bound to use greater than ordinary care."

We think the law required that the conductor should have acted only in the exercise of reasonable care. The phrase "great care" as used in the instruction was without limitation. It was left entirely to the jury to say what meaning should be attached to it. They may have said that it was the duty of the conductor to inquire of every passenger upon his car if they wished to alight and that if he failed to do this in the exercise of the duty requiring "great care," he was negligent. Or if so strenuous a duty as to inquire of each passenger was not deemed necessary in the exercise of "great care," the jury might have found that some other burdensome duty was imposed by the instruction given.

The rule of law now generally recognized by the great weight of authority is that the legal measure of duty, except that made

absolute by law, with respect to nearly all legal relations, is better expressed by the phrases "due care," "reasonable care" or "ordinary care," terms used interchangeably. Reasonable care may be defined as such care as an ordinarily reasonable and prudent person exercises with respect to his own affairs, under like circumstances. In this definition it is the phrase "under like circumstances" that imposes upon the term "reasonable care" both its limitations and its elasticity. The term is a relative one; that is, the same act under one set of circumstances might be considered due care, under different conditions a want of due care or negligence. Therefore the duty intended by the use of the phrase "ordinary care," is always referable to the circumstances and conditions, under which the act or omission to act is required to be performed. These limit or define the scope of the situation within which the performance of the same act, may be called reasonable or unreasonable. The same rule is now generally held to apply to employment in the most perilous places and in the manipulation and use of the most dangerous agencies. A person may be engaged upon a most treacherous machine, yet the employer is held only to the exercise of reasonable care in explaining the hazard connected with the machine and the operation of it. One may employ the use of dynamite or any other powerful explosive and yet he is responsible only for due care. But in each of these cases due care, under the flexibility of the definition given, might, in the minds of the jury or of the court, require the exercise of the highest possible care which human effort could bestow; but yet it would be in the end only such care as an ordinarily prudent and careful man would exercise under like circumstances with respect to his own affairs.

The A. and E. Enc. of Law, 2nd Ed. Volume 21, page 459, under the heading, Degrees of Negligence, summarizes the authorities as follows: "The theory that there are three degrees of negligence, described as slight, ordinary, and gross, was introduced into the common law from some of the commentators of Roman law. While not in frequent use references are still found in judicial discussions of the subject to the classification of negligence into degrees, the tendency of modern authority and the weight of the best considered cases are now opposed to this view, holding that in every case, negligence,

however described, is merely a failure to bestow the care and skill which the situation demands and hence it is more accurate to call it simply negligence. Some decisions even go further and declare that the classification of negligence into degrees is a matter of pure speculation and of no practical consequence; that it is useless and tends to confusion, that in fact it is unsafe to base any legal decision on distinction in the degrees of negligence."

In *Steamboat New World* v. *King*, 16 Howard, 262, Mr. Justice Curtis, in delivering the opinion of the court, said: "The theory that there are three degrees of negligence prescribed by the terms slight, ordinary and gross has been introduced into the common law from some of the commentators of the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield until there are so many general exceptions that the rules themselves can scarcely be said to have a real operation. Then he proceeds to quote from *Storer* v. *Gowan*, 18 Maine, 177, as follows: "How much care will in a given case relieve a party from the imputation of gross negligence or what omission will amount to the charge, is necessarily a question of fact, depending upon a great variety of circumstances which the law cannot exactly define."

In *Perkins* v. *New York Central Railroad Company*, 24 N. Y. 196, the court say: "I think with Lord Denman, who, in *Hinton* v. *Dibbin*, 2 Q. B. 661, said: "It may well be doubted whether between gross negligence and negligence merely, any intelligent distinction exists."

In *Railroad Company* v. *Lockwood*, 17 Wallace, 382, Mr. Justice Bradley, delivering the opinion of the court, said: "We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence . . . . . And this seems to be the tendency of modern authors."

In *Milwaukee Railroad Company* v. *Ames et al.*, reported in 91 U. S. page 494, the court say: "This court has expressed its

disapprobation of these attempts to fix the degrees of negligence by legal definition. . . . . Some of the highest English courts have come to the conclusion that there is no intelligent distinction between ordinary and gross negligence. . . . . "Gross negligence is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence'; but after all it means the absence of the care that was necessary under the circumstances." See also *Rowse* v. *Downs*, 5 Kan. App. 549; *McPheters* v. *Hannibal, etc., R. Co.*, 45 Mo. 22; *Reed* v. *Western Union Tel. Co.*, 135 Mo. 661; *Culbertson* v. *Halliday*, 50 Neb. 229.

It will be here observed that the courts in discussing the above propositions have used the term negligence instead of the word care, to express the measure of duty. But confusion has arisen from regarding "negligence" as a positive instead of a negative word.

For this reason it is usual to express the duty owed in positive terms by stating what constitutes *due care*, rather than in negative terms by stating what constitutes *negligence* which is the unintentional failure to perform a duty implied by law. "Negligence" is the opposite of "due care." Where due care is found, there is no negligence. If there is a want of due care then there is negligence. We are inclined to agree with the great weight of judicial opinion that the attempt to divide negligence, or its opposite due care, into degrees will often lead to confusion and uncertainty. It seems to us therefore that the measure of duty, owed by persons in the discharge of their mutual relations, would be better expressed by the use of the term negligence, if one prefers a negative definition, or due, reasonable or ordinary care, always having reference to the circumstances and conditions with regard to which the terms are used. In view of the above conclusion it becomes unnecessary to consider the motion.

Exceptions sustained.

FREDERICK A. POWERS et als. *vs.* LOUISE J. SAWYER.

Aroostook. Opinion December 9, 1905.

Petition for Partition. Sale for Non-payment of Taxes. State Treasurer's Deed. Insufficient Description. No Cloud Upon Title.

A description in a deed from the State Treasurer, whereby a portion of land in a Township containing twenty-two thousand acres was attempted to be sold for the non-payment of taxes, as follows: "4520 acres in 13, Range 7, W. E. L. S.," is utterly insufficient to pass any title to any portion of the Township, and is insufficient to create any cloud upon the title of a tenant in common who seeks partition of the Township either in equity or by petition for partition.

On exceptions by defendant. Overruled.

Petition for partition. At the hearing before the court at nisi prius, judgment for partition was ordered and commissioners were appointed. Defendant excepted to certain rulings made by the presiding Justice. Exceptions overruled.

PETITION FOR PARTITION.

To the Honorable Justice of the Supreme Judicial Court next to be held at Caribou, in and for the County of Aroostook, on the first Tuesday of December next.

Respectfully represents Frederick A. Powers, Simon Friedman and Jennie Wilson, all of Houlton, and John P. Donworth, of Caribou, all in said County of Aroostook, and Elaine Wilson, also of said Houlton, an infant under the age of twenty-one years who joins in this petition by said Jennie Wilson, her guardian, that they are seized in fee simple and as tenants in common of and in certain real estate situated in said County of Aroostook, to wit: Township No. thirteen (13) in the seventh Range of Townships west of the east line of the State of Maine, excepting the Public Lots, the Township containing twenty-two thousand forty acres, exclusive of the Public Lots which have been set out and are described as follows:

Commencing at a cedar stake on the north line of the Township one mile and a half east from the northwest corner and running south

one mile to a cedar stake; thence east five hundred rods to a hemlock tree marked "PUBLIC LOT": thence north one mile to a cedar stake and stones on the north line of the Township; thence west on said north line five hundred rods to the point begun at, according to plan of said Township designated as plan No. 17 and recorded in the Land Office of the State of Maine. That your petitioners are the owners of four hundred fifty-one undivided five hundred fifty-first (451-551) parts thereof with Louise J. Sawyer of Bangor, in the County of Penobscot and said State, who is seized of one hundred undivided five hundred fifty-first (100-551) parts thereof, and who also owns the pine and spruce timber which was standing on said Township December 3, A. D. 1850; and that your petitioners desire to hold their undivided interests in severalty, that is, they desire to hold their undivided interests separately from, and independently of the said Louise J. Sawyer.

WHEREFORE, they pray that notice to all persons interested, to wit: the said Louise J. Sawyer, may be ordered; that commissioners may be appointed; that the interests of your petitioners may be set out to them to be held in fee and in severalty, that is, in common and undivided as among themselves, but separately from, and independently of the interest of the said Louise J. Sawyer.

HOULTON, MAINE, October 1, A. D. 1903.

FREDERICK A. POWERS,
SIMON FRIEDMAN,
JENNIE WILSON,
JOHN P. DONWORTH,
ELAINE WILSON,
By JENNIE WILSON, Guardian.

DEED.

STATE OF MAINE TO MILTON S. CLIFFORD.

To all Persons to whom These Presents may come. I, F. M. Simpson, Treasurer of the State of Maine Send Greeting. Whereas, in obedience to the provisions of Chapter 6, Section 73 of the Revised Statutes in relation to the collection of taxes in unincorporated places,

the said Treasurer caused to be published a notice containing a list of all tracts of land lying in unincorporated places which have been forfeited to the State for State taxes or County taxes, which have been certified according to law to the Treasurer of State, together with the amount of such unpaid taxes, interest and costs on each parcel and that the same would be sold at the Treasury office in Augusta, on the twenty-eighth day of September, A. D. 1899, at eleven o'clock a. m. in the State paper and in a paper in the County where said lands are situated (where any such was published) three weeks successively before the day of sale and within three months thereof and Whereas said list contains the following described parcel of land so forfeited situate in the County of Aroostook viz: 4520 acres in 13, Range 7, W. E. L. S. upon which there was due and payable for taxes, interest and cost the sum of Thirty-eight and 6-100 Dollars including its proportion of the State tax for 1897 and of the County tax for the same year certified to the Treasurer of State according to law. And Whereas, on said twenty-eighth day of September, 1899, at eleven o'clock a. m., at the Treasury Office in Augusta, said Treasurer did sell all the interest of the State in said premises to Milton S. Clifford at auction for the sum of Forty-one 0-100 Dollars he being the highest bidder therefor and his bid being a price not less than the full amount due thereon for such unpaid State and County taxes, interest and cost of advertising as required by law. Now know Ye That I, F. M. Simpson, in my said capacity in consideration of the premises and of the payment of the said sum of Forty-one 0-100 Dollars, the receipt whereof is hereby acknowledged do hereby sell, and convey to him the said Milton S. Clifford, his heirs and assigns forever, all the interest of the State by virtue of said forfeiture in and to said premises so sold as aforesaid. To Have and To Hold the same, with all the privileges thereof to him the said Milton S. Clifford, his heirs and assigns forever subject to all taxes assessed thereon subsequent to the year eighteen hundred and ninety-seven, provided however that any owner or part owner thereof shall have the right to redeem his proportion of the same at any time within one year, by paying or tendering to the purchaser or treasurer of State, his proportional part of what the said Milton S. Clifford paid for the same

with interest at the rate of twenty per cent per annum and the cost of conveyance as provided in Chapter 6, Section 75 of the Revised Statutes.

In Witness Whereof, I, the said F. M. Simpson in my said capacity have hereunto set my hand and seal this twenty-eighth day of September in the year of our Lord one thousand eight hundred and ninety-nine.

Signed, sealed and delivered in presence of

D. W. EMERY F. M. SIMPSON (L. S.)
State Treasurer.

(L. S.)

Kennebec, ss. Oct. 25, A. D., 1899. Personally appeared the above named F. M. Simpson and acknowledged the foregoing instrument by him signed as Treasurer of State as aforesaid to be his free act and deed.

Before me,
D. W. EMERY, Justice of the Peace.

DEED.

MILTON S. CLIFFORD TO LOUISE J. SAWYER.

Know all Men by these Presents, that I, Milton S. Clifford of Bangor, County of Penobscot, State of Maine, in consideration of One Dollar and other considerations paid by Louise J. Sawyer of said Bangor the receipt whereof is hereby acknowledged, do hereby remise, release, sell, and forever quitclaim unto the said Louise J. Sawyer, her heirs and assigns forever, all my right, title and interest in and to a certain parcel of land situated in the County of Aroostook and known as Township thirteen (13) Range Seven (7) W. E. L. S. Said parcel being 4520 acres as per deed of F. M. Simpson, Land Agent to me dated Sept. 28, 1899.

To Have and to Hold the above described premises with all the privileges and appurtenances thereof, to the said Louise J. Sawyer, her heirs and assigns forever.

In Witness Whereof, I, Milton S. Clifford have hereunto set my

hand and seal, this 29th day of March in the year of our Lord one thousand nine hundred.

Signed, sealed and delivered in presence of

MILTON S. CLIFFORD (L. S.)

Penobscot, ss. March 29, 1900. Personally appeared the above named Milton S. Clifford and acknowledged the above instrument to be his free act and deed.

Before me, SAMUEL F. HUMPHREY, Justice of the Peace.

Both of the foregoing deeds were duly recorded.

EXCEPTIONS.

"And now at the hearing for partition in the above entitled action, and before judgment, the defendant comes and files this bill of exception, and prays that the same may be allowed.

This is a petition for partition of certain real estate in the County of Aroostook, to wit: Township No. 13, in the Seventh Range of Townships, west of the east line of the State of Maine, excepting the public lots.

To entitle the claimants for partition, they must show a clear, legal title.

The defendant offered to show that the complainants did not have a clear, legal title to the demanded premises by reason of a cloud on the title by reason of an existing sale of this land for taxes, and in support of this contention, produced a deed from the State of Maine to M. S. Clifford, and from said M. S. Clifford to the defendant, Louise J. Sawyer.

The court ruled that these deeds were not sufficient to show any cloud on the title of petitioners, and to this ruling, the defendant being aggrieved, asked, and the court allowed an exception thereto.

To the foregoing ruling, the defendant excepts and prays that the exception may be allowed."

The case is also stated in the opinion.

E. C. Ryder, for plaintiffs.

H. L. Fairbanks, for defendant.

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

WISWELL, C. J. This is a petition for partition of a township of land in Aroostook County, described in the petition as follows: "Township No. thirteen (13) in the seventh Range of Townships west of the east line of the State of Maine, excepting the Public Lots, the Township containing twenty-two thousand forty acres, exclusive of the Public Lots which have been set out," and which are described in the petition.

At the hearing before the court at nisi prius, judgment for partition was ordered and commissioners were appointed. The only question raised by the exceptions, upon which the case comes to the law court, is as to the effect of two deeds offered by the respondent, one from the State Treasurer, attempting to convey land claimed to have been forfeited by the non-payment of taxes, and the other a quitclaim deed to the respondent from the grantee in the first deed.

The position of the respondent is that the petitioners are not entitled to a judgment for partition unless they can show a clear legal title to the proportion of the premises claimed to be owned by them, invoking the rule established where a partition is sought in equity, *Nash* v. *Simpson*, 78 Maine, 142; *Pierce* v. *Rollins*, 83 Maine, 172, although this is, as we have seen, a petition for partition and not a bill in equity brought for partition; and that the deed from the State Treasurer is at least sufficient to raise a doubt as to the title of the petitioners, or to create a cloud upon their title.

A sufficient answer to this position of the respondent is a reference to the description of the premises attempted to be sold and conveyed as forfeited from non-payment of taxes. The only description contained in this deed is as follows: "4520 acres in 13, Range 7, W. E. L. S." The township containing, as we have seen over twenty-two thousand acres exclusive of the Public Lots. It has been uniformly held in numerous decisions of this court that such a description in a deed is utterly ineffectual to pass any title to any specific tract or acre in the Township or to convey any title whatever. *Larrabee* v. *Hodgkins*, 58 Maine, 412; *Griffin* v. *Creppin*, 60 Maine,

270; *Moulton* v. *Egery*, 75 Maine, 485; *Skowhegan Savings Bank* v. *Parsons*, 86 Maine, 514; *Millet* v. *Mullen*, 95 Maine, 400. A deed with such a description is insufficient to create any doubt or cast any cloud upon the petitioners' title, since a mere inspection of it shows upon its face that it conveyed no title. *Briggs* v. *Johnson*, 71 Maine, 235. The deed from the grantee in this last deed to the respondent contains a similar description and is equally insufficient to pass any title. The ruling of the Judge at nisi prius, that these deeds were ineffectual to pass any title and insufficient to create any cloud upon the petitioners' title, was correct.

Exceptions overruled.

JOHN C. HEINTZ et al. *vs.* FRANCIS LEPAGE et al.

Penobscot. Opinion December 8, 1905.

Intoxicating Liquors. Same Defined. Action for Price. Vendor's Non-knowledge of Purpose for Which Liquors are Purchased.
R. S., c. 29, § 64.

Section 40 of Chapter 29, R. S., reads as follows: "No person shall at any time, by himself, his clerk, servant or agent, directly or indirectly, sell any intoxicating liquors, of whatever origin, except as hereinbefore provided; wine, ale, porter, strong beer, lager beer and all other malt liquors, and cider when kept or deposited with intent to sell the same for tippling purposes, or as a beverage, as well as all distilled spirits, are declared intoxicating within the meaning of this chapter; but this numeration shall not prevent any other pure or mixed liquors from being considered intoxicating."

Held: That any liquor containing alcohol, which is based on such other ingredients or by reason of the absence of certain ingredients that it may be drank by an ordinary person as a beverage and in such quantities as to produce intoxication, is intoxicating liquor. If its composition is such that it is practicable to commonly and ordinarily drink it as a beverage and drink it in such quantities as to produce intoxication, then it is intoxicating liquor within the meaning of the statute.

An action for the price of intoxicating liquors sold contrary to the laws of this state, cannot be maintained in the courts of this state.

It is immaterial whether the plaintiffs had any knowledge for what purpose the liquors were purchased if they were in fact intoxicating liquors and intended by the purchasers for illegal sale in this state.

On motion by defendants. Sustained. Verdict set aside. New trial granted.

Assumpsit on account annexed to recover $770 for "Paragon Malt Extract" sold and delivered by the plaintiffs, residents of the State of New York, to the defendants, residents of Maine, October 21st, November 5th, and December 19th, 1903, the entire quantity being 60 barrels containing 800 dozen or 9600 bottles. Tried at January term, 1905, Supreme Judicial Court, Penobscot County. Plea, the general issue with a brief statement alleging "that the claim or demand in the above entitled case is wholly for intoxicating liquors sold in violation of chapter 29, section 64, Revised Statutes of Maine, 1903, and in violation of chapter 27, section 56, Revised Statutes of Maine, 1883, then in force at the time said liquors were purchased."

Verdict for plaintiffs for $770. Defendants then filed a general motion for a new trial.

The case appears in the opinion.

Bertram L. Fletcher, for plaintiffs.

H. H. Patten, for defendants.

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

SPEAR, J. This is an action of assumpsit to recover the sum of $770 on the following account. 1903, October 21st, to Mdse. $210. Nov. 5, to Mdse. $420. Dec. 19, to Mdse. $210. $840. The first charge in this account was for 20 barrels, 200 dozen Paragon Malt Extract. The second charge was for 40 barrels, 400 dozen Paragon Malt Extract. The third charge was for 20 barrels, 200 dozen Paragon Malt Extract. In other words, from the 21st day of October, 1903, to Dec. 19th, 1903, a little less than two months, the plaintiffs in this case sent to the defendants at Millinocket, Maine, 60 barrels containing 800 dozen, 9600 bottles of Malt Extract and

claim that it was sold and delivered for medicinal use by the inhabitants of this village. The defendant plead the general issue to the plaintiffs' declaration and for a brief statement in defense claimed "that the goods they purchased were intoxicating liquors, sold out of this state with the intention that they should be sold in this state in violation of chapter 29, R. S., sec. 64, which reads as follows: 'No action shall be maintained upon any claim or demand, promissory note or security contracted or given for intoxicating liquors sold in violation of this chapter or for any such liquor purchased out of the state with the intention to sell the same or any part thereof in violation thereof; but this action shall not extend to negotiable paper in the hands of a holder for a valuable consideration and without notice of the illegality of the contract.'" The undisputed facts regardless of the testimony of witnesses show conclusively that the plaintiffs knew that these malt extracts were intoxicating. We have no doubt that they were compounded as a subterfuge to avoid the effect of the prohibitory law of this state. The claim that they intended the sale of nine thousand six hundred bottles of this "Extract," for medicinal use only, in the village of Millinocket and vicinity, is utterly absurd. The quantity alone under the circumstances is sufficient to convince us that these extracts were intended to be sold as a beverage and not as a medicine. The other evidence in the case if any was needed thoroughly confirms this view. The plaintiffs' salesman admits that he told the defendants "so long as they sold malt extract as a medicinal preparation with the cork intact that it would be selling it just as safe as anything that they had in their store." Why this advice if the agent did not know that this preparation was intoxicating? What difference could it make if it was not intoxicating whether the cork was intact or not? But this is not all, six witnesses testified without contradiction that they drank these very goods, and five of them that they became intoxicated on them, and the other that he had seen many people get drunk on them.

It also appeared by the testimony of Prof. Knight, called by both the plaintiffs and defendants, that an analysis of several bottles of this extract showed that it contained from 4 39-100 % to 5 5-100 % of alcohol. The defendants were also compelled to pay a United

States internal revenue tax. This liquor was sold by the bottle and glass and the testimony shows that one person could drink two or three bottles at a time. From the testimony we should infer that it was drank practically the same as lager beer and ale. Over three hundred bottles were sold on one Fourth of July. The Justice presiding charged the jury as follows, with respect to what constituted intoxicating liquors: "So I repeat, any liquor containing alcohol, which is based on such other ingredients or by reason of the absence of certain ingredients that it may be drank by an ordinary person as a beverage and in such quantities as to produce intoxication, is intoxicating liquor. If its composition is such that it is practicable to commonly and ordinarily drink it as a beverage and to drink it in such quantities as to produce intoxication, then it is intoxicating liquor." Under this definition, which is entirely accurate, and the evidence in this case, we hardly see how any question can be raised as to the intoxicating quality of the malt extract for which the plaintiffs seek to recover. The evidence indisputably shows that it could be drank in any quantity up to two or three bottles and by everyone who wanted to drink it and that it produced intoxication. It seems to us very clear that the plaintiffs must, when they sold these large invoices of goods, have understood the purpose for which they were bought.

It is, however, immaterial whether the plaintiffs had any knowledge for what purpose these extracts were purchased if they were in fact intoxicating liquors and intended by the purchasers for illegal sale in this state. *Knowlton in review* v. *Doherty*, 87 Maine, 518.

Motion sustained. Verdict set aside. New trial granted.

FLAVEL M. WYMAN *vs.* PISCATAQUIS WOOLEN COMPANY.

Somerset. Opinion December 9, 1905.

Complaint for Flowage. Insufficient Service. How Service Should be Made. R. S., c. 84, § 132; c. 90, § 3; c. 94, § 6.

A complaint for flowage, not inserted in a writ of attachment, may, under the statute, be presented to the court in term time or be filed in the office of the clerk in vacation, but before it can be served there must be an order of service by the court in term time or by some justice thereof in vacation. The delivery of a copy of the complaint, attested by the clerk of court, by a sheriff to the respondent, without such an order, is not a sufficient service.

On report. Complaint dismissed.

Complaint for flowage of land in Mayfield, Somerset County. On the second day of the term, to which the complaint was made returnable, the defendant appeared specially and filed a motion to dismiss the complaint for want of legal service. Hearing on motion had at December term, 1904, of the Supreme Judicial Court, Somerset County. By agreement the case was reported to the Law Court and that court "to enter such judgment as the legal rights of the parties may require."

The case appears in the opinion.

J. S. Williams, for plaintiff.

D. D. Stewart and David R. Straw, for defendant.

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

WISWELL, C. J. This is a complaint for flowage. Upon the second day of the term to which the complaint was made returnable, counsel for respondent appeared specially and filed a motion that the complaint be dismissed for want of legal service. There was no officer's return of service of any kind upon the complaint, but these facts as to the manner in which service was made are admitted. The

complaint was filed in the office of the clerk of this court for Somerset County in vacation, a copy thereof was made by the clerk, certified by him as such and returned by him to the counsel for the complainant with the original complaint, the original and certified copy were then given by complainant's counsel to a deputy sheriff for service and the deputy sheriff gave the copy to the treasurer of the respondent corporation thirty days before the return term named in the complaint. The complaint was not inserted in a writ of attachment and there was no order of notice by the court in term time nor by any Justice thereof in vacation.

Was this a sufficient service of a complaint for flowage? We think not. The statute in relation to the commencement of a proceeding of this nature and the service of the complaint is as follows: "The complaint may be presented to the court in term time, or be filed in the clerk's office in vacation; and the proper officer shall serve the same, fourteen days before the return day, on the respondent, by leaving a copy thereof at his dwelling house, if he has any in the state; otherwise, he shall leave it at the mill in question, or with its occupant; or the complaint may be inserted in a writ of attachment and served by summons and a copy." R. S., c. 94, sec. 6.

What is the purpose of this requirement of the statute, that the complaint, if not inserted in a writ, should be presented to the court in term time, or filed in the office of the clerk in vacation? Clearly, we think, that the court in term time may fix the return term and order service of the complaint upon the respondent; or that a Justice of the court, in vacation, may make such an order. The Justices of the Supreme and Superior courts having authority under R. S., c. 84, sec. 1, to order notice concerning any civil proceeding in term time or vacation. When such a complaint is inserted in a writ of attachment, the writ contains an order, authorized by statute and signed by the clerk of the court, directed to the proper officer, commanding the service of the process, and the summons contains an order commanding the respondent to appear and answer at the time named. Without such an order, contained either in the writ and summons or in the special order of court, or of some Justice thereof in vacation, there is no command to a defendant or respondent to appear and defend, and

this command is not to be given to a defendant by a plaintiff but by the court at the instance of the plaintiff.

Unless authorized by statute in direct terms, or by clear implication, the complaint or petition in any civil proceeding should have thereon an order of court as to service before it can be served. In a petition for partition, for instance, authority for service without an order of court is given by the statute in direct terms. R. S., c. 90, sec. 3. But in that section the petition is filed with the clerk in order that the clerk, as provided by the section, may make a certified copy of the petition, which is to be served, but the section in regard to a complaint for flowage, above quoted, contains no authority for the clerk to make a certified copy of the complaint for service, and the requirement that the complaint may be filed in the clerk's office is not for this purpose. Neither does this statute, in our opinion, by implication, authorize service without an order therefor.

This insufficient service might have been called to the attention of the court in any way, however informal, and at any time. An inspection of the complaint itself by the court would have shown no return of any service, and even after the officer had been allowed to make a return in accordance with the facts, such return would have failed to show a sufficient service. The complaint, therefore, should be dismissed for want of service, with costs for the respondent, since although the respondent only appeared by counsel for the special purpose of calling the attention of the court to the want of service, it was still a party, and the prevailing party, under R. S., c. 84, sec. 132, as decided in *Thomas* v. *Thomas,* 98 Maine, 184.

The court is asked to decide whether or not, if the respondent's motion to dismiss should prevail, the complainant may be allowed to amend. We do not see how the question of amendment arises. We have not considered the sufficiency of the complaint, although a question concerning it was raised by counsel for the respondent, but as the complaint must be dismissed for want of service, it is unnecessary to decide this question and no question of amendment is left.

Complaint dismissed for want of service with costs to the respondent.

FRANK W. GOODWIN, by next friend,

vs.

INHABITANTS OF CHARLESTON.

Penobscot. Opinion December 11, 1905.

Infant. Tuition Voluntarily Paid. Infant Cannot Maintain an Action Therefor. Contract. R. S., c. 15, § 63.

Under the provisions of section 63, chapter 15, R. S., a minor, residing with his father, who never undertook to make any contract in his own behalf respecting his tuition at a school attended by him, and who personally incurred no legal indebtedness, made no expenditure and sustained no loss, cannot maintain an action against a town to recover the amount voluntarily paid as tuition for him to such school, by his father.

On exceptions by plaintiff. Overruled.

Action to recover the sum of $13.50 paid by the plaintiff's father to the Higgins Classical Institute as tuition for the plaintiff, a minor residing with his father, as a pupil in said Institute during the fall and winter terms, 1903 and 1904.

The case is fully stated in the opinion.

Taber D. Bailey, for plaintiff.

P. H. Gillin, for defendant.

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

WHITEHOUSE, J. It is provided by section 63, chapter fifteen of the revised statute, that "any youth who resides with a parent or guardian in any town which does not support a free high school giving at least one four years' course properly equipped and teaching such subjects as are taught in secondary schools of standard grade in this state may, when he shall be prepared to pursue such four years' course, attend any school in the state which does have such a four years' course and to which he may gain entrance by permission of those having charge thereof, *provided* said youth shall attend a school or schools of standard grade which are approved by the state superintendent of public schools. In such case the tuition of such youth,

not to exceed thirty dollars annually for any one youth, shall be paid by the town in which he resides as aforesaid."

The plaintiff was a minor of the age of seventeen years residing with his father in the defendant town of Charleston, which did not maintain a free high school giving at least one four years' course. During the school year 1902-3, the plaintiff attended the Higgins Classical Institute in Charleston, a school of standard grade approved by the State Superintendent of Schools. According to the practice prevailing in that institution, he was permitted to enter and pursue his studies through this freshman year without any certificate of qualification from the school committee of the town. On the twenty-sixth day of December, 1903, the plaintiff took an examination before the school committee of the town, but failed to receive from that board a certificate of qualification to enter Higgins Classical Institute. Notwithstanding this fact, by permission of those having charge of the Institute, the plaintiff entered upon his second or sophomore year in that school and maintained "good rank" in his studies during the fall and winter terms of that year. Although requested, the town officers refused to pay the plaintiff's tuition for those two terms, and the amount was thereupon paid to the Institute by the plaintiff's father. This action was brought in the name of the plaintiff by his next friend to recover from the town the amount thus voluntarily paid by his father. The presiding Justice ruled that this action in the name of the plaintiff was not maintainable and ordered judgment for the defendant. The case comes to this court on exceptions to this ruling.

It is the opinion of the court that the ruling of the presiding Justice was correct. Whether or not under the provisions of the statute above quoted, the Higgins Classical Institute could have maintained an action to recover the tuition of a pupil who was thus permitted to enter the school without a certificate of qualification from the school committee, if the amount had not been paid by the pupil's father, and whether under the same circumstances the father could have maintained an action against the town in his own name for the tuition thus paid by him, are questions not now before the court. The only question now presented for determination is whether this action

brought in the name of the pupil himself by his next friend, can be maintained to recover from the town the amount of the tuition voluntarily paid to the Institute by his father, and our conclusion is that the situation disclosed by the evidence constitutes no legal basis for the plaintiff's action. He was a minor and never undertook to make any contract in his own behalf respecting his tuition at the Institute. He personally incurred no legal indebtedness, made no expenditure, sustained no loss and acquired no right of action. The entry must therefore be,

Exceptions overruled.

WILLIAM H. GLOVER et al.,

vs.

CLARA E. O'BRIEN AND TRUSTEE.

Knox. Opinion December 11, 1905.

Pleading. Covenant Broken. Declaration. What Declaration Must Allege. Assignment of Breaches. Plaintiff Bound by Assignment in Declaration. When an Assignment is Necessary. When not Necessary. R. S., c. 75, § 11.

It is a well settled general rule respecting the assignment of breaches of covenants, that the plaintiff may allege the breaches generally by simply negativing the words of the covenant, but the exception to this rule is equally well recognized that when such a general assignment does not clearly and necessarily show a breach, special averments are required.

The covenant against incumbrances and that of general warranty comes within the exception, and breaches of those covenants must be specifically set forth, showing, in the case of the former, the nature of the incumbrance complained of and in case of the latter a disturbance of title or possession by a paramount title equivalent to an eviction.

In the case at bar, the covenant that the defendant was lawfully seized in fee of the premises, and the covenant that she had good right to sell and convey the same to the plaintiffs, fall within the rule, and it was only

incumbent upon the plaintiffs to negative the words of the covenants. But the plaintiffs were not content to rely upon such a general assignment of the breaches of these covenants but supplemented it with a specification of the grounds upon which they relied to establish the breach of these covenants, and having elected to do so, they are confined to the ground stated in the specification, and the defendant would be warranted in relying upon the facts thus stated in the specification as the only cause relied upon by the plaintiffs.

The specification in this case sets forth that the defendant before the date of her deed to the plaintiffs by her deed "duly sealed, executed and acknowledged did convey said premises to one Charles Steere of Boston, Massachusetts, and did convey and part with the title, which she, before the deed to said Steere held and possessed in the premises, and that before making her deed to the plaintiffs with the covenants aforesaid, she was not the owner of and had no right to convey said premises." This specification does not allege that the prior deed was either delivered or recorded.

Held: (1). That although all the facts stated in the specification may be true yet if it does not necessarily follow that either of the covenants has been broken, the assignment of breaches is not sufficient.

(2). Assuming that the averment of a conveyance by necessary implication includes a delivery, still the specification is defective because it does not allege that the deed to Steere was recorded.

(3). All that is stated in the specification may be true and yet the plaintiffs may have received a good title, and it does not appear either by express words or necessary implication that any covenant had been broken.

(4). If this specification could be construed to apply also to the general covenant of warranty, it would be equally unavailing. If it does not apply to this covenant there is no specification of the breach of it.

(5). Neither does the declaration specify the nature of the incumbrance alleged to constitute a breach of the covenants against incumbrances, therefore the breaches of these last named covenants are not well assigned.

On exceptions by defendant. Sustained.

Action of debt on an alleged breach of covenant of warranty in a deed of land under seal. At the return term of the writ in this action, the defendant filed a general demurrer to the writ and declaration, which demurrer was joined by the plaintiffs, and heard at a subsequent term. The demurrer was overruled, and thereupon the defendant excepted.

The case appears in the opinion.

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

D. N. Mortland, for defendant and trustee.

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

WHITEHOUSE, J. The plaintiffs declared in a plea of debt that the defendant conveyed to them a certain piece of land by deed of warranty, and "did therein covenant with the plaintiffs, their heirs and assigns, that she was lawfully seized in fee of the premises; that they were free from all incumbrances; and that she had good right to sell and convey the same to the plaintiffs to hold as aforesaid; and did also covenant that she and her heirs would warrant and defend the same to the plaintiffs, their heirs and assigns, against the lawful claims and demands of all persons.

"But the plaintiffs aver that in fact at the time of making and executing said deed the said defendant was not seized in fee of the premises; that they were not free from all incumbrances, and that she did not have good right to sell and convey the same as in her said deed set forth, and that she has not made good her covenant to warrant and defend the same to the plaintiffs against the lawful claims and demands of all persons. But the plaintiffs aver that the said Clara E. O'Brien before that time, viz. on the thirtieth day of April 1884, by her deed of that date on that day duly sealed, executed and acknowledged did convey said premises to one Charles Steere of Boston, Massachusetts, and did convey and part with the title, which she, before the deed to said Steere held and possessed in said premises, and that before making her deed to the plaintiffs with the covenants aforesaid, she was not the owner of and had no right to convey said premises. And so the said Clara E. O'Brien, her covenant aforesaid hath not kept, but hath broken the same; to the damage of the said plaintiffs (as they say), the sum of eight hundred dollars."

To this declaration the defendant filed a general demurrer which was joined by the plaintiffs. The presiding Judge overruled the demurrer, and the case comes to the law court on exceptions to this ruling.

In support of the demurrer the defendant contends in the first place that inasmuch as the distinguishing feature of the action of debt is the fact that it lies for the recovery of money or its equivalent, in sums certain or that can readily be made certain by computation, if

this action is to be deemed one of debt the declaration is wholly insufficient for want of any allegation of an agreement on the part of the defendant to pay any such sum, or of any failure on his part to pay money. Again it is insisted, that if, as the substance of the averments indicates it was intended as an action for covenant broken, it is demurrable, first, because the defendant is summoned to answer in a plea of debt and not of covenant broken, and second because the action is fatally defective for want of a proper and necessary assignment of the breaches of the covenants.

Whether the objection that the plaintiffs declared in a plea of debt instead of covenant broken is open to the defendant upon a general demurrer or can be taken advantage of only by special demurrer, it is unnecessary to determine, for it is the opinion of the court that considered as an action for covenant broken, the declaration does not contain a sufficient allegation of a breach of any of the covenants declared upon.

It is undoubtedly a well settled general rule respecting the assignment of breaches of covenants, that the plaintiff may allege the breaches generally by simply negativing the words of the covenant, but the exception to this rule is equally well recognized that when such a general assignment does not clearly and necessarily show a breach, special averments are required. In *Marston* v. *Hobbs*, 2 Mass. 433, cited with approval, in *Wait* v. *Maxwell*, 4 Pick. 87, and *Blanchard* v. *Hoxie*, 34 Maine, 376, the different covenants are critically distinguished and the reasons for the rule and the exceptions above stated, fully considered and explained. According to the doctrine there laid down, the covenant against incumbrances and that of general warranty come within the exception and breaches of those covenants must be specifically set forth, showing, in the case of the former, the nature of the incumbrance complained of and in case of the latter a disturbance of title or possession by a paramount title, equivalent to an eviction.

On the other hand the covenant that the defendant was lawfully seized in fee of the premises, and the covenant that she had good right to sell and convey the same to the plaintiffs, fall within the rule, and it was only incumbent upon the plaintiffs to negative the words

of the covenants. But it has been seen that the plaintiffs were not content to rely upon such a general assignment of the breaches of these covenants but supplemented it with a specification of the grounds upon which they relied to establish the breach of them.

Their declaration proceeds as with a videlicet to state the particular facts constituting the breach. It avers that the defendant before the date of her deed to the plaintiffs "by a deed" duly sealed, executed and acknowledged, "did convey said premises to one Charles Steere of Boston and did convey and part with the title" which she held in the premises and that before making her deed to the plaintiffs "she was not the owner and had no right to convey said premises."

The plaintiffs were not compelled by the rules of pleading to specify the cause of the breach of these covenants but having elected to do so, they are confined to the ground stated in the specification, and the defendant would be warranted in relying upon the facts thus stated in the specification as the only cause relied upon by the plaintiffs. If therefore the facts stated in the specification may all be true and still it does not necessarily follow that either of these covenants has been broken, the assignment of breaches is not sufficient. 5 Ency. of Plead. & Pr., 369, and cases cited. It will be noticed that the specification does not state that the prior deed was either delivered or recorded. It does allege, however, that the defendant "did convey the premises to one Charles Steere" etc. Assuming that the deed could not operate as a conveyance of the title to Steere without a delivery, and that the averment of the conveyance by necessary implication includes a delivery, still the specification is defective for the reason that it does not allege that the deed to Steere was recorded. It is provided by Rev. Statutes, ch. 75, section 11, that "No conveyance of an estate in fee simple, fee tail, or for life or lease for more than seven years, is effectual against any person except the grantor, his heirs and devisees, and persons having actual notice thereof, unless the deed is recorded as herein provided." All that is stated in the plaintiffs' specification may therefore be true and yet the plaintiffs may have received a good title, and it would not appear either by express words or necessary implication that any covenant had been broken. If this specification could be construed to apply also to the

general covenant of warranty, it would be equally unavailing. If it does not apply to this covenant there is no specification of the breach of it. Neither does the declaration specify the nature of the incumbrance alleged to constitute a breach of the covenant against incumbrances. The breaches of these last named covenants are therefore not well assigned, and the entry must be,

Exceptions sustained. Demurrer sustained.

MEDOMAK NATIONAL BANK

vs.

FANNIE L. WYMAN, Admx.

Lincoln. Opinion December 19, 1905.

Bills and Notes. Statute of Limitations. Payment of Interest by New Note. New Promise. Barred Note Revived as to One-Maker.

When one of the makers of a joint and several negotiable promissory note, after the same has become barred by the statute of limitations, gives his negotiable promissory note to the payee of the barred note in payment of interest on the barred note, it constitutes a new promise on his part to pay the barred note, and revives the barred note as to himself.

On report. Judgment for plaintiff.

Assumpsit on certain negotiable promissory notes given by the defendant's intestate, L. L. Kennedy, to the plaintiff bank. Tried at the April term, 1905, of the Supreme Judicial Court, Lincoln County. Plea, the general issue and general statute of limitations. At the conclusion of the evidence, it was agreed to report the same to the Law Court, "and that upon so much of the evidence as is legally admissible said court to render such judgment as the rights of the parties require."

The case is amply stated in the opinion.

Heath & Andrews and W. H. Miller, for plaintiff.

Arthur S. Littlefield, for defendant.

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

SPEAR, J. This is an action of assumpsit upon seven promissory notes, only four of which are in controversy, and comes up on report. The four notes in question were all substantially in the same form as follows: For value received, we jointly and severally promise to pay the Medomak National Bank of Waldoboro or order $500 on demand and interest. They were all signed by the Medomak Ice Company and endorsed upon the back before delivery by L. L. Kennedy the defendant's intestate. These notes were all intended for the benefit of the Ice Company and in no respect for the benefit of the endorser. In the report "It is admitted that all the endorsements upon the last described four notes except the last endorsement on each were made from funds delivered to the plaintiff by the Medomak Ice Company.

"The plaintiff admits that the said four notes are barred by the statute of limitations as against Lincoln L. Kennedy defendant's intestate, unless the bar in the statute was removed by the note for $152.61 above offered under the sixth count."

This note was as follows: $152.61 Waldoboro, Maine, May 8th, 1902. For value received, we jointly and severally promise to pay the Medomak National Bank of Waldoboro or order One Hundred fifty-two 61-100 dollars on demand and interest, and was signed by the Medomak Ice Company and endorsed by L. L. Kennedy, precisely as the four notes in controversy were signed and endorsed. It will also be observed by comparison that it was in the same form as the other four notes. "It is further admitted that said note for $152.61 is made up of the aggregate of the last endorsements appearing upon the aforesaid four notes, and that said note for $152.61 was entered upon the books of the bank as 'Note, Medomak Ice Company' and that entry was balanced by a credit of the same amount to profit and loss." The last endorsements appearing upon these notes show that the note for $152.61 was given to pay the interest upon them to June 5, March 16, March 25 and March 28, 1902, respectively.

The only question presented by this case is whether the payment

of interest upon the four notes by giving the note of $152.61 removed these four notes from the operation of the statute of limitations with respect to the endorser L. L. Kennedy; whether the payment was such an acknowledgment by him of the debt created by these four notes as to warrant the inference of a new promise on his part to pay them. This is not a question as to whether these notes were revived as to the Ice Company but whether they were revived as to the endorser. While the name of L. L. Kennedy appears upon the note in the usual place of an endorser, his legal relation to it under our decisions was that of an original promisor. It will therefore appear that the defendant's intestate stood in the capacity of original promisor upon each of the four notes, and also upon the note which was given for the payment of interest.

After the four notes became outlawed, Mr. Kennedy was relieved by the operation of the statute from payment. At this juncture he was free from any liability and it was absolutely within his privilege to decline to make himself further liable for the payment of these notes. But he did not do this. On the other hand, he became a joint and several promisor with the Ice Company upon the note and gave it to the bank in payment of interest as above stated. As a matter of law he gave his own individual obligation for the payment of the interest, the note given being joint and several. Here it may be remarked that the peculiar wording of this note makes the apparent endorser an original promisor in fact as well as law. The only name upon the face of the note is that of the Medomak Ice Company. It could not be joint and several as to the Company, a single signer. It must therefore have reference to the endorser as one of the joint and several promisors. This is also true with respect to the relation of Mr. Kennedy to the four notes upon which the interest was paid. They were, in fact as well as law, his individual notes. There can be no presumption, under the wording of these notes, either in fact or law, of any other relation of L. L. Kennedy to all of them than that of an original promisor, individually liable.

It would therefore affirmatively appear from the form of these notes that Mr. Kennedy by the note given was not only making a payment of interest upon the notes of the Medomak Ice Company but

upon his own notes as well. He gave no notice to the bank that he did not intend to revive his liability upon the barred notes and no evidence in the case tends to show that his relation to the notes was other than that shown by the notes themselves.

It therefore seems clear that the natural inference from the facts disclosed by this transaction is, that Mr. Kennedy intended this note at the time it was given as a payment of interest upon these four notes as much as if he had made the payment with his own money or his own check in lieu of the note. We think that instead of requiring evidence to show that the payment of interest by the note was intended to acknowledge and revive the debt, it would rather require some evidence to overcome the inference that it was not.

In view of the above construction of the relation of the defendant's intestate to the notes in controversy, it becomes unnecessary to consider her contention that the note given for the payment of interest was the note of the Medomak Ice Company only, the payment of which was guaranteed by the endorser as surety provided the company failed to pay.

The principles of law applicable to the removal of the bar of the statute of limitations are well settled. Payments on a note already barred remove their bar. *Sinnett* v. *Sinnett*, 82 Maine, 278; *Manson, Ex'r*, v. *Lancey*, 84 Maine, 380; *Pond* v. *French*, 97 Maine, 405.

Payments of interest take the case out of the statute with like effect as payments of principal. *Fryeburg Parsonage Fund* v. *Osgood*, 21 Maine, 176.

A partial payment by note is as effectual to take the original debt out of the operation of the statute as payment in any other manner. *Ilsley* v. *Jewett*, 2 Met. 168; *Sigourney* v. *Wetherell*, 6 Met. 553; *Wenman* v. *Ins. Co.*, 13 Wend. 261; *Bowman* v. *Downer*, 28 Vt. 532.

In *Sigourney* v. *Wetherell*, 6 Met. supra, it was held that a note given by a guarantor, in payment of the interest due upon the guaranteed note, takes the debt out of the operation of the statute of limitations.

The above decisions follow and rest upon the well settled rule in

Maine that the giving and acceptance of a negotiable note is presumably payment. *Varner* v. *Nobleborough*, 2 Maine, 121. *Bunker* v. *Barron*, 79 Maine, 62. But in the case at bar it is unnecessary to rely upon the presumption of payment as it is admitted that the note was given for the express purpose of paying and did pay the last endorsements on the four original notes. Our conclusion is that the note given in payment of interest upon the four notes, removed the bar of the statute upon these notes as to the defendant's intestate, and that she is liable in this action for their payment.

The plaintiff is entitled to judgment upon the first count in its writ for $3300 and interest at six per cent from Oct. 1, 1902; under the second count for $500 and interest at six per cent from June 5th, 1902; under the third count for $336.95 and interest at six per cent from March 16, 1902; under the fourth count for $135.00 and interest at six per cent from March 25, 1902, under the fifth count for $300 and interest at six per cent from March 28, 1902; under the sixth count for $152.61 and interest at six per cent from May 8, 1902; and under the seventh count for $250.00 and interest at six per cent from April 1, 1904.

Judgment for plaintiff as above.

MARY F. HURD *vs.* FRED W. CHASE.

Aroostook. Opinion December 21, 1905.

Real Action. Deed. Life Estate. Bond for Support. Possession of Granted Premises. Equity Powers of Supreme Judicial Court in Actions at Law. Technical Pleadings Considered Waived, When.
R. S., c. 84, § § 17-21; c. 106, § 5.

1. The court now having full equity powers has the power to treat a conveyance or a reservation in a conveyance absolute in terms, as made solely for security for some obligation, if it finds such to be the fact from extrinsic evidence.
2. Having this power the court also has the power in such a case to determine from extrinsic evidence what the obligation is that was intended to be secured, including its nature, extent and terms.
3. When the instrument made as security itself contains a description of the obligation to be secured, the court cannot add to, nor take away anything from such description, but when the instrument contains no description the court can ascertain the full terms of the obligation from extrinsic evidence.
4. These equity powers of the court can now be exercised in an action at law for the possession of the estate thus conveyed or reserved. A separate bill in equity is not now necessary for that purpose.
5. Upon report of an action at law technicalities in pleading are to be regarded as waived unless otherwise stipulated, and, at least in the absence of such stipulation, the court can ascertain and decide upon its merits the real controversy in the case.
6. In this case the plaintiff reserved in terms an absolute life estate out of a farm conveyed by her to the defendant, but the court finds that one consideration for the conveyance was the bond of the defendant to support the plaintiff on the farm, and that the reservation was made solely as security for the performance of the bond. *Held:* that the defendant is entitled to retain possession of the farm until a breach of his bond and, no such breach being shown, the plaintiff is not yet entitled to possession.

On report. Plaintiff nonsuit.

Real action wherein the plaintiff demanded against the defendant eighty acres of land, with its appurtenances, from the south part of Lot 82, in Perham, Aroostook County, "whereof the plaintiff was seized in an estate for life within twenty years last past." Writ dated November 14, 1903. Plea, nul disseizin. Evidence taken out

at December term, 1904, of Supreme Judicial Court, Aroostook County, and by agreement case sent to the Law Court on report.

The case appears in the opinion.

Willis B. Hall, Wm. P. Allen and Louis C. Stearns, for plaintiff.

Ira G. Hersey and A. B. Donworth, for defendant.

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

EMERY, J. This is a real action. The plaintiff formerly owned the demanded land (a farm) in fee subject to a mortgage, but conveyed it to the defendant with the following habendum clause: "To have and to hold to the said Fred W. Chase (the defendant) his heirs and assigns to and for the following uses, viz: To the use of me, the said Mary F. Hurd, (the plaintiff) during my natural life and after my decease or other determination of said estate, to the use of the said Fred W. Chase and his heirs and assigns forever." The consideration for this conveyance was the agreement by the grantee (the defendant) to assume and pay the mortgage debt on the land and his bond to the plaintiff for her support in the house on the conveyed premises during her life. This bond was executed and delivered at the same time as the deed and was a part of the same transaction and furthermore recites the deed. Under these instruments the defendant at once took possession of the demanded premises in order to take care of the plaintiff as stipulated in his bond, and she went upon the premises to receive the stipulated support and remained there ten days. She then brought this real action to recover her life estate. There is no suggestion in the report of any failure of the defendant to perform his bond.

It may be conceded that the plaintiff has the legal title to a life estate in the land, but to maintain this action (ignoring technicalities in pleading), she must be entitled to possession as well. R. S., ch. 106, sec. 5. One may retain his title to real estate while debarring himself from right of entry and possession. We think the plaintiff has done so in this case. It is evident that she reserved a life estate simply and solely as security for the performance of the defendant's bond to maintain her on the premises. It is as if the defendant had

mortgaged to her a life estate for the same purpose. It is clearly implied in the instruments that the defendant was to have possession of the farm and its revenues to enable him to perform his bond, and as long as he performed it. This bars an action for possession until there is a breach of the bond which is not yet shown. *Lamb* v. *Foss*, 21 Maine, 240; *Norton* v. *Webb*, 35 Maine, 218; *Brown* v. *Leach*, 35 Maine, 39; *Davis* v. *Poland*, 99 Maine, 345-348.

True, the reservation of the life estate in the deed is not in terms conditioned or otherwise than absolute, but since this court has possessed full equity powers it has had full power to go beneath the terms of a conveyance, or reservation of an estate to ascertain whether it is in fact unconditional or only for security for some obligation. *Reed* v. *Reed*, 75 Maine, 264; *McPherson* v. *Hayward*, 81 Maine, 329. And for this purpose the court may even resort to oral evidence. *Knapp* v. *Bailey*, 79 Maine, 195.

True, again, there are cases holding that the right of possession by the mortgagor must be expressed or necessarily implied in the deed itself and cannot be sustained by oral evidence nor even by written instruments not referred to in the deed. Those cases, however, were cases of deeds of mortgage in form, and were decided before the court had the power to go beyond the terms of the deed to get at the truth of the transaction. If the court has power to ascertain and declare that a deed, absolute in terms, is in fact a mortgage, it necessarily has power to ascertain in the same way what is the obligation the deed is to secure.

There are also cases holding that the conditions expressed in the deed, the statement in the deed itself of what it is intended to secure, cannot be enlarged by parol nor even by the language of other writings between the parties not referred to in the deeds. See *Mason* v. *Mason*, 67 Maine, 546.

Those cases, however, are not applicable to this case where no conditions are expressed in the deed, and where there is no description whatever of the obligation to be secured. When the parties to a deed undertake to describe therein the obligation to be secured the court cannot enlarge or limit it, but when no description is given and yet the deed is unquestionably to secure some obligation, the nature and

extent of that obligation are to be ascertained from sources outside of the deed.

Of course, the court should not declare a conveyance, or reservation, of an estate absolute in terms, to be for security only, unless fully satisfied upon clear, convincing evidence that such is the truth. In this case, however, the inference from the evidence is irresistible. It is to be noted also that the action is by the original party to the deed.

True, this suit is an action at law, but now, since the enactment of R. S., ch. 84, secs. 17 to 21 inclusive, the court can use its equity powers to apply equitable principles in the defense to an action of law. A separate bill in equity is not now necessary for that purpose.

The defendant pleaded nul disseizin only, without any plea of equitable matter and it is suggested that by that plea he denies her title and thus enables her to maintain this action to establish her title. By reporting the case the parties must be held to have waived technical questions of pleading, there being no stipulation otherwise. *Pillsbury* v. *Brown*, 82 Maine, 455.

It is evident that the only issue between the parties, and the only issue that needs decision, is the right of present possession. That issue we are authorized by the report to decide.

Plaintiff nonsuit.

EDWIN M. HIGGINS

vs.

FRANKLIN COUNTY AGRICULTURAL SOCIETY.

Franklin. Opinion December 19, 1905.

Agricultural Society. Fair. Negligence. Collision on Race Track. Active Duty. Safety of Patrons.

1. An agricultural Society holding a fair, for admission to which a fee is charged, is bound to use reasonable care to keep all parts of its grounds, to which patrons are admitted, free from dangers to them.
2. When such Society invites patrons, even by implication only, to cross its racing track to reach the space enclosed by the track, it is bound to use reasonable care to keep the track clear of danger of collision during such crossing.
3. A patron of such fair, while crossing the racing track by invitation of the Society, express or implied, is not bound to be as watchful for teams approaching along the track as he would be in crossing a public road. He may assume that the Society is using reasonable care to keep the track clear of such teams. Hence the mere fact that he is not watching for such teams does not constitute contributory negligence on his part.
4. In this case the evidence, though conflicting, warranted findings by the jury that the plaintiff was invited by the defendant Society to cross the track when he did, that he was not guilty of contributory negligence in not seeing the team approaching along the track, and that the defendant was negligent in not preventing the use of the track by the colliding team at that time.

On motion for new trial by defendant. Overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff and also to recover for damages to his wagon, caused by the alleged negligence of the defendant. The defendant, on the 17th day of September, 1903, was holding a fair on its grounds at Farmington, and had under its care and control a half mile race track or a race course for speeding and racing horses. At a time when a race was not in progress, the plaintiff undertook to drive across the track with his horse and wagon, and while so doing his wagon was struck and himself injured by a rapidly driven vehicle

with which the driver was giving his horse "a warming up mile" preparatory to a race later in the afternoon.

Tried at the February term, 1905, of the Supreme Judicial Court, Franklin County. Plea the general issue. Verdict for plaintiff for $100. Thereupon defendant filed a general motion to have the verdict set aside.

The case appears in the opinion.

Frank W. Butler, for plaintiff.

Joseph C. Holman, for defendant.

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

EMERY, J. The defendant society was holding a fair on its grounds arranged for that purpose. On these grounds was the usual half mile track for the exercising, speeding and racing of horses. Outside of this track was space used for various purposes. An admission fee was charged and paid at the outer entrance, and visitors having thus entered the grounds were permitted to cross the track, when not in use for horses, to the space within the track. The passage way to and across the track was barred by a rope while the track was in use, which rope was lowered to the ground by a servant of the company employed for that purpose, when the track was clear permitting visitors to cross the track to the interior space. The plaintiff had paid the admission fee and had driven upon the grounds up to the track at the crossing barred by the rope. He then started to cross the track and when part way across, his carriage was struck and himself injured by a rapidly driven vehicle with which the driver was speeding his horse along the track. There was evidence that the attendant guarding the passage way across the track lowered the barring rope to the ground in such a manner as to be an invitation to the plaintiff to attempt the crossing when he did, or an assurance to him that the track was then clear for crossing. The defendant strongly denies this and insists that the rope was lowered only for an instant to enable a team to leave the track and that the plaintiff practically forced his way past the attendant and barrier. We are not

satisfied, however, that the jury was clearly wrong in finding for the plaintiff on this point and so far the verdict must stand.

The plaintiff might have avoided the collision had he been on the constant watch for approaching horses from the time he entered upon the track, which, however he was not. The defendant insists that hence the plaintiff did not exercise due watchfulness and that his negligence in that respect was a contributing cause of the collision. The only question of law arising under this contention is whether the plaintiff was negligent as matter of law under the circumstances in not being constantly on the watch for horses and vehicles rapidly passing along the track he was crossing. We think he was not. The case is very different from that of crossing a public highway. There the person crossing has no assurance, but from his own careful observation, that the way is clear. He is therefore bound to anticipate that teams slow and fast may be rightfully approaching at any time, and to be on his own guard against them. In this case the track was a purely private way owned and operated by the defendant society as a part of the attractions to induce people to pay for admission to its grounds. It was the society's duty to exercise due and reasonable care to keep the track clear and free from danger to its patrons at all such times as they were invited or permitted to cross it, and while they were thus crossing. Assuming, as the jury has found, that the plaintiff was assured by the action of the defendant's servant that he could then cross the track, he was thereby assured that reasonable care had been and was being taken to keep the track clear for his crossing. With that assurance it cannot be held as matter of law that he was negligent in not looking about for the approach of rapidly driven horses and vehicles along the track. Whether under all the circumstances of this case such an omission to look about was negligence was a question for the jury. We see no reason why the finding on this question should be set aside.

Another point made in defense is that the defendant society is not responsible for the act of the offending driver since he was not in any way its servant, and since it does not appear that he had permission to drive on the track at that time. The society's duty was not limited to refraining from giving permission to drive rapidly on its track

at such times. It had an active duty to use due and reasonable care to prevent such driving even by unauthorized persons. The jury has found that it did not perform this duty in this case and we see no reason to disturb the verdict on this point. It follows that the motion must be overruled. *Thornton* v. *Maine State Agricultural Society*, 97 Maine, 108.

Motion overruled.

LILLIAN G. COPP *vs.* MAINE CENTRAL RAILROAD COMPANY.

Somerset. Opinion December 19, 1905.

Railroads. Negligence. Trespassers on Railroad Track. Locomotive Engineer not Guilty of Negligence, When. When and When not Bound to Stop. R. S., c. 52, § 77.

1. That a railroad company does not prosecute persons walking upon its railroad track between crossings and stations in violation of R. S., c. 52, sec. 77, does not authorize persons to so use its tracks.
2. Persons walking upon railroad tracks are bound to apprehend that locomotives may be swiftly approaching at any time and are bound to be continually on the watch for them and to leave the track in season to avoid collision with them.
3. Engineers running locomotives are not bound to stop, or even decrease the speed of the locomotive, merely because they see persons walking upon the track. They may ordinarily assume that such persons have made themselves aware of the approach of the locomotive and will seasonably leave the track for its free passage.
4. If such engineer makes all possible effort to stop the locomotive as soon as he has reason to believe that a person walking upon the track is in fact not aware of the approach of the locomotive, he is not guilty of negligence.
5. In this case the engineer besides the customary whistles at crossings, blew sharp warning whistles as he approached the plaintiff who was walking on the outside of the left rail. He also shut off steam but let the locomotive drift expecting the plaintiff would, at the last, step off out of the way of the locomotive. As soon as it became evident to him that the plaintiff might not do so, he did all he could to avoid running upon her but without avail. He was not guilty of negligence in not sooner apprehending she would not leave the track.

On report. Judgment for defendant.

Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant, by one of its servants, a locomotive engineer. Tried at the March term, 1905, of the Supreme Judicial Court, Somerset County. Plea, the general issue. At the conclusion of the evidence, the case was reported to the Law Court for decision upon so much of the evidence as was competent and legally admissible.

The case sufficiently appears in the opinion.

S. W. Gould and Fred F. Lawrence, for plaintiff.

Nathan & Henry B. Cleaves & Stephen C. Perry, and White & Carter, and Walton & Walton, for defendant.

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

EMERY, J. While the plaintiff, a woman twenty-eight years old, was walking along and upon the defendant company's railroad track on her way to visit a friend, she was overtaken and injured by a locomotive operated by the defendant in the regular course of its business at that place. She did not look behind her nor take any other measures to become apprised of the approach of trains or locomotives, though she was aware that the track where she was walking was used, not only for the passage of regular trains, but also for shifting cars, making up trains, &c.

To extricate herself from the position of a trespasser upon the track, she showed that other persons frequently and even habitually walked upon the track at that place without being forbidden by the defendant company. This however did not give her any right to walk on the track. Not only was the railroad company entitled to the exclusive use of its track between crossings and stations as this place was, but she was forbidden by statute to walk upon it. R. S., ch. 52, sec. 77. That the defendant company did not prosecute violators of this statute did not legalize her act nor protect her from its consequences.

To relieve herself from the inference of gross carelessness on her

part, she says she was walking on the outside of the left hand rail and thought she was walking far enough from it to be out of danger. Her opinion that she was in no danger does not alter the patent fact that she had voluntarily placed herself, and was voluntarily remaining, in a position conspicuously fraught with imminent danger. She says she was hard of hearing, but that very fact made it all the more reckless for her to walk on the track.

Finally she claims that, however great her own negligence, it was past and over before the locomotive struck her, and hence was no part of the proximate cause of the collision and her injury; that the engineer was negligent in not stopping the locomotive as he might have done after he saw her and before he reached her; that her negligence was anterior to his, and hence his was the sole proximate cause of the injury.

Of course, even if she were a trespasser, the defendant company's servants could not lawfully disregard her presence on the track and recklessly run over her, but, even if she were a licensee as she claims, they owed her no special duty of care such as they owed to those whose right or duty it was to be on the track.

It is common knowledge that people frequently walk on railroad tracks, and if locomotive engineers were bound to stop or decrease speed every time they saw a person on the track, the operation of the railroad would be greatly hindered to the detriment of the public. It is also common knowledge that persons thus walking on railroad tracks and aware of the approach of a locomotive, will often remain on the track until the locomotive is within a few feet of them, before they step aside.

In this case the engineer could rightfully assume that the plaintiff was of ordinary intelligence, that she was aware of the danger of her position, that she would exercise the care due in such a position, that she would seasonably look or listen for trains and locomotives and seasonably step out of their way. He had given the usual warning signals, loud enough for the neighborhood to hear distinctly. He even shut off steam and let the locomotive drift when he saw she did not step off at once. As she was on the left of the track and he on the right he supposed she had stepped off, and when it was seen

by the fireman on the left that she had not, it was too late to prevent the collision though every reasonable effort was made to do so. In all this there is no evidence that the engineer was negligent.

The plaintiff, however, claims that a high bank of snow at her left, formed by railroad snow plows, prevented her stepping aside and that the engineer should have known it. The evidence does not support that theory. She did not try to step aside, and it is not established that she could not, much less that the engineer should have known that she could not.

The case is similar in principle to the case *Garland* v. *Maine Central R. R. Co.*, 85 Maine, 519. There, the plaintiff in driving a loaded team across the railroad track at a highway crossing became stuck on the crossing. The engineer saw the team, and even saw it was not moving, but did not then undertake to stop his train. As soon as he saw that the team could not be moved, he did all he could to stop his train but it was too late to avoid the collision. It was held that there was no evidence of his negligence, that he was not in fault in not sooner comprehending that the plaintiff would haul a load on the crossing he could not haul off. So, in the case now at bar, we hold that the engineer was not in fault in not sooner comprehending that for any reason the plaintiff would not at last step aside.

We base our decision on the absence of sufficient evidence of negligence on the part of the engineer, and hence have no occasion to determine whether the plaintiff's negligence was contributory.

Judgment for the defendant.

AGNES COTE *vs.* ARSENE A. LETERNEAU.

Androscoggin. Opinion December 20, 1905.

Real Action. Rents and Profits.

1. The owner of land is not obliged to begin an action for its recovery as soon as he is aware of the defendant's occupation.
2. That the plaintiff in a real action was aware of the defendant's occupation of his land and made no objection until beginning his suit, does not bar his claim for rents and profits, they having been duly demanded in the action.

On motion by defendant. Overruled.

Real action wherein the plaintiff demanded against the defendant the possession of certain real estate situate in Auburn, Maine. The plaintiff also claimed rents and profits for the use of the demanded premises while in the possession of the defendant. Plea, the general issue, nul disseizin, and also a brief statement of special matter of defense as follows: "And the defendant says he has done nothing to in any way interfere with the rights of the plaintiff in and to the land, but may have trepassed technically upon her land, but that he has committed no damage thereby." No disclaimer was filed by the defendant.

Tried at the January term, 1905, of the Supreme Judicial Court, Androscoggin County. Verdict for plaintiff and damages assessed at $77.25. Defendant then filed a general motion for a new trial.

The case appears in the opinion.

Oakes, Pulsifer & Ludden, for plaintiff.

McGillicuddy & Morey, for defendant.

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

EMERY, J. The only question of law presented by this motion is whether upon the evidence the defendant was liable for rents and profits, they having been demanded in the declaration and assessed by the jury. The demanded land was a strip five feet wide which

the plaintiff had annexed to a lot previously mortgaged. Her title to the lot mortgaged came through the mortgage to the defendant who supposed the five foot strip was included in the mortgage, and entered into occupation of it. He built a barn partially over it, but was allowed to remove it and did so. He pleaded the general issue, nul disseizin, to this real action but made no actual contest on the question of title, and does not object to the verdict on that question, but only on the question of rents and profits. There was uncontradicted evidence that the plaintiff was aware of his occupation, but did not demand any rent nor make any objection until she brought this action.

Upon this evidence we see no reason why the defendant is not liable for the rents and profits of the strip for the time he occupied it within six years before the date of the writ, assuming that the strip would have yielded rents and profits. He was in occupation claiming title and had thereby disseized the plaintiff. She was not bound to regain seizin at once by suit or by entry. When she did assert her title by this suit he did not disclaim, but pleaded nul disseizin. It turns out that she was entitled to the strip and hence to such rents and profits as it should have yielded during his occupation. It is only just that he should hand them over. The injury caused her by his disseizin is not fully compensated until that is done.

Of course there may be cases where a plaintiff in a real action may be estopped in equity, and even in law, from recovering rents and profits, such as the case of *Jewell* v. *Harding*, 72 Maine, 124, cited by defendant. In that case the defendant had a title good in equity derived directly from the plaintiff, a title which the plaintiff was bound and could be compelled to make good in law. He practically put the defendant in possession under this title. It was properly held that he could not recover rents and profits. In this case the plaintiff is not claiming any improvements made by the defendant with her knowledge. He was allowed to remove them. The estoppel upon her, if any, does not extend to rents and profits.

The defendant, besides the general issue, pleaded by way of brief statement that he had "done nothing in any way to interfere with the rights of the plaintiff in and to the land, but may have trespassed

technically upon her land, but that he has committed no damage thereby." This was not a disclaimer of the demanded land nor of any part of it. His plea of the general issue still stood as an admission of his possession and a denial of the plaintiff's title. The action was tried upon that issue. Recovery of rents and profits follow.

The defendant urges that the amount assessed by the jury for rents and profits was far too large. We must assume they were instructed to make the proper deductions and to award only "the clear annual value of the premises while he was in possession" after such deductions. Though the amount awarded seems large to us it is not so large as to convince us that the jury clearly erred. We think the motion must be overruled upon both questions.

Motion overruled. Judgment on the verdict.

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

Androscoggin. Opinion December 23, 1905.

Exceptions. What Same Must Show. Declaration. Variance. Negligence. Evidence.

1. Exceptions to a ruling cannot be sustained merely because the ruling, viewed as an academic proposition, was erroneous. It must further be made to appear in the bill of exceptions that the ruling was also prejudicial to the excepting party's case.
2. A bill of exceptions to a refusal to give a requested instruction based on a factual hypothesis must show in itself, or by express reference, that there was evidence in support of the hypothesis; otherwise the court cannot know that the excepting party was prejudiced by the refusal even though the legal proposition contained in the request was correctly stated.
3. Whether a statement in a bill of exceptions that "the evidence upon the motion for a new trial if printed may be referred to, to illustrate and explain the exceptions" sufficiently makes the report of the evidence a part of the bill of exceptions. *Quare.*
4. In this case as to the requests based on factual hypotheses, it does not appear from the bill of exceptions that there was any evidence in support of the hypotheses and hence these exceptions must be overruled.

5. Where the declaration alleges that the defendant's team ran into the plaintiff's team, and the proof is that both teams were in motion approaching each other up to the instant of collision, the fact that the defendant's team was much slower in motion than the team of the plaintiff does not constitute a fatal variance between the allegation and the proof.
6. To sustain a common law action based on the negligence of the defendant, it is not necessary to prove that the defendant's negligence was the sole cause of the plaintiff's injury.

On exceptions by defendant. Overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant whose vehicle collided with that in which the plaintiff was riding, on a public street in Auburn.

The testimony showed that the plaintiff, sixty-eight years of age, was riding in a light carriage with her husband, and that the horse was his. The husband, who was seventy-two years of age, was driving. At the time of the collision which resulted in the injuries complained of, the plaintiff and her husband were traveling south on Turner street, in Auburn, at about six miles an hour, and on the right of the middle of the traveled part of the street, as they traveled. The street at the point of collision was from forty-six to fifty feet in width. The defendant, in a heavily loaded team, was traveling north on the same street, at a walk, but he was on the left of the traveled part of the street, as he traveled. Both teams were thus west of the middle of the traveled part of the street, and the team of the defendant was nearer the middle.

The testimony tended to show that there was apparently sufficient room on the west of the middle of the traveled part of the street so that the teams could have passed without interference, had they both continued as they were traveling just before the collision described in plaintiff's writ, but that the horse attached to the wagon in which the plaintiff was riding became suddenly frightened, and shied towards the center of the traveled part of the road and towards defendant's team. The front left wheel of the plaintiff's carriage came into collision with the hind wheel of defendant's vehicle, whereby the plaintiff was thrown from her carriage and suffered the injuries for which she claimed damages in this action.

The testimony also tended to show that the two teams would have passed each other safely and without collision had it not been for the horse's fright and shying; also that they would have passed each other safely if the defendant had been driving on the right of the middle of the traveled part of the street.

The plaintiff recovered a verdict for $400. Before the case was submitted to the jury, the defendant requested the presiding Justice to give four certain instructions to the jury, the substance of each of which sufficiently appears in the opinion, and which said request was refused. Thereupon the defendant excepted.

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

Oakes, Pulsifer & Ludden, for defendant.

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

EMERY, J. The first request for instruction is based upon the factual hypothesis that there was not sufficient time for the defendant to turn and reach the right of the middle of the road after he first saw the plaintiff approaching. It does not appear, however, from the bill of exceptions that there was any evidence in support of the hypothesis. Hence the request does not appear to have been applicable to the case, and its refusal does not appear to have prejudiced the defendant.

The second request is based on the factual hypothesis that the defendant's team did not run into that of the plaintiff. From the bill of exceptions, it appears to be undisputed that both teams were in motion approaching each other up to the moment of collision, though the defendant's team was proceeding at a walk. There is no suggestion of any evidence that the defendant's team was stationary. Each team, therefore, ran into the other, though there was a difference in the speed of the two teams. This sufficiently sustains the case stated in the declaration that the defendant's team ran into the plaintiff's team. It was practically so held in *Neal* v. *Rendall*, 98 Maine, 69.

The third request was based upon the legal hypothesis that the

defendant's negligence must have been the sole cause of the collision. This hypothesis is not well founded in law. It is enough if the defendant's negligence was a direct contributing cause without which the collision would not have occurred, no evidence being stated of plaintiff's contributory negligence. While the request might have been applicable were the action a statutory one against a town, it is not applicable to this common law action against an individual.

The fourth request is based on several factual hypotheses as to the character of the plaintiff's horse, the condition of her husband, the driver, his manner of driving, his want of control over the horse, etc. Here again the bill of exceptions is bare of any statement that there was evidence in support of these hypotheses. It is not made to appear that the request was applicable to the case and hence that the defendant was prejudiced by the refusal to so instruct.

At the close of the bill of exceptions it is stated that the evidence upon a motion for a new trial if printed might be referred to to illustrate and explain the exceptions. It is at least questionable whether such a statement makes the whole evidence a part of the bill of exceptions to supply what was omitted in the bill itself, but we have no occasion to decide this question inasmuch as the evidence was not printed or brought before the court in any way.

It follows that none of the exceptions can be sustained.

Exceptions overruled.

In Equity.

NORTHWESTERN MUTUAL LIFE INSURANCE CO.

vs.

CHARLES H. COLLAMORE AND JOSEPHINE COLLAMORE, Admx.

Knox. Opinion December 23, 1905.

Gift Inter Vivos or Causa Mortis. Declaration of Trust. Declaration in Contemplation of Suicide Ineffective. Evidence.

1. To constitute a gift, inter vivos or causa mortis, there must be a transfer of possession under circumstances indicating an intention thereby to at once transfer title as well as possession irrevocably. Enclosing the article in a sealed envelope and handing the package to another with instructions to keep, but not to open it until after the death of the depositor, does not indicate such intention.
2. A declaration of trust to be effective must be explicit, absolute and complete, vesting the equitable title in the beneficiary at once, though the transfer of the legal title may be deferred till the happening of some event sure to happen, as the death of the declarant. If the transfer of the legal title is to be contingent on an event which though expected may not happen, the declaration is ineffective. Thus a declaration made in contemplation of suicide and to direct the disposition of the property after death by suicide, is ineffectual since the intention to commit suicide may be abandoned.
3. The evidence in this case does not satisfy the court that the property in the insurance policy in question was effectively transferred either by delivery or by a declaration of trust.

In Equity. On report. Decree according to opinion.

Bill of interpleader to determine whether the amount of a life insurance policy, issued by the plaintiff company to Ellison C. Collamore should be paid to his estate, he being deceased, or to his brother, Charles H. Collamore. After the death of the said Ellison C. Collamore, the said Charles H. Collamore claimed that payment of the insurance policy should be made to him alleging that the policy had been assigned to him by the deceased in his lifetime. Thereupon

the said Josie Collamore, widow of said deceased, and who was afterwards appointed his administratrix, brought a bill in equity to have the plaintiff enjoined from paying said insurance policy to said Charles H. Collamore pending the determination of the bill and decree thereon. An injunction was granted as prayed for in said bill. The said Charles H. Collamore also brought an action at law against the plaintiff to recover from it the amount of said insurance policy. The said Josie Collamore, after her appointment as administratrix of the estate of said deceased, likewise brought an action of law against the plaintiff to recover from it the amount of said insurance policy. Thereupon this bill of interpleader was brought. At the hearing on the bill of interpleader in the court of the first instance, the facts were submitted in the form of an agreed statement, and the case was reported to the Law Court with the stipulation that "upon so much of the agreed statement as is legally admissible" the Law Court to determine the rights of the defendants and make decree in accordance therewith.

AGREED STATEMENT.

On September 22, 1899, Ellison C. Collamore took out with the Northwestern Mutual Life Insurance Co. a tontine policy of insurance upon his life for the sum of fifteen hundred (1500) dollars, payable to his estate.

At the time of taking out such insurance and at the time of his death he had living a wife and one son.

Clause six of the policy provides "If this policy shall be assigned, a duplicate of the assignment shall within thirty days be given to the company, and due proof of interest shall be produced on making claim."

On March 6th, 1900, he signed an assignment of said policy recited to be in consideration of love and affection, running to Charles H. Collamore, his brother; but therein reserving to himself the right to make choice of options contained in the policy, and to receive the whole benefit thereof himself without the consent of the assignee; and in event of the death of the assignee before the policy became payable on account of the death of the insured, the same was to be payable to his estate.

This policy and assignment was in the possession of the insured on January 6th, 1904, on which date he delivered a sealed envelope to Charles H. Collamore, which it finally turned out contained the insurance policy and assignment with some other papers; but the contents of the envelope was unknown to Charles H. Collamore until after the death of the insured.

The insured died by his own hand on March 16th, 1904. Just prior to committing suicide the insured sent a letter to Charles H. Collamore, which was received after his death, in an envelope post marked March 16, and which letter read as follows:

Rockport, Feb. 9, 1904.

Well, Charles, as I shall not see you again I will send you this receipt, you will have it, show, and Joe cannot make enny trouble about it. I told Geneva that I would fix my board bill on that note; I have fixed it by making the interest four per sent, and I thought that would satisfy you for what trouble and my board, and the trouble while I was with you. You will have the money to pay this note when you collect the Insurance, but don't pay it too fast, for they will spend it if you do; and you can take the interest on some of the other money and pay them their interest. You will know what I about the other money when you open the envelope I gave you. Don't wait too long before you attend to it either. It is no need of me telling you my troubles for it will do you no good or me either, but I think that I am tired of living, and have been for the past three years, I cannot stand and strain enny longer, so I hope you will do all you can for Harry. I have fixed my things as I thought best for you and Harry and our sister, and I hope you will do what I have asked you to do, for I have left it as I thought best. I shall take a dose of poison which I have had ready for a long time, and hoping I will meet you all in a world where trouble never comes, Good bye.

From your brother,

E. C. Collamore,

Rockport, Maine.

In the sealed envelope, which after receiving the above Charles H. Collamore opened, was contained the two following letters, one of them in a smaller envelope:

Rockport, Oct. 13, 1903.

To Charles H. Collamore from E. C. Collamore:

Charles:

If enny thing happens to me I want you to collect my Life Insurance and divide it between yourself and Harry and your sister. Take Five Hundred Dollars for yourself; Five Hundred Dollars for Harry P. Collamore and the reast for your sister, Syreno A. Andrews. I want you to take care of Harry's until he is 17 years old before you give him enny of it; then I want you to give it to him, or put it where he can get it, to finish his schooling with; don't give it to all at one time so Joe can get it and go through with it. I want you to help him all you can; he is not to blame for what he has done, his mother is to blame for it all. You will have to use your own judgment about Syreno's money; you will have to let her have a little at a time when she needs it the most. You will have to get her plaster for her when I am gone. Be shure and keep enough of her money to bury her when she dies, for they will not have enough in the family. If there is enny of her money left when she dies you divide it between yourself and Harry. I have fixed your note so it will be four per cent interest. This is the last favor I shall have to ask of you and I want you to have me buried with mother, at West Rocksport.

E. C. Collamore.

Rockport, Jan. 31, 1904.

Charles:

You will notify C. R. Dunton, of Bangor Exchange, of my death, for he is the Insurance Agent for the North Western, and will see that you get the money that will fall due there. You use it as I have asked you to in the other letter I have left you. Be shure and do the best you can for Harry, and God will bless you.

Good bye, from your brother,

E. C. Collamore.

Instructions in relation to the envelope, as given orally to Charles H. Collamore, were at different times said by him to have been as follows:

"You keep it and if anything happens to me you open it," and "Keep that; don't open it unless something happens to me."

This was all of the communication made at the time of the delivery of the envelope and nothing further was said about the envelope or in relation to property matters after the delivery.

Other envelopes had previously been left in a similar way; but the contents of envelopes so left were never known to Charles H. Collamore and might or might not have contained the insurance policy and assignment Charles H. Collamore had received, but drew the inference that said packages did contain these papers among other things; but no direct statement to that effect was made, and the packages held previously were returned to the insured.

Prior to the death of the insured's mother in 1899 the insured had been in the habit of giving her similar matters to keep for him.

The insured was not indebted to said Charles H. Collamore, but on the other hand Charles H. Collamore was indebted to his brother for borrowed money, and is still indebted to his estate, he having given his note therefor.

The assignment had no relation to any business transaction between the brothers.

Josie Collamore, the widow of Ellison C. Collamore, was appointed administrator of his estate. Charles H. Collamore claims the insurance under the assignment in question. Josie Collamore claims to collect the same as administratrix to be disposed of as provided by statute.

On the bill decree was made that the money should be paid into court and the defendants were ordered to interplead, decree was complied with and each of the defendants in the bill of interpleader makes answer setting up their respective claims upon the facts above stated.

L. F. Starrett, for plaintiff.

L. M. Staples, for defendant, Charles H. Collamore.

Arthur S. Littlefield, for defendant, Josie Collamore, Admx.

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

EMERY, J. The question submitted on this bill of interpleader is whether the amount of a life insurance policy, issued by the plaintiff company to Ellison C. Collamore, is payable to his estate, he now being deceased, or to his brother Charles H. Collamore. The policy is admittedly payable to his estate unless the court shall find from the agreed statement of facts that the legal or equitable title to it was effectually transferred by him before his death to his brother, the other claimant.

There certainly does not appear to have been any such delivery of the instrument of assignment or of the policy itself to the brother, as was necessary to constitute a transfer of any title, legal or equitable. Although he placed them in the hands of his brother, there was nothing said or done indicating that it was an irrevocable gift, or intended as such. The papers were in a sealed envelope. No statement was made of what the envelope contained or that the contents were a gift. He simply told his brother to keep it and not to open it unless something happened to him. The brother did not know the contents of the envelope until he opened it after the death of Ellison. Other envelopes had previously been left by Ellison with the brother in a similar way and had been taken back, but the contents of those envelopes are unknown. Prior to his mother's death in 1899, Ellison had been in the habit of giving her similar packages to keep for him.

All that can be reasonably inferred from the agreed statement is that Ellison entrusted the envelope to his brother as bailee, to be kept for him (Ellison) and not to be opened unless something happened to him. Had Ellison called for the envelope before his death the brother would have been obliged to give it up. He clearly had acquired no title to it or its contents by its being thus placed in his hands. Indeed, the brother frankly concedes no completed gift, either inter vivos or causa mortis, can be inferred from the facts stated.

He urges, however, that a declaration of trust by Ellison, in favor of his brother and others, can and should be inferred. For this he

relies upon two letters of Ellison found in the envelope with the policy, and another sent by him through the mail just before his death by suicide.

A declaration of trust to be effectual must be explicit, unconditional and complete. If it be tentative, or conditional, or made subject to reservation, it is not a perfected declaration of trust and will not be enforced by the courts. True, a future time or event may be fixed for the legal title to vest in the beneficiary, such as the death of the donor, but the declaration must be of a present trust vesting the equitable title in the beneficiary thereby and irrevocably. One may dispose of property during his life by gift or declaration of trust, but to do so he must divest himself of the ownership of what he gives. If he desires to retain ownership during his life and yet fix its disposition after, or in case of, his death he must do so by will. The foregoing legal principles are established by the decisions of this court in *Bath Savings Inst.* v. *Hathorn*, 88 Maine, 122, and *Norway Sav. Bank* v. *Merriam*, 88 Maine, 146, and buttressed by the numerous authorities there cited as well as by the reasoning of the opinions.

Turning now to the letters and reading them in the light of the other facts, it is clear they do not constitute an effectual declaration of trust. Whatever statements he made of his wishes, he had not gone so far that he could not recall them. The envelope was still unopened. Even after sending the letter dated Feby. 9, but mailed March 16, he could have repented of his design, and, notwithstanding his letters, could have enforced the return of the sealed envelope and its contents.

The deceased evidently desired to retain ownership to the last, and yet deprive his widow of her interest in his estate. This under our law he could not do. *Brown* v. *Crafts*, 98 Maine, 40.

It must be decreed that the money due on the policy be paid to the administratrix Josie Collamore, less the costs and reasonable counsel fees of the plaintiff which may be deducted by the plaintiff from the fund.

Decree to be made accordingly.

INDEX.

"The practical value of a law book depends upon its index."

MR. JUSTICE EMERY.

ACCOUNTING.

See MORTGAGES.

The rule which now prevails in the equity courts respecting the wrongdoer's accountability for the "profits and damages" resulting from his unlawful acts, requires the master not only to take an account of all profits made by the defendant, but also to make an inquiry in regard to all damages sustained by the plaintiff on account of the defendant's wrongful acts, and since it cannot be ascertained with any reasonable certainty how much of the profit is due to the trade-mark and how much to the intrinsic value of the commodity the whole will be awarded to the plaintiff. It is well settled that the profits recoverable in equity for unfair competition are governed by the same rule as in cases of infringement of trade-marks.

Shoe Co. v. *Shoe Co.*, 461.

Held: That a plaintiff whose trade-mark has been infringed by a defendant and who has been damaged by "unfair competition" on the part of the defendant, is entitled to an accounting not only for profits realized by the defendant from sales of goods upon which was impressed the trade-mark of the plaintiff or any simulation thereof, but also for the profits resulting from the wrongful acts committed by the defendant in "unfair competition" with the plaintiff. *Shoe Co.* v. *Shoe Co.*, 461.

ACTIONS.

See ESTOPPEL. FERRIES. INTOXICATING LIQUORS. REAL ACTIONS.

Under the provisions of section 63, chapter 15, R. S., a minor, residing with his father, who never undertook to make any contract in his own behalf respecting his tuition at a school attended by him, and who personally incurred no legal indebtedness, made no expenditure and sustained no loss, cannot maintain an action against a town to recover the amount voluntarily paid as tuition for him to such school, by his father. *Goodwin* v. *Charleston*, 549.

In an action at law for the possession of an estate conveyed as security or reserved, the court can from extrinsic evidence ascertain the full terms of the obligation, and a separate bill in equity is not necessary.

Hurd v. *Chase*, 561.

ADJOINING LANDOWNERS.

See BOUNDARIES.

ADMINISTRATION.

See APPEAL. EXECUTORS AND ADMINISTRATORS.

ADVERSE CLAIMANT.

See TRUSTEE PROCESS.

ADVERSE POSSESSION.

See EVIDENCE.

Where a grantor conveys a parcel of land to which he had the title and another parcel to which he had no title, though the grantee also claimed the other parcel, it is not a disseizin of the owner thereof, unless the grantee actually entered upon and occupied the same. *Proctor* v. *Railroad Co.*, 27.

Occupation by one of land which he owns under a deed *held* not constructive occupation of other land, conveyed by the deed, to which the grantor had no title. *Proctor* v. *Railroad Co.*, 27.

To constitute adverse possession there must be actual possession and occupancy of the premises for the requisite period.
Proctor v. *Railroad Co.*, 27.

Evidence *held* to fall far short of proving adverse, exclusive, continuous, open and notorious occupation of certain flats for twenty years or more.
Whitmore v. *Brown*, 410.

AFFIDAVITS.

See NEW TRIAL.

AFTER ACQUIRED PROPERTY

See CHATTEL MORTGAGES.

AGENCY.

See PRINCIPAL AND AGENT.

AGRICULTURAL SOCIETY.

See NEGLIGENCE.

ANIMALS.

See RAILROADS.

A person not the owner of a dog, may be liable, under R. S., c. 4, § 52, as its keeper, yet the mere fact that the dog is kept by its owner on the premises of another, with the knowledge or permission of the owner of such premises, does not of itself make the owner of such premises the keeper of the dog.
McCosker v. *Weatherbee*, 25.

APPEAL.

See EMINENT DOMAIN. EXECUTORS AND ADMINISTRATORS. GUARDIAN AND WARD. LAW COURT. REFERENCE. WILLS.

An administrator has no pecuniary or personal interests which can be affected by a decree of distribution of funds shown by his account to be in his hands.

CARE REQUIRED OF INFANTS.

See STREET RAILWAYS.

CARRIERS.

See COMMON CARRIERS.

CASES ON REPORT.

When a case is reported to the Law Court, it should be wholly reported as reports are intended to take up the whole case for the Court to make final disposition. A case should not come up by installments.

LaForest v. *Blake Co.*, 218.

When a case is reported to the Law Court with a stipulation that it is to be heard as if a verdict had been rendered for the plaintiff, and a motion for a new trial had been filed by the defendant, all conclusions and inferences of fact, which a jury would have been warranted by the evidence in finding for the plaintiff, must be found by the court for the plaintiff.

McTaggart v. *Railroad Co.*, 223.

Where a case comes to the Law Court upon a report of the evidence, the necessity for a compliance with the rules of pleading must be considered as waived and the Law Court will consider the questions presented by the report. *Rush* v. *Buckley*, 322.

Upon report of an action at law technicalities in pleading are to be regarded as waived unless otherwise stipulated, and, at least in the absence of such stipulation, the court can ascertain and decide upon its merits the real controversy in the case. *Hurd* v. *Chase*, 561.

CASES CITED, EXAMINED, ETC.

CAVEAT EMPTOR.

See LANDLORD AND TENANT.

CHARTER.

See EMINENT DOMAIN.

CHATTEL MORTGAGES.

(1) A mortgage of chattels including all stock in trade, furniture and fixtures that may hereafter be acquired, contained the further provision that the mortgagee should have the right to take possession of the mortgaged property and of any additions that might be made thereto, whenever he should deem it for his interest to do so.

(2) The plaintiff as mortgagee, took possession of the mortgaged property including the after-acquired stock in question for the purpose of enforcing his rights under the mortgage, and sought to retain possession of it as

against an attaching creditor, who attached after possession had been taken by the mortgagee. The attached property had not been purchased with the proceeds of any of the mortgaged stock previously sold by the mortgagors.

(3) There was no act of delivery of such after-acquired stock on the part of the mortgagor at any time after it was purchased by him, and possession of it was taken by the mortgagee without any other consent of the mortgagor than that contained in the agreement found in the mortgage.

(4) *Held:* That such mortgage is valid as to the after-acquired property and that the mortgagee had a lawful right to take possession of the same under the mortgage and that his claim to the after-acquired property is superior to that of the attaching creditor. *Burrill* v. *Whitcomb*, 286.

CITIES.

See MUNICIPAL CORPORATIONS.

CLAIMS AGAINST COUNTIES.

See COUNTIES.

COLLISION.

See NEGLIGENCE. STREET RAILWAYS.

COMITY.

See CONTRACTS.

COMMERCE.

The statute, R. S., chapter 29, section 64, which prohibits the maintenance of an action in the courts of this state to recover for intoxicating liquors bought in another state with intention to sell the same in this state in violation of the law, is not in violation of that clause of the Federal Constitution which gives Congress the power to regulate commerce between the states.

Corbin v. *Houlehan*, 246.

COMMON CARRIERS.

In the actual transportation of passengers, common carriers are required by public policy and safety to exercise the highest decree of care consistent with the business in which they are engaged. They are required to do all that human care, vigilance and foresight can do under the circumstances considering the character and mode of conveyance, to prevent accident to passengers. But the standard recognized by law is that of ordinary care with respect to the exigencies of the particular case; and the "standard by which to determine whether a person has been guilty of negligence is the conduct of a prudent, careful and diligent man." *Maxfield* v. *Railroad Co.*, 79.

In view of the great peril involved in the transportation of passengers by steam railways, a very high degree of vigilance, foresight and skill is required to fill the measure of ordinary care in order to prevent accident and injury. So with respect to the duty owed to the passenger on the platform of a railway station, the company is required to exercise ordinary care for the protection and safety of a passenger in that situation but it is obvious that different precautions and safeguards and a less degree of skill and foresight may be sufficient to meet the requirements of ordinary care under those circumstances. The correct principle obviously is that in all cases the amount of care bestowed must be equal to the emergency, however the standard may be denominated.
Maxfield v. *Railroad Co.*, 79.

It is the duty of a railroad company to exercise all ordinary care to maintain its platform in such a reasonably safe and suitable condition that the passengers who are themselves in the exercise of ordinary care can walk over it in safety. *Held:* that where there was a coating of ice on the station platform partially covered with slush, such platform was not in a reasonably safe condition for passengers. *Maxfield* v. *Railroad Co.*, 79.

A common carrier may limit his responsibility for property entrusted to him by a notice containing reasonable and suitable restrictions, if brought home to the owner of the goods delivered for transportation, and assented to clearly and equivocally by him, if it also appears that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties, according to which the service of the carrier was to be rendered.
Gerry v. *Express Co.*, 519.

(1) A defendant express company furnished plaintiffs a book of blank receipts in which the plaintiffs entered their shipments. At the top of each sheet of these receipts there was printed the following: "The property hereinafter described to be forwarded subject to the terms and conditions of the company's regular form of receipt printed on the inside cover of this book." Below this were entered the date, amount and destination of each shipment, and receipted by the defendant's agent when the goods were taken by him. Also on the inside cover at the bottom was the following: "The liability of this company is limited to $50.00, at which sum the property is hereby valued unless the just and true value is stated in this receipt." In the receipt for the shipment of goods by the plaintiffs no value of the goods was stated. The goods injured, however, were of a much greater value than fifty dollars and the loss by reason of the injury was more then fifty dollars. The plaintiffs claimed that they did not read the terms and conditions in the shipping book given them by the defendant.

(2) *Held:* That the receipt in this case incorporated into it the limitation of liability contained in the conditions printed in the books of receipts used by the plaintiffs. Upon that receipt and under its conditions the defendant

CONTRACTS.

See ACTION. ASSUMPSIT. BILLS AND NOTES. CHATTEL MORTGAGES. COMMON CARRIERS. CONSTITUTIONAL LAW. DEEDS. INSURANCE. INSURANCE (LIFE). LANDLORD AND TENANT. LIENS. MORTGAGES. SALES. SCHOOLS AND SCHOOL DISTRICTS. STATUTE OF LIMITATIONS. TRUSTEE PROCESS. WATERS AND WATER COURSES.

In a verbal contract where there is no guaranty that the work to be done under it shall secure a particular result desired, and from the nature of things this may be impossible, the law implies a condition that both parties shall be excused from their obligations where it becomes reasonably certain that a continuance would be useless. *Poland* v. *Brick Co.*, 133.

A municipal ordinance which by its terms gives the exclusive privilege of collecting and removing all refuse matter constituting house offal or swill, within a city, to a person or persons specially appointed, and which prohibits all other persons from engaging in that business, is not void as creating a monopoly and as being in restraint of trade. *State* v. *Robb*, 180.

It is a fundamental and elementary rule of the common law that courts will not enforce illegal contracts, or contracts which are contrary to public policy, or which are in contravention of the positive legislation of the state. To the general rule that the question whether a contract is a legal or illegal one, is judged by the law of the state or country, in which it was made, and that a contract good where made is good everywhere, there are some exceptions the most important of which is, that where the contract violates the positive legislation or the established public policy of the state of the forum, it will not be enforced in that state, although perfectly valid and legal according to the laws of the state or country where it is made.

Corbin v. *Houlehan*, 246.

The courts of a state will not enforce a contract in behalf of a vendor to remove the purchase price of goods sold by him to a vendee, if the vendor not only had knowledge of the illegal purpose of the purchaser to sell them in violation of the laws of the state to which they were to be transported but, as well, did some act in furtherance of this illegal purpose. A person should not be allowed to resort to the courts of the state to enforce a contract which he had made for the purpose of violating or evading the laws of that state, or by aiding another to violate such laws.

Corbin v. *Houlehan*, 246.

Courts recognize the laws of other states and countries pertaining to contracts, and give them force and effect upon the principle of comity, which is the voluntary act of the state or nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests. The comity of nations, rightly understood, cannot violate, because it is a part of, the law of this and every other civilized country. *Corbin* v. *Houlehan*, 246.

COURTS.

COUNTIES.

COVENANTS.

A covenant that a defendant was lawfully seized in fee of the premises, and the covenant that she had good right to sell and convey the same to the plaintiffs, fall within the rule, and it was only incumbent upon the plaintiffs to negative the words of the covenants. But the plaintiffs were not content to rely upon such a general assignment of the breaches of these covenants, but supplemented it with a specification of the grounds upon which they relied to establish the breach of these covenants, and having elected to do so, they are confined to the ground stated in the specification, and the defendant would be warranted in relying upon the facts thus stated in the specification as the only cause relied upon by the plaintiffs. *Glover* v. *O'Brien*, 551.

A specification set forth that the defendant before the date of her deed to the plaintiffs by her deed "duly sealed, executed and acknowledged did convey said premises to one Charles Steere of Boston, Massachusetts, and did convey and part with the title, which she, before the deed to said Steere held and possessed in the premises, and that before making her deed to the plaintiffs with the covenants aforesaid, she was not the owner of and had no right to convey said premises." This specification does not allege that the prior deed was either delivered or recorded.

(1) *Held:* That although all the facts stated in the specification may be true yet if it does not necesarily follow from either of the covenants has been broken, the assignment of breaches is not sufficient.

(2) Assuming that the averment of a conveyance by necessary implication includes a delivery, still the specification is defective because it does not allege that the deed to Steere was recorded.

(3) All that is stated in the specification may be true and yet the plaintiffs may have received a good title, and it does not appear either by express words or necessary implication that any covenant had been broken.

(4) If this specification could be construed to apply also to the general covenant of warranty, it would be equally unavailing. If it does not apply to this covenant there is no specification of the breach of it.

(5) Neither does the declaration specify the nature of the incumbrance alleged to constitute a breach of the covenants against incumbrances, therefore the breaches of these last named covenants are not well assigned.

Glover v. *O'Brien*, 551.

CRIMINAL LAW.

See Bail. Habeas Corpus. Intoxicating Liquors.

The issuance of a mittimus is a ministerial and not judicial act, a sequence of the sentence necessarily following it, and not subject to control by a magistrate, except in case of appeal. *Tuttle* v. *Lang*, 123.

The statute allows an appeal from a judgment or municipal court, to be taken within twenty-four hours thereafter. If not taken before the close of

the session, the mittimus should issue, and the convict be placed in jail; but in such case, if an appeal is duly taken within twenty-four hours, the magistrate must necessarily recall the mittimus to allow the appeal to be perfected. *Tuttle* v. *Lang*, 123.

The ordinary mittimus directs the officer to commit the convict then in custody, to the jail or prison according to the sentence. It contains no order to arrest, and does not authorize an arrest of one at large, and not an escaped prisoner. The sentence takes effect and is in force the day it is pronounced, and if the magistrate voluntarily discharges the convict from that custody without day, he cannot be afterwards taken in execution; certainly not after the time named for his imprisonment has elapsed. *Tuttle* v. *Lang*, 123.

A permanent court of general jurisdiction, having stated terms for the trial of criminal cases, may, for good cause, place an indictment on file, or continue the case to a subsequent term for sentence. In such case jurisdiction of the person and cause is retained. But after sentence and adjournment of the term or the end of the session, if before a magistrate, all jurisdiction of the cause and the person has ceased. *Tuttle* v. *Lang*, 123.

If after conviction and sentence any court, whether of general or limited jurisdiction, permits the convict to go at large without day, it can never thereafter issue a mittimus for his commitment. In such case, having completed its judicial functions, it has voluntarily surrendered all further control over the case and person. *Tuttle* v. *Lang*, 123.

The municipal court of Skowhegan, when a respondent is convicted of an offense within its jurisdiction or pleads guilty thereto, must impose sentence at the same session. It cannot suspend the issuance of the mittimus and allow the respondent to go at large and thereafter issue a mittimus for his commitment. *Tuttle* v. *Lang*, 123.

Where a court of criminal jurisdiction has power to impose sentence only at the same session at which conviction is had, the fact that the accused assents to the suspension of the mittimus is immaterial. Such consent does not enlarge the jurisdiction or the power of such court. *Tuttle* v. *Lang*, 123.

A plea of guilty in court is a confession of the crime charged in the complaint or indictment, and may be shown by oral testimony. It is not necessary to show it by record. *State* v. *Call*, 403.

When a record of a municipal court offered to show a plea of guilty is incomplete, in that, the spaces for the names of witnesses ordered to recognize, and for the amount of their recognizance in the printed form, are left blank, it is held to be admissible, and sufficient for the purpose for which it is offered. *State* v. *Call*, 403.

DAMAGES.

See ACCOUNTING. WATERS AND WATER COURSES.

In an action for personal injuries, a verdict of $1158.35 held not to be excessive. *Maxfield* v. *Railroad Co.*, 79.

DAMNUM ABSQUE INJURIA.

See WATERS AND WATER COURSES.

DAMS.

See WATERS AND WATER COURSES.

DEATH.

See MASTER AND SERVANT.

DEATH OF COURT STENOGRAPHER.

See LAW COURT.

DECLARATION.

See COVENANTS.

DECLARATION AND PROOF.

See EVIDENCE.

DECLARATIONS IN DISPARAGEMENT OF TITLE.

See EVIDENCE.

DECREE.

See EQUITY.

DEEDS.

See ADVERSE POSSESSION. BOUNDARIES. MORTGAGES. TAXATION.

The defendant in a real action acquired title to the demanded premises by a deed from the demandant which contained this clause: The above named Association (the grantee) to erect and maintain a fence around the remainder of the lot, of which the above mentioned ten acres is a part, and lying between said Association track and the County road, said Association or their successors failing to erect and maintain a suitable fence this instrument becomes null and void. *Held:* that this clause constituted a condition subsequent, and that upon the failure of the grantee to comply with the condition, its title was forfeited and the demandant had the right to make an entry upon the premises for the purpose of revesting himself with the estate.

Randall v. *Wentworth*, 177.

When the grantee in a deed has failed to comply with the terms of a condition subsequent, and the grantor prior to the commencement of an action to recover possession, made an entry upon the premises for the purpose of revesting himself with the estate, such grantor is entitled to a judgment in his favor. *Randall* v. *Wentworth*, 177.

It is a well settled rule of law that in construing a deed, general words are not restrained by restrictive words added, where such words do not clearly indicate the intention and designate the grant; also that a grant shall be taken most forcibly against the grantor. *Shepherd Co.* v. *Shibles*, 314.

The modern doctrine with respect to the construction of deeds is that they shall be made to carry out the intention of the parties, if practicable, when no principle of law is thereby violated. This intention is to be ascertained by taking into consideration all the provisions of the deed as well as the situation of the parties to it. *Shepherd Co.* v. *Shibles*, 314.

A deed of warranty containing all the covenants usually found in such a deed, states that it gives, grants, bargains, sells and conveys to the grantees, their heirs and assigns forever, a certain parcel of land therein described, with all the privileges and appurtenances thereof, and then further says "meaning to convey only a right of way across the same; and reserving the right to take limerock from the same." *Held:* that this deed conveyed the fee to the premises therein described with a reservation of the right to take limerock therefrom. *Shepherd Co.* v. *Shibles*, 314.

In construing a grant, the intention of the parties is ascertained by giving suitable effect to all the words of the grant, reading them in the light of the circumstances attending the transaction; but the supposed intention of the parties, however fortified by circumstances, cannot be permitted to overcome the effect of the express language of the grant, taken as a whole, and properly construed. *Whitmore* v. *Brown*, 410.

The description of land conveyed is to be interpreted by reference to all the calls in the deed, and every call is to be answered if it can consistently be done. *Chapman* v. *Hamblet*, 454.

In cases of ambiguity the interpretation is to be sought from the attendant circumstances and the intent of the parties, and the deed must receive a construction most favorable to the grantee. *Chapman* v. *Hamblet*, 454.

DEMURRER.

See INTOXICATING LIQUORS.

When the legislature grants the right of eminent domain for several purposes, for some of which the grant would be constitutional, and for others not, with the discretion in the grantee to exercise the right when and where it chooses, within the confines of a large territory, that discretion must be used in good faith, and the taking must actually be for the constitutional purpose in order to be valid. And the actual purpose is open to judicial inquiry.

Brown v. *Gerald*, 351.

The private property of one cannot constitutionally be taken by another under the sanction of legislative authority, without the consent of the owner, except for public uses, and then only in case of public exigency.

Brown v. *Gerald*, 351.

Whether a public exigency exists for the granting of the exercise of the right of eminent domain, is for the legislature to determine. Whether the use for which it is granted is a public one, the court must decide.

Brown v. *Gerald*, 351.

A public use such as justifies the taking of private property against the will of the owner cannot rest merely upon public benefit or public interest, or great public utility. It implies a possession, occupation and enjoyment of the property taken by the public at large, or by public agencies. That only can be considered a public use where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience or welfare which, on account of their peculiar character and the difficulty or impossibility of making provisions for them otherwise, it is alike proper, useful and needful for the government to provide.

Brown v. Gerald, 351.

Manufacturing, generating, selling, distributing and supplying electricity for power, for manufacturing or mechanical purposes, is not a public use for which private property may be taken against the will of the owner.

Brown v. *Gerald*, 351.

A corporation empowered by its charter to generate and transmit electric power, for lease or sale, and having granted to it the right of eminent domain, does not by accepting the provisions of its charter become a quasi public corporation, and does not thereby become invested with the right to exercise the eminent domain for the purpose of supplying electric power for manufacturing purposes. *Brown* v. *Gerald*, 351.

If a corporation is not a quasi public one, it cannot make itself one by a vote recognizing itself as such, and pledging itself to perform the duties of a quasi public corporation. *Brown* v. *Gerald*, 351.

EQUITY.

See ACCOUNTING. APPEAL. CORPORATIONS. ESTOPPEL. EXECUTORS AND ADMINISTRATORS. MUNICIPAL CORPORATIONS. TRADE-MARKS AND TRADE-NAMES.

EQUITABLE ESTOPPEL.

See ESTOPPEL.

EQUITABLE LIENS.

See WILLS.

EQUITY POWERS OF S. J. COURT.

See MORTGAGES.

ESTATES.

See DESCENT AND DISTRIBUTION. EXECUTORS AND ADMINISTRATORS.

ESTOPPEL.

See COUNTIES.

The doctrine of equitable estoppel is founded upon the principles of equity and justice, and is applied so as to conclude a party, who by his acts and admissions intended to influence the conduct of another, when, in good conscience and honest dealings, he ought not to be permitted to gainsay them. *Rogers* v. *Street Railway*, 86.

The doctrine of equitable estoppel should be applied with great care in each case, so that a person may not be debarred from the maintenance of a suit based upon his legal rights, unless the conduct relied upon as creating an estoppel has been of such a character, and has resulted in such injury to the person relying upon such conduct, that, in equity and good conscience, he should be thereby prohibited from enforcing the legal rights which he otherwise would have, nor unless in any given case all the elements exist which have been universally held to be essential for the purpose of creating an estoppel. *Rogers* v. *Street Railway*, 86.

The conduct, declarations or silence relied upon to create an estoppel, must be made to or in the presence of a person known to have an interest in the subject matter, and must be of such a character as would naturally have the effect of influencing the conduct of the person to whom it is addressed. *Rogers* v. *Street Railway*, 86.

It is not necessary, in accordance with the prevailing rule, that the conduct creating an estoppel should be characterized by an actual intention to mislead and deceive. Neither would ignorance upon the part of the plaintiff of his legal rights, provided he had a full knowledge of the facts, be an answer to the estoppel relied upon. *Rogers* v. *Street Railway*, 86.

In order to create an estoppel, the conduct, misrepresentations or silence of the person claimed to be estopped must be made to or in the presence of a person who had no knowledge of the true state of facts, and who did not have the same means of ascertaining the truth as did the other party. *Rogers* v. *Street Railway*, 86.

A person will not be estopped merely by his silence and failure to disclose facts that may be ascertained by an examination of public records, when the situation is not such as to place upon him the duty of making known the truth. In such a case he may rely upon the notice given to all by the public records.

ESTRAYS.

See RAILROADS.

EVIDENCE.

See ADVERSE POSSESSION. BASTARDY PROCESS. CRIMINAL LAW. DEEDS. DESCENT AND DISTRIBUTION. EXCEPTIONS. GIFTS. INSURANCE (LIFE.) MASTER AND SERVANT. MORTGAGES. MUNICIPAL CORPORATIONS. NEGLIGENCE. NEW TRIAL. PAUPERS. PRINCIPAL AND AGENT. TRADE-MARKS AND TRADE-NAMES. TRUSTEE PROCESS. WATER AND WATER COURSES. WILLS.

EXCEPTIONS.

See CASES ON REPORT. EQUITY. GUARDIAN AND WARD. INSTRUCTIONS. LAW COURT.

Court of Probate, and a direct and convenient mode of procedure is thus provided for reaching a final decision of the question involved in the settlement of the estate. *Stilphen, Aplt.*, 146.

The relief in equity given by chap. 87, sec. 19, R. S. 1883, depends upon the following propositions:

(1) The existence of a claim due the creditor enforceable by an action at law except for the special statute bar of limitations.

(2) That there are undistributed assets of the estate.

(3) That justice and equity require it.

(4) That the creditor is not chargeable with culpable neglect in not seasonably prosecuting his claim. *Holway* v. *Ames*, 208.

The meaning of culpable neglect in the statute is negligence less than gross carelessness but more than failure to use ordinary care; it is a culpable want of watchfulness and diligence, the unreasonable inattention and inactivity of "creditors who slumber on their rights." *Holway* v. *Ames*, 208.

Where a creditor had general knowledge of transactions conducted by the deceased as general manager of business in which he was interested, and had access to the books of the debtor from August to November before his action at law was barred, he will be held chargeable with culpable neglect in not prosecuting his claim against the estate within the time limited by statute, unless he had been misled by fraud, or has relied upon the agreement of the administrator. *Holway* v. *Ames*, 208.

An administrator is the proper party to sue for the goods which once belonged to his intestate, but which were disposed of by the latter, by a fraudulent and void transfer or gift. *Wright* v. *Holmes*, 508.

EXPLOSIVES.

See MASTER AND SERVANT.

EXPRESS COMPANY.

See COMMON CARRIERS.

FACTUAL HYPOTHESES.

See EXCEPTIONS.

FAIR.

See NEGLIGENCE.

FALSE IMPRISONMENT.

Where the plaintiff was arrested for the violation of an invalid city ordinance, *held* that the defendants, who made the original complaints on which the warrants were issued, are not liable in damages to the plaintiff therefor.
Rush v. *Buckley*, 322.

Where warrants were issued by a judge of a municipal court having general jurisdiction over the violation of ordinances, and contained nothing on their face to indicate that the court did not have jurisdiction over the particular offenses charged because of the invalidity of an ordinance, *held* that the officer who served the warrants was not liable in damages to the person arrested. *Rush* v. *Buckley*, 322.

FERRIES.

The only proprietorship in a ferry in this state is the franchise conferred by statute, and the person holding it has no common law remedy against those who interfere with his profits, but the remedy is by sec. 6, chap. 20, R. S. 1883. *Peru* v. *Barrett*, 213.

Where a town provides a person to be licensed to keep a ferry and pays the expenses beyond the amount of tolls received for maintaining it, it is entitled to the tolls and profits of the ferriage and has a right of action against those interfering with the business. *Peru* v. *Barrett*, 213.

Any person has a right to keep and use boats for his own accommodation in passing over a river, or transporting his family, servants and goods, and to occasionally carry over strangers within the line of travel implied in the location of an established ferry, because it would not be public carrying for hire; but he has no right to transport passengers and goods for hire so as clearly to diminish the profits of the ferry, the criterion being the interference with the ferry franchise causing a natural, appreciable loss of patronage.
Peru v. *Barrett*, 213.

Where a merchant controls land on both sides of a river near the location of a ferry and has a store on one side and a warehouse on the opposite side of the river, and keeps two rowboats by which he transports his customers and their purchases without charge, there being no public crossings, except the ferry, nearer than a bridge three and one half miles above and another seven miles below the ferry, and this privilege was known to those trading with him and was an inducement intended to increase and did increase his business and diminished the profits of the ferry, *held*, that this was in effect a transportation of persons and property for hire, and that he is liable to the holder of the ferry franchise for interfering with his profits.
Peru v. *Barrett*, 213.

GUARDIAN AND WARD.

See SUBROGATION.

GUIDE POSTS.

See WAYS.

HABEAS CORPUS.

See CRIMINAL LAW.

A discharge on a petition for habeas corpus will not be granted for technical or unimportant errors in a criminal process or proceedings; but it will be granted where the detention is under process issued by a court or magistrate without authority or in excess of its jurisdiction. *Tuttle* v. *Lang*, 123.

Habeas Corpus is the proper remedy, when the process upon which a convict is held, was issued by a court having no jurisdiction of the case or person at the time of its issue. *Tuttle* v. *Lang*, 123.

HEALTH.

See CONSTITUTIONAL LAW. EMINENT DOMAIN.

Under a city ordinance providing that "no person shall go about collecting any house offal, consisting of animal and vegetable substances, or carry the same through any of the streets, lanes or courts of the city," except the person appointed for that purpose by the Sanitary Committee, the term house offal is held to include refuse food from the table, discarded victuals, and swill consisting of refuse from the table, though none of it be in a decayed condition. *State* v. *Robb*, 180.

Reasonable municipal regulations for the purpose of promoting the health of the citizens are clearly within the police power of the state. Among such regulations are those for the collection and removal of refuse and offal in thickly populated cities. *State* v. *Robb*, 180.

A municipal ordinance prohibiting the collection of house offal, except by duly authorized appointees, extends only to offal collected by an unauthorized person elsewhere than on his own premises, and to that extent is valid. *State* v. *Robb*, 180.

Defendant held guilty of violating a municipal ordinance of the City of Portland regulating the removal of house offal. *State* v. *Robb*, 180.

HIGHWAYS.

See WATER AND WATER COURSES. WAYS.

HIRING SCHOOL TEACHERS.

See SCHOOLS AND SCHOOL TEACHERS.

HORSE TROTS.

See NEGLIGENCE.

HOUSE OFFAL.

See HEALTH.

1. The term "house offal" includes refuse food from the table, discarded victuals, and swill consisting of refuse from the table, though none of it be in a decayed condition. *State* v. *Robb*, 180.

HUSBAND AND WIFE.

To constitute a valid gift inter vivos of an insurance policy from a wife to her husband the necessary changes of beneficiary must be made during her lifetime. *Littlefield* v. *Perkins*, 96.

Essential elements of a gift *held* wanting. *Littlefield* v. *Perkins*, 96.

In this state, prior to June 1, 1903, when chap. 160 of the Public Laws of that year took effect, a married woman might make such disposition by gift, voluntary conveyance or otherwise, of her personal property during her lifetime, as she wished, even though her husband was thereby deprived of the distributive share therein, which would otherwise fall to him upon her death; and even though such disposition was made with intent to prevent his receiving such a distributive share. *Wright* v. *Holmes*, 508.

Whether the rule in effect, prior to June 1, 1903, when chapter 160 of the Public Laws of that year took effect, that a married woman might dispose of her personal property during her lifetime even though her husband was deprived of a distributive share therein, will apply as to gifts causa mortis, since chapter 160 of the Public Laws of 1903, permitting a widower to waive the provisions of his wife's will, and take his distributive share in her personal estate, as if she had died intestate, is not decided. *Wright* v. *Holmes*, 508.

ICE AND SLUSH.

See COMMON CARRIERS.

ICY SIDEWALK.

See NEGLIGENCE.

INFANTS.

See ACTION. CARE REQUIRED OF INFANTS. GUARDIAN AND WARD.

INFRINGMENT.

See TRADE-MARKS AND TRADE-NAMES.

INSOLVENCY.

See CORPORATIONS.

INSTRUCTIONS.

See EXCEPTIONS. NEGLIGENCE.

(1) A plaintiff attempted to alight from a street railway car which had come to a stop at a point of intersection with the tracks of a steam railroad. The car started before she had alighted and she was thrown and injured. It was claimed that the only purpose of the stop was to safeguard the crossing of the railroad tracks, and that it was not a place where a stop was regularly made for passengers to get off or on the street cars, but there was likewise evidence that passengers did sometimes get off or on the street cars while so stopping. At the trial of the action brought by the plaintiff, the presiding Justice at the request of plaintiff's counsel, gave the following instruction: "If you believe that this was the crossing of tracks, and that under the practice and custom of the company, the cars stop at this crossing and believe that people get on or off at this place, while cars are stopped, then it was the duty of the conductor in charge of the car to ascertain for himself whether passengers wanted to get on or off; and if he could by great care discover who wanted to get off, whether they wanted to get off, that would be equivalent to actual knowledge on the subject."

(2) *Held:* that this instruction imposed upon the conductor the duty of exercising "great care" to discover if any one wanted to get off the car, and the phrase "great care" as used in the instruction was without limitation. It was left entirely to the jury to say what meaning should be attached to it. Under it the jury may have said that it was the duty of the conductor to inquire of every passenger upon his car if they wished to alight and that if he failed to do this in the exercise of the duty requiring "great care," he was negligent. Or if so strenuous a duty as to inquire of each passenger was not deemed necessary in the exercise of "great care," the jury might have found that some other burdensome duty was imposed by the instruction given. Exceptions to instructions sustained. *Raymond* v. *Railroad Co.*, 529.

INSURANCE.

See HUSBAND AND WIFE.

If a plaintiff falsely and knowingly inserts in his sworn schedule of loss, as burned, any single article which in fact was not in the house or was not burned, this would constitute a fraud on the company, and such plaintiff cannot recover anything on his policy. *Rovinsky* v. *Assurance Co.*, 112.

If a plaintiff knowingly puts a false and excessive valuation on any single article, or puts such false and excessive valuation on the whole as displays a reckless and dishonest regard of the truth in regard to the extent of the loss, such knowing over-valuation is itself fraudulent and such plaintiff cannot recover at all. *Rovinsky* v. *Assurance Co.*, 112.

INSURANCE (LIFE.)

See GIFTS.

INTERSTATE COMMERCE.

See COMMERCE.

INTOXICATING LIQUORS.

See CONSTITUTIONAL LAW. CONTRACTS. COMMERCE. SEARCH AND SEIZURE.

JUDICIAL DISCRETION.

See EXCEPTIONS.

JURISDICTION.

See CORPORATIONS. CRIMINAL LAW. FALSE IMPRISONMENT. JUDGMENT. JUDGES. LAW COURT. MUNICIPAL CORPORATIONS.

KEEPER.

See ANIMALS.

KENNEBEC SUPERIOR COURT.

See JUDGMENT.

LANDLORD AND TENANT.

When a landlord leases a dwelling house to a tenant there is no implied warranty that such dwelling house is reasonably fit for habitation, and no obligation on the part of the landlord to make repairs on the leased premises unless he has made an express valid agreement to do so.

Bennett v. *Sullivan*, 118.

The common law rule of caveat emptor is still in force in this state and applies to a lease as well as a sale of property. *Bennett* v. *Sullivan*, 118.

The owner of private property owes to a prospective lessee no duty to exercise ordinary care to ascertain and apprise him of unknown defects in the property to be leased where such prospective lessee has equal opportunity to ascertain the defects. *Bennett* v. *Sullivan*, 118.

Agreement of a landlord to repair a tenement *held* not to include repairs on a certain platform. *Bennett* v. *Sullivan*, 118.

Where a lessor, after the execution of the lease, promised to repair part of the premises, without any threat by the lessee to quit the premises if the repairs were not made, the promise was without consideration.

Bennett v. *Sullivan*, 118.

The owner of real estate may transfer his land by a lease signed by him alone.

Braman v. *Dodge*, 143.

This is true even though such lease contains an independent covenant for execution by the lessee, where the evidence shows that it was the intention of the parties it should take effect as a lease, without being signed by the lessee, and that the lessee's execution of such covenant was waived by the lessor. *Braman* v. *Dodge*, 143.

LAW AND FACT.

See EMINENT DOMAIN.

LAW COURT.

The Law Court is a creature of the statute, and has no power except such as are given it by statute. *Stenographer Cases*, 271.

The statutory right of a hearing upon a motion for a new trial is conditional upon the furnishing the Law Court with a report of the evidence. This condition cannot be waived or dispensed with by the Law Court. *Stenographer Cases*, 271.

When by reason of the death of an official court stenographer, a party who has filed a motion for a new trial at law, or has taken an appeal in equity is unable to procure a report of the evidence, the Law Court has no authority to remand the case for a new trial, but must overrule the motion, or dismiss the appeal, for want of prosecution. *Stenographer Cases*, 271.

LESSOR AND LESSEE.

See LANDLORD AND TENANT.

LICENSES.

See FERRIES.

LIENS.

See EQUITABLE LIENS. WAREHOUSEMEN.

Chapter 93, section 53, R. S., gives a lien for certain services upon spool timber and spool bars manufactured therefrom which continues for sixty days after such timber or spool bars arrive at the place of destination for sale or manufacture. *Chamberlain* v. *Wood*, 73.

In the case of spool bars, the place of destination for sale or manufacture, is the place where such spool bars are actually intended to be sold or manufactured into spools. *Chamberlain* v. *Wood*, 73.

LIFE ESTATE.

See MORTGAGES.

LIFE INSURANCE.

See INSURANCE (LIFE).

LIMITATION OF ACTIONS.

See ADVERSE POSSESSION. STATUTE OF LIMITATIONS.

LIQUOR SELLING.

See INTOXICATING LIQUORS.

LOCOMOTIVE ENGINEERS.

See RAILROADS.

LOGS AND LUMBER.

See LIENS.

MALICIOUS PROSECUTION.

See FALSE IMPRISONMENT.

MANDAMUS.

1. Mandamus lies by an individual to compel a water company which is a public service corporation, to supply water to him.
Robbins v. *Railway Co.*, 496.

MARRIAGE.

See HUSBAND AND WIFE.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See TRUSTEE PROCESS.

When there is known to an employee a safe method of doing the work assigned to him, and he nevertheless uses an unsafe method without direction to do so from his employer, he does so at his own risk, and the employer is not liable to him for any resulting injury. *Leard* v. *Paper Co.*, 59.

An employee of mature age working at taking down tiers of pulp twelve feet high must be held to have known there was danger of single tiers falling if deprived of the support of adjacent tiers, and that such danger could be avoided by reducing the heights of all the tiers nearly simultaneously. If, nevertheless, he took one tier down separately and in consequence the next tier being thus left without support fell upon him to his injury he must bear the loss and cannot shift it upon his employer. *Leard* v. *Paper Co.*, 59.

That such an employee was only one of several engaged in the same work, and that he used the unsafe method only in concurrence with them, or at their suggestion, does not relieve him from the risk thereby incurred.
Leard v. *Paper Co.*, 59.

To throw such risk upon his employer, the employee must at least show that he was specifically directed by his employer, or by his agent in charge of the work, to use the unsafe method. It is not enough that some or a majority of the workmen in the crew, or some other employee of the same employer having no charge of that work, give such instructions.

Leard v. *Paper Co.*, 59.

Held: that the plaintiff produced no evidence from which his own due care could be inferred, and that the uncontradicted evidence showed that he assumed the risk of injury in doing the work as he did.

Leard v. *Paper Co.*, 59.

One cannot be lawfully held guilty of negligence by reason of an act or omission which would not lead an ordinarily prudent, observant man giving the matter thought, to apprehend danger from it.

Cowett v. *Woolen Co.*, 65.

The existence upon the collar of a revolving shaft of a small set screw with an oval head one-fourth of an inch in diameter and projecting only one sixteenth of an inch above the surface of the collar, is not such a circumstance as would lead such a man to apprehend danger from it to a workman having no occasion to grasp or touch the collar. *Cowett* v. *Woolen Co.*, 65.

The master is obliged to provide the servant with a reasonably safe place in which to perform his labor having reference to the nature of the work, and if he is inexperienced to instruct him and warn him of the existence of particular dangers, so that he may be able to decide with discretion whether he will assume the hazards of the employment. *Erickson* v. *Slate Co.*, 107.

The servant is bound to use reasonable care, and to assume ordinary risks incident to the business, those which are obvious or which he ought to know and appreciate, and those pointed out by the master.

Erickson v. *Slate Co.*, 107.

It is not negligence to use dynamite in slate quarrying, but on account of its great explosive power it is a recognized element of danger in such work, and proportionate care is required of both master and servant in its use.

Erickson v. *Slate Co.*, 107.

It would not be negligence in law to leave unexploded cartridges of dynamite in old holes in the pit of the quarry when new holes are being drilled, but it would be the duty of the master to warn a servant of this particular danger, unless he knew or ought to know that they were frequently left from imperfect explosions. Instructions of the foreman to the plaintiff, when drilling "to set his drill as far as he could from the old holes and not to bother

them," were not only words of direction but of warning, and would ordinarily fulfill the defendant's duty as indicating a condition of danger.
Erickson v. *Slate Co.*, 107.

Where, in an action to recover damages sustained from an accidental explosion of dynamite, the plaintiff was an adult of good intelligence, familiar with slate quarries, and of the particular quarry by working for two years on the dump, and running the hoister within two rods of the pit, and knew that the men were constantly using dynamite, knew it to be a dangerous explosive and that unexploded cartridges frequently remained in the place where he was operating the drill, and was directed to avoid proximity to the old holes, and he set his drill within four or five inches from one containing dynamite, without ascertaining its location by clearing the surface of the ledge, and the explosion was caused by the action of the drill, *held*, that he was guilty of contributory negligence. *Erickson* v. *Slate Co.*, 107.

Where a servant received positive orders from the master as to the manner in which he is to do his work, this imposes upon him a duty, and failure to perform it is prima facie evidence of his negligence.
Erickson v. *Slate Co.*, 107.

The duty of an employer to give notice to his servant of dangers in the operation of machinery, or of changes in machinery, which increase or which change the nature of dangers to be avoided, is confined to such dangers and changes, as are not known to the servant, and to such as would not naturally be discovered by him by the exercise of the power of observation on his part. It is not the duty of an employer to give his servant notice of anything which the latter has an ample opportunity to become aware of himself by observation, if he exercises that reasonable care which the law requires of him in order to protect himself from harm.
Bryant v. *Paper Co.*, 171.

A plaintiff who was employed as an oiler in a pulp mill, was caught in the unprotected cog wheels of a plunger pump, and seriously injured. The plaintiff had known for a long time previous to the injury of the lack of protection for the cog wheels, but with full knowledge of the absence of such protection, he continued his employment. *Held:* That he assumed the risk attendant upon the performance of his work about the pump in the condition in which it was. *Bryant* v. *Paper Co.*, 171.

A plaintiff in an action for personal injuries, complained that during his absence by reason of sickness, the revolution of certain cog wheels had been changed, without notice to him, so that they revolved in the reverse direction, but he continued his work as oiler of the machinery twice each day for a period of four weeks after the change. *Held:* That if he failed to observe the change during that period he was guilty of contributory negligence. *Bryant* v. *Paper Co.*, 171.

In an action for injuries to an employee, evidence *held* insufficient to show negligence on the part of the defendant. *Bryant* v. *Paper Co.*, 171.

It is the duty of the master to exercise reasonable care so as to place its appliances, boilers and pipes, as to make it reasonably safe for the servant to perform any service which the master has any reason to expect that the servant may properly do, at that place, by virtue of his employment; and omission to exercise such care is negligence.
McTaggart v. *Railroad Co.*, 223.

It is held further, that, even if the foregoing were otherwise, the defendant had no reason to anticipate that a baggage master in a car with two high and wide doors on the side, as here, made on purpose to be used by him, would leave the car and go down upon the lower steps, as the deceased must have done, if he was hit by the pipe, for the purpose of throwing off a message, when he could have done it safely and conveniently from one of the side doors. *McTaggart* v. *Railroad Co.*, 223.

It matters not whether an appliance is so placed as to be safe or unsafe as to other servants in the performance of their respective duties.
McTaggart v. *Railroad Co.*, 223.

A baggage master in the employ of a defendant railroad company, at the request of one of the defendant's station agents who was also the telegraph operator at his station, took a telegraphic message addressed to one of the defendant's construction crew which was at work along the line, and undertook to throw it off from the moving train when the train reached the place where the crew was at work, and was killed while so doing. The case fails to show that the station agent was authorized to require the baggage master to undertake the delivery of a telegram by throwing it off a moving train, or that it came within the scope of the baggage master's employment to perform such service. Nor does the case show any custom of the station agent and baggage master to forward and deliver messages in this way, from which it might be inferred that the defendant knew and assented to the practice. Therefore it is *held* that the defendant was not bound to anticipate the performance of any such service by the baggage master, as was undertaken in this case, and did not owe him the duty of providing so that he might do it safely. *McTaggart* v. *Railroad Co.*, 223.

Held: That the evidence is insufficient to warrant the court in giving judgment for the plaintiff. *McTaggart* v. *Railroad Co.*, 223.

The legal standard governing a master's duty is that of ordinary care with respect to the exigencies of the situation. What precautions and safeguards, what degree of vigilance and foresight would meet the requirements of ordinary care in a given case, must be determined by reference to the conduct

(1) The court now having full equity powers has the power to treat a conveyance or a reservation in a conveyance absolute in terms, as made solely for security for some obligation, if it finds such to be the fact from extrinsic evidence.

(2) Having this power the court also has the power in such case to determine from extrinsic evidence what the obligation is that was intended to be secured, including its nature, extent and terms.

(3) When the instrument made as security itself contains a description of the obligation to be secured, the court cannot add to, nor take away anything from such description, but when the instrument contains no description the court can ascertain the full terms of the obligation from extrinsic evidence.

(4) These equity powers of the court can now be exercised in an action at law for the possession of the estate thus conveyed or reserved. A separate bill in equity is not now necessary for that purpose.

(5) In this case the plaintiff reserved in terms an absolute life estate out of a farm conveyed by her to the defendant, but the court finds that one consideration for the conveyance was the bond of the defendant to support the plaintiff on the farm, and that the reservation was made solely as security for the performance of the bond. *Held:* that the defendant is entitled to retain possession of the farm until a breach of his bond and, no such breach being shown, the plaintiff is not yet entitled to possession.

Hurd v. *Chase*, 561.

MOTIONS.

See LAW COURT. NEW TRIAL.

MUNICIPAL CORPORATIONS.

See NEGLIGENCE. SCHOOLS AND SCHOOL DISTRICTS.

The Supreme Judicial Court has jurisdiction to prevent a manifest violation of Art. XXII of the amended Constitution of the state, providing that no city or town shall create any debt or liability exceeding five per centum of the last regular valuation thereof. *Blood* v. *Beal*, 30.

The Supreme Judicial Court has authority to prevent a city from creating a debt in excess of the constitutional limit, whether the debt contemplated is for a legal or illegal purpose. *Blood* v. *Beal*, 30.

Where the rules of a city council provide that certain orders shall not be passed unless two-thirds of the whole number of each branch vote in the affirmative, and the whole number was twenty-one, and the number voting in the affirmative on the passage of the order was ten, such order is void.

Blood v. *Beal*, 30.

For failure upon the part of a city to maintain and keep in repair a sewer which caused injury to the plaintiff's property, the defendant would have been liable by the express provisions of the special act under which it was located and planned, as well as by those of the general statute. But the evidence does not disclose any failure upon the part of the city in this respect. Upon the contrary, it appears that the injury to the plaintiff's property resulted entirely from the insufficient size of the sewer and of its outlet, a fault in the original plan of construction, for which the city is not liable. *Keeley* v. *Portland*, 260.

MUNICIPAL INDEBTEDNESS.

See MUNICIPAL CORPORATIONS.

NAVIGABLE WATERS.

See BOUNDARIES. WATERS AND WATER COURSES.

By force of the Colonial Ordinance of Massachusetts, 1641-7, the owner of upland adjoining tidewater prima facie owns to low water mark; and does so own, in fact, unless the presumption is rebutted by proof to the contrary. *Whitmore* v. *Brown*, 410.

Flats pass by grant of the upland, unless excluded by the terms of the grant properly construed. *Whitmore* v. *Brown*, 410.

The flats do not pass as appurtenant to the upland, when they are outside of the express boundaries in the grant, even if the grant contains the words "together with all the privileges and appurtenances thereto belonging." *Whitmore* v. *Brown*, 410.

NEGLIGENCE.

See CARE REQUIRED OF INFANTS. COMMON CARRIERS. EVIDENCE. EXCEPTIONS. INSTRUCTIONS. MASTER AND SERVANT. RAILROADS. STREET RAILWAYS.

(1) A defendant bank had partially constructed and built a certain walk, about eight feet wide, on the south side of its bank building and on its own premises. Said walk fronted on and adjoined a certain public street south of said bank building. In this walk, about seventeen feet from the east end of the same was a rollway to the cellar of the bank building, about twelve feet long, five feet wide and five or six feet deep. The rollway itself was uncovered and without protection of any kind. But in the space on the walk, both east and west of the rollway there were piled various obstructions such as bricks, barrels, lumber, carpenter's horses and other debris. These obstructions practically prevented entrance upon the walk from either end. The plaintiff, in the night time, while going to a fire, fell into this roll way and was injured and thereupon she brought suit to recover damages for the injuries sustained.

(2) *Held:* that these various obstructions and unfinished condition of the walk were a plain indication to the plaintiff and the public generally that this walk was not opened for travel and negatived any implied invitation on the part of the defendant bank for travelers to enter upon it, and that the plaintiff in going upon it was at most but a mere licensee to whom the defendant bank owed no duty except not to wantonly injure her, also *held* that the plaintiff was guilty of contributory negligence. *McClain* v. *Nat'l Bank*, 437.

The plaintiff slipped upon the ice on the sidewalk in front of the defendant's house and sustained an injury. Thereupon the plaintiff brought suit against the defendant alleging that the defendant wrongfully conducted water from the roof of a part of her house upon the sidewalk which froze and rendered the sidewalk dangerous. *Held:* that to entitle the plaintiff to recover it was necessary for her to show that the icy condition of the sidewalk resulted from water artificially conducted upon the sidewalk, and not from surface water naturally flowing upon the sidewalk, or from melting snow which had fallen upon the sidewalk, and this the evidence fails to show.
Greenlaw v. *Milliken*, 440.

In an action to recover for injuries received by falling on the ice on the sidewalk in front of defendant's house, evidence *held* to show that plaintiff was guilty of contributory negligence. *Greenlaw* v. *Milliken*, 440.

The rule of law now generally recognized by the great weight of authority is that the legal measure of duty, except that made absolute by law, with respect to almost all legal relations, is better expressed by the phrases "due care," "reasonable care," or "ordinary care," terms used interchangeably. Reasonable care may be defined as such care as an ordinarily reasonable and prudent person exercises with respect to his own affairs, under like circumstances. In this definition it is the phrase "under like circumstances" that imposes upon the term "reasonable care" both its limitations and its elasticity. The term is a relative one; the same act under one set of circumstances might be considered due care and under different conditions a want of due care, or negligence. Therefore the duty intended by the use of the phrase "ordinary care," is always referable to the circumstances and conditions, under which the act or omission to act is required to be performed. These limit or define the scope of the situation within which the performance of the same act may be called reasonable or unreasonable.
Raymond v. *Railroad Co.*, 529.

An agricultural society holding a fair, for admission to which a fee is charged, is bound to use reasonable care to keep all parts of its grounds, to which patrons are admitted, free from dangers to them.
Higgins v. *Agricultural Society*, 565.

When an agricultural society holding a fair, to which an admission fee is charged, invites patrons even by implication only, to cross its racing track,

PAUPERS.

Neither the act nor the omission of the assessors in the assessment or non-assessment of a tax on an individual, can be evidence for or against a town on the question of the residence of such individual.

Rockland v. *Union*, 67.

The assessment of a tax against a person is no admission on his part unless coupled with its payment or his recognition of it in some manner as an existing liability. *Rockland* v. *Union*, 67.

At the most the assessment or non-assessment of a tax but represents the opinion of the assessors upon the question of the residence or non-residence of the person at the time, and cannot be evidence of the fact itself before another tribunal. *Rockland* v. *Union*, 67.

In 1883 the pauper joined a Masonic Lodge at Islesboro. Defendant town offered a deposition to prove that the rules governing the residential jurisdiction of Masonic lodges in Maine at that time required that an applicant must have been a resident of that town for six months prior to his joining the lodge. This regulation was not shown to have been brought to the pauper's notice or acted upon by him. *Held:* that the evidence was properly excluded. All that it tended to prove as to the pauper's residence was the opinion of the persons who invited him to join the lodge and admitted him to membership, a matter irrelevant to the issue.

Rockland v. *Union*, 67.

PAUPER SETTLEMENT.

See PAUPERS.

PAYMENT.

See ACCORD AND SATISFACTION.

PETITION FOR PARTITION.

See TAXATION.

PLEA IN CRIMINAL PROSECUTION.

See CRIMINAL LAW.

PLEADING.

See BASTARDY PROCESS. CASES ON REPORT. COVENANTS. EXECUTORS AND ADMINISTRATORS. INTOXICATING LIQUORS. TRUSTEE PROCESS. WATERS AND WATER COURSES.

PRACTICE.

See WATERS AND WATER COURSES.

PRACTICE (EQUITY.)

See CASES ON REPORT. COURTS. EQUITY.

PRESCRIPTION.

See ADVERSE POSSESSION. WATERS AND WATER COURSES.

PRINCIPAL AND AGENT.

A selling agent has no implied authority, which binds the principal, to contract that payment may be made by goods to be sold, or services to be rendered, to him on his own personal account. *Hook* v. *Crowe*, 399.

Persons dealing with a selling agent, knowing him to be such, are bound to know that he has no such implied authority, and that the principal will not be bound by such terms of payment. If the purchaser makes such an

RENTS AND PROFITS.
See ESTOPPEL. MORTGAGES.

REPEAL BY IMPLICATION.
See STATUTES.

RES JUDICATA.
See WATERS AND WATER COURSES.

RESERVATIONS.
See DEEDS.

RESIDENCE.
See PAUPERS.

RESULTING TRUST.
See WILLS.

REVENUE.
See TAXATION.

REVERSIONS.
See EXECUTORS AND ADMINISTRATORS.

REVIVER OF BARRED NOTE.
See STATUTE OF LIMITATIONS.

REVIEW.
See APPEAL. EXCEPTIONS.

RULE 16 OF SUPREME JUDICIAL COURT.
See NEW TRIAL.

RULE OF THUMB.

A rule suggested by a practical rather than a scientific knowledge; in allusion to the use of the thumb in marking off instruments roughly.

"We'll settle men and things by RULE OF THUMB,
And break the lingering night with ancient rum."

Sidney Smith to Francis Jeffrey, Sept. 3, 1809.
Century Dict., 5265.

SALES.

See INTOXICATING LIQUORS. WAREHOUSEMEN.

The defendant executed and delivered to the plaintiffs his two promissory notes for goods sold and delivered to him by the plaintiffs, and on the same date the plaintiffs gave the defendants a written warranty and guaranty in relation to the same goods. *Held:* That in an action on these notes by the plaintiffs, any breach of the warranty and guaranty by the plaintiffs to the detriment of the defendant can be shown in defense.

Pratt v. *Johnson*, 443.

SCALE BOOKS.

See EVIDENCE.

SCHOOLS.

See ACTIONS.

SCHOOLS AND SCHOOL DISTRICTS.

While by sec. 87, chap. 11, R. S., 1883, the authority to hire teachers was conferred upon the superintending school committee, unless the town otherwise vote, yet a contract with a teacher made, at their request, by the superintendent of schools is valid; the maxim delegata potestas non potest delegari does not apply. *Dennison* v. *Vinalhaven*, 136.

A contract made with a school teacher by a person not authorized to make it may be ratified by those having authority either expressly or by acts recognizing the employment. *Dennison* v. *Vinalhaven*, 136.

When a contract is indefinite as to time, it is to be interpreted by the intention and understanding of the parties as indicated by their acts and the attendant circumstances. *Dennison* v. *Vinalhaven*, 136.

Where the plaintiff was engaged as a school teacher at the beginning of the second term of the school year at the rate of the annual salary, it will be presumed that the contract was to end with the year.

Dennison v. *Vinalhaven*, 136.

SCIRE FACIAS.

See JUDGMENT.

SEARCH AND SEIZURE.

A single search warrant cannot be lawfully issued to search more than one place. If the warrant contains a description of more than one place to be searched it is invalid. *State* v. *Duane*, 447.

When a warrant in describing the place to be searched describes, as it reads, three places, each occupied by a different person though all three places are

adjoining, the court cannot read into the warrant words not therein written to show that the other two places were named simply as boundaries of the place occupied by the respondent. *State* v. *Duane*, 447.

SEARCH WARRANTS.

See SEARCH AND SEIZURE.

SENTENCE.

See CRIMINAL LAW.

SET SCREW.

SEE MASTER AND SERVANT.

SIGNATURES.

See LANDLORD AND TENANT.

S. J. COURT RULE 16.

See NEW TRIAL.

SKOWHEGAN MUNICIPAL COURT.

See CRIMINAL LAW.

SPECIFIC AND DEMONSTRATIVE LEGACIES.

See WILLS.

SPECIAL APPROPRIATION.

See EXECUTORS AND ADMINISTRATORS.

SPECIFICATIONS.

See COVENANTS.

SPOOL BARS.

See LIENS.

STANDARD OF CARE.

See COMMON CARRIERS.

STATION PURPOSES.

See RAILROADS.

STATUTES.

See COMMERCE. CONSTITUTIONAL LAW. COURTS. INTOXICATING LIQUORS. JUDGMENT. LAW COURT. MUNICIPAL CORPORATIONS. TAXATION.

In construing a statute, where the punctuation enables the language to bear an interpretation making the whole instrument self-consistent, it must be considered as much as the language itself. *Blood* v. *Beal*, 30.

Words in a statute are to be construed in reference to the subject to which they relate and the connection in which they are used, and where in such connection their meaning is ambiguous the consequences of an interpretation made according to their ordinary and popular definition may be considered in determining their legal signification. *State* v. *Railway Co.*, 202.

As used in sec. 42, chap. 6, R. S. 1883, amended by chap. 145 Public Laws 1901, the word "railroad" comprehends the equipment, roadbed, sites of depots and warehouses, and other real estate incidentally used in its business, and from it the words "line or system" cannot be disconnected. There is meant in this connection a railroad "operated as a part of a line or system extending beyond this state." *State* v. *Railway Co.*, 202.

In a civil action it is not necessary to set out a statute or to make any reference it in the declaration; it is sufficient if the case is brought within its provisions by alleging the requisite facts. *Peru* v. *Barrett*, 213.

In the absence of any repealing clause, it is necessary to the implication of a repeal of a prior statute that the objects of the two statutes be the same. *Stoddard* v. *Crocker*, 450.

STATUTES CITES, EXPOUNDED, ETC.

See APPENDIX.

STATUTE OF LIMITATIONS.

When one of the makers of a joint and several negotiable promissory note, after the same has become barred by the statute of limitations, gives his negotiable promissory note to the payee of the barred note in payment of interest on the barred note, it constitutes a new promise on his part to pay the barred note, and revives the barred note as to himself. *National Bank* v. *Wyman*, 556.

STIPULATIONS.

See CASES ON REPORT.

STREET RAILWAYS.

See INSTRUCTIONS. NEGLIGENCE.

Between street crossings a street car has a paramount right of way to be exercised in a reasonable and prudent manner. *Marden* v. *Street Railway*, 41.

SUBROGATION.

SUICIDE.

See GIFTS.

TAXATION.

See PAUPERS.

The mileage basis of apportionment in taxing railroads and other public service companies is eminently just, but there are exceptional cases where deductions should be made to prevent manifest inequality of value per mile. *State* v. *Railway Co.*, 202.

A railroad may be in a legal sense considered a unit capable of proportionate subdivisions measured by miles, but where it is especially chartered to own and operate, in connection with its transportation business, lines of steamboats across navigable waters beyond its termini the length of such lines should be excluded from the computation in determining the franchise tax, under the provisions of chapter 6, section 42, R. S. 1883, as amended by chapter 145 of the Public Laws of 1901. *State* v. *Railway Co.*, 202.

Under section 55, chap. 6, R. S. 1883, as amended, providing for the assessment of taxes upon express companies, it is *held:*

(1) That the statute simply fixes the mode, determining the valuation upon which the tax is to be assessed.

(2) That the tax therein prescribed is clearly a franchise tax and was so intended by the legislature.

(3) That by the phaseology of the statute, the pro rata part of the gross receipts, to be used as a basis for taxation, should be found by a rule analogous to that employed in determining the gross receipts of railroads as the basis for the assessment of the railroad tax; that is, in the proportion that the number of miles of the express haul in the state bears to the whole number of miles of the route from which the entire gross receipts are derived.

(4) If the "return under oath" made by the defendant company conforms with all the requirements of the statute, it cannot be arbitrarily disregarded by the state assessors in determining the amount of business done by the defendant. *State* v. *Express Co.*, 278.

A description in a deed from the State Treasurer, whereby a portion of land in a township containing twenty-two thousand acres was attempted to be sold for the non-payment of taxes, as follows: "4520 acres in 13, Range 7, W. E. L. S.," is utterly insufficient to pass any title to any portion of the Township, and is insufficient to create any cloud upon the title of a tenant in common who seeks partition of the Township either in equity or by petition for partition. *Powers* v. *Sawyer*, 536.

TEMPORARY LOAN.

See MUNICIPAL CORPORATIONS.

TESTAMENTARY CAPACITY.

See WILLS.

TORTS.

See NEGLIGENCE. TRADE-MARKS AND TRADE-NAMES.

TOWNS.

See WATERS AND WATER COURSES. WAYS.

TRADE-MARKS AND TRADE-NAMES.

See ACCOUNTING.

Any words, letters, figures, marks or devices, or combination of any of these, affixed to a commercial article and used primarily to indicate the origin or ownership of it, either by its own meaning or by association with the article, and not employed merely as descriptive of such article to designate its quality or ingredient only, or solely as a geographical name without any secondary signification, must be recognized as a valid trade-mark.

Shoe Co. v. *Shoe Co.*, 461.

All the courts agree that one man shall not be permitted, by imitating a distinctive name or mark already employed by another to designate a commercial article, to impose upon the public an article of his own manufacture as the genuine article of another, for the reason that it would be a fraud upon the manufacturer first appropriating such mark, and also a fraud upon the consumers who have a right to be protected against such imposition.

Shoe Co. v. *Shoe Co.*, 461.

A geographical name when used alone and affixed to a manufactured article for the purpose of designating the place of its manufacture, or the address of the manufacturer, cannnot be appropriated as a trade-mark, yet a geographical name which has long been used to indicate a particular manufactured article, may acquire a secondary meaning as the designation of a particular class of such articles, or the product of a particular manufacturer, and thus either become entitled to protection against infringement as a valid trade-mark, or serve as the basis of a proceeding to prevent unfair competition.

Shoe Co. v. *Shoe Co.*, 461.

In contemplation of law two trade-marks are substantially the same if the resemblance between them is so close that it deceives a customer exercising ordinary caution in his dealing and induces him to purchase the goods of one manufacturer for those of another. A critical comparison of two trade-marks placed side by side might disclose differences in both words and devices, but if the similarity is of such a character as to convey a false impression to the minds of ordinarily careful purchasers, respecting the identity of the manufactory or of the goods, it is sufficient to afford ground for redress.

Shoe Co. v. *Shoe Co.*, 461.

TRESPASSERS ON RAILROAD TRACK.

See RAILROADS.

TRIAL.

See LAW COURT. MASTER AND SERVANT. REAL ACTIONS.

TROVER.

See GUARDIAN AND WARD.

TRUSTEE DISCLOSURE.

SEE TRUSTEE PROCESS.

TRUSTEE PROCESS.

WAREHOUSEMEN.

(1) April 10, 1902, the plaintiff deposited with the defendant, a public warehouseman, a quantity of household goods. Storage being unpaid, the defendant on May 28, 1904, filed his petition in the Municipal Court of Portland for process of sale, under the provisions of chapter 91, sections 48-56, R. S. 1883, which are the same provisions contained in chapter 93, sections 67-75, R. S. 1903. The defendant obtained the order and sold the goods.

(2) Chapter 304 of the laws of 1897, re-enacted in the revision of 1903, added a new section to chapter 31, R. S. 1883, relating to warehousemen, by which a public warehouseman having goods in store for one year after the expiration of the time for which the charges had been paid, was authorized to sell the goods subject to the conditions named therein.

(3) *Held:* that this provision is the exclusive and only one under which the goods could have been legally sold, and that the proceedings under the statute R. S. 1883, chapter 91, sections 48-56, were unauthorized and the sale illegal. *Stoddard* v. *Crocker*, 450.

A bill in equity by the owners of a mill against the owners of another mill higher up upon the same stream, alleging that the defendants by the use of

planks and gates in their dam were obstructing the natural flow of the stream, to the injury of the plaintiffs, and praying that the obstruction be adjudged a nuisance, and that it be abated, cannot be sustained, when the rights of the parties have never been determined by an action at law, and where there is neither allegation in the bill, nor proof in the record, that irreparable injury will result to the plaintiffs, unless an injunction be granted, nor that their rights are in danger, nor that adequate compensation for their wrongs may not be obtained in an action at law. *Boynton* v. *Hall*, 131.

It is settled law in this state that in order to acquire a prescriptive right to flow land by means of a mill dam without the payment of damages, it must appear that the land was flowed for twenty consecutive years, and that some appreciable damage to it was thereby occasioned.

Foster v. *Improvement Co.*, 196.

While the owner of the land sustains no damage and can therefore maintain no suit of process, or in any way prevent such flowing, he cannot be presumed to have granted or relinquished any of his legal rights.

Foster v. *Improvement Co.*, 196.

At common law the foundation of a prescriptive right to an easement in another man's land is the adverse and uninterrupted enjoyment of it for a period of twenty years under a claim of right without payment of damages and without consent of the owner. But the overflowing of another's land, by the owner of a mill, to work it, by means of a dam, the mill and dam standing upon his own land, being secured by the provisions of the Mill Act, his common law remedy for damages, when sustained, is taken away, and he can recover against the owner of the mill, only in the mode and in the cases provided for by the Mill Act. *Foster* v. *Improvement Co.*, 196.

If the owner of the land flowed has not been injured by the flowing, he cannot maintain an action under the mill act, against the owner of the mill for flowing his land; and having no power to prevent the flowing in such case, no prescriptive right to flow the lands without the payment of damages can be acquired against him. But if the owners of the land flowed, has a right to maintain a complaint against the owner of the mill for such flowing, the latter may acquire a prescriptive right to flow the land without payment of damages. *Foster* v. *Improvement Co.*, 196.

Evidence *held* not to show any foundation for a prescriptive right to flow plaintiff's land. *Foster* v. *Improvement Co.*, 196.

When under the provisions of the Mill Act, R. S., chapter 94, section 1, a dam has been legally erected across a non-navigable river, for the purpose of operating a mill, and the location of such dam is neither illegal nor wrongful, and such dam has been constructed in a suitable, skilful and proper manner

WATERS AND WATER COURSES.

WAYS.

WILLS.

volition. Upon the other hand, whatever may be the nature and extent of the influence, if, because of the physical or mental weakness of the testator, and the nature and persistency of the influence exerted, it is such that the testator is unable to resist it, if it deprives him of his power to act as a free agent in the manner that he otherwise would, it is sufficient to avoid the will, because a will made under such circumstances is not the will, and does not carry out the wishes of a capable testator, acting as a free agent.

O'Brien, Aplt., 156.

It follows that the true test is to be found, not so much in the nature and extent of the influence exercised, as in the effect that such influence has upon the person who is making his will. Whatever the nature and extent of the influence exercised, if in fact it is sufficient to overcome the volition and free agency of the testator, so that he does that which is not in accordance with the dictates of his own judgment and wish, and what he would not have done except for the influence exerted, it is undue influence. But the mere fact that arguments and suggestions are adopted by a testator, and his will, on that account, is different from what it otherwise would have been, is not sufficient. It necessarily depends upon the further question as to whether such advice or suggestions are intelligently and freely adopted, because they have appealed to the judgment of the testator, so as to become in accordance with his own desires, or whether because of the persistency of the importunity, or for any other reason the testator is unable to resist and finally yields, not because of the voluntary action of his own judgment, but because, on account of the strength of the influence or the weakness of his own judgment and will he cannot resist longer. *O'Brien, Aplt.*, 156.

On an appeal from a decree admitting a will to probate, evidence considered and held to show that the will was not procured by any undue influence exercised by the proponent. *O'Brien, Aplt.*, 156.

A testatrix by her will directed her executor to apply the income of her estate to the support and education of her minor daughter, and to sell any property necessary therefor. *Held:* That an imperative power and trust duty were created, and not a mere naked and discretionary power.

Cutter v. *Burroughs*, 379.

Where property was left in trust, with power in the trustee to sell the same for the benefit of the beneficiary, and the guardian of the beneficiary, who was a minor, sold the property and applied the proceeds for the benefit of the beneficiary without authority, no trustee having been appointed, the title of the property which should have been applied for the benefit of the beneficiary passed on her death to the heirs of the testatrix.

Cutter v. *Burroughs*, 379.

Where certain property was left in trust, with power in the trustee to sell for the support and education of the beneficiary, and no trustee was appointed, but the guardian of the beneficiary sold the property and applied the proceeds

WITNESS.

See EVIDENCE.

WORDS AND PHRASES.

WORK AND LABOR.

See ASSUMPSIT.

WRITS.

See HABEAS CORPUS. JUDGMENT. WRIT OF ENTRY.

WRIT OF ENTRY.

See REAL ACTIONS. TRIAL.

WRITTEN INSTRUMENTS.

See DEEDS.

APPENDIX.

STATUTES CITED, EXPOUNDED, ETC.

COLONIAL ORDINANCES OF MASSACHUSETTS.

COLORADO SESSION LAWS.

SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES OF MAINE.

STATUTES OF MICHIGAN.

STATUTES OF NEW YORK.

CONSTITUTION OF MAINE.

CONSTITUTION OF MASSACHUSETTS.

CONSTITUTION OF UNITED STATES.

SUPREME JUDICIAL COURT RULES.