"TROS TYRIUSQUE MIHI NULLO DISCRIMINE AGETUR"

MAINE REPORTS

101

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

DECEMBER, 1905—SEPTEMBER, 1906

GEO. H. SMITH

REPORTER

PORTLAND, MAINE

WILLIAM W. ROBERTS

1907

LAW.

"The welfare of the people is the highest law."

ANON.

"Law and Equity, which God hath joined, let no man put asunder."

COLTON.

"There is no free state where the laws are not supreme."

ARISTOTLE.

JUSTICE.

"Thrice is he armed, that hath his quarrel just."

SHAKESPEARE.

"Justice tempered with too much mercy becomes injustice."

ANON.

"Mercy to the criminal may be cruelty to the people."

ANON.

PRESS OF

THE THOMAS W. BURR PTG. & ADV. CO.

BANGOR, MAINE.

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

HON. ANDREW P. WISWELL, CHIEF JUSTICE.
HON. LUCILIUS A. EMERY.
HON. WILLIAM PENN WHITEHOUSE.
HON. SEWALL C. STROUT.
HON. ALBERT R. SAVAGE.
HON. FREDERICK A. POWERS.
HON. HENRY C. PEABODY.
HON. ALBERT M. SPEAR.

Justices of the Superior Courts

*HON. PERCIVAL BONNEY,	CUMBERLAND COUNTY.
†HON. LEVI TURNER,	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.

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* Died August 4, 1906.
† Appointed September 21, 1906.

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1906

LAW TERMS

BANGOR TERM, First Tuesday of June.

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

PORTLAND TERM, Fourth Tuesday of June.

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

AUGUSTA TERM, Second Tuesday of December.

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

NATHAN ASH, et al., *vs.* WILLIAM H. McLELLAN.

Hancock. Opinion December 26, 1905.

Money Voluntarily Paid. When Same Cannot be Recovered Back.

When one with a full knowledge of all the facts, or with means of knowledge, voluntarily pays money under a claim of right, he cannot maintain an action to recover it back.

When one demands money under a claim of right, and uses no other means to obtain it than importunity, or a threat, expressed or implied, of resort to litigation to obtain it if it is not voluntarily paid, and the one of whom the money is demanded has time for consideration and deliberation, and to obtain the advice of counsel or friends, and the money is then voluntarily paid to settle the demand, it cannot be recovered back, though the demand is illegal and unjust.

Held: That in the case at bar, the payment of the plaintiffs was a voluntary payment and cannot be recovered back.

On exceptions by plaintiff. Overruled.

Money had and received to recover back money paid by the plaintiffs to the defendant. Previous to this action, the plaintiffs were sureties on a "poor debtor's" bond, dated August 30, 1902, given by one George R. Robinson, a judgment debtor, who had been arrested on execution, and on the 20th day of June, 1903, they, as sureties on said bond, paid to the defendant, who was then the legal owner of the judgment on which the execution was issued, $190 in settlement of bond and execution. September 29th, 1903, the plain-

tiffs demanded of the defendant the return of the $190, so paid to him, and upon his refusal to return the money, this action was brought to recover it back. The action was heard at the October term, 1903, of the Supreme Judicial Court, Hancock County, before the presiding Justice with the right to except. The presiding Justice ruled that the defendant was entitled to judgment and ordered judgment accordingly. Thereupon the plaintiffs excepted.

The case is fully stated in the opinion.

Memorandum. One of the Justices sitting at the term of the Law Court when this case was argued, did not sit in this case, being disqualified under the statute by reason of having ruled therein at nisi prius.

E. S. Clark, for plaintiffs.

Wm. H. McLellan and A. W. King, for defendant.

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

STROUT, J. Carter recovered a judgment against George R. Robinson. This judgment was duly assigned to the defendant McLellan, who became its legal owner. McLellan sued the judgment and recovered a new judgment in Carter's name for one hundred and forty-five dollars and eighty-two cents ($145.82) debt and nine dollars and ninety-three cents ($9.93) costs at the April Term S. J. C. 1896. Upon an execution upon this judgment, dated August 30, 1902, McLellan caused the debtor Robinson to be arrested, and the debtor gave bond to take the poor debtor's oath as provided by statute. The plaintiffs were sureties on that bond. Upon notice to Carter, Robinson did in fact take the poor debtor's oath on January 24, 1903, and thus performed the condition of his bond,—but McLellan had no knowledge of this fact from any source. After expiration of the time limited in Robinson's bond, McLellan, believing the condition had not been performed and that the sureties were liable, called upon them for payment. Robinson at that time was in the employment of the plaintiffs, and they saw him daily, and were indebted to him to some amount, which at the end of the season amounted to something over two hundred dollars.

Upon the call for payment by McLellan of the plaintiffs, Mr. Ash, one of the sureties and one of the plaintiffs, wrote him asking for his best terms, to which McLellan replied that he "would send the execution and bond fully discharged for one hundred and ninety dollars, the sureties paying the deputy sheriff." This was less than the amount due. Thereupon plaintiffs sent McLellan check for one hundred and ninety dollars ($190) and received back the bond and execution against Robinson fully discharged.

September 29, 1903, the plaintiffs demanded of McLellan the return of the money paid him, but made no offer to return the bond and execution at any time until after the hearing of this suit to recover the money. They obtained what they paid for, not only their discharge from the bond but the discharge of the judgment against Robinson. If for any cause they had the right to rescind or recover back the money paid, it was indispensable that they should have returned or offered to return the bond and execution before suit brought. But instead of that they retained the discharged execution and sued to recover the money paid therefor. Failing to do this, this action cannot be maintained.

But waiving this technical defense, and treating the case as one of a voluntary payment upon an honest claim of right by McLellan, though in fact unfounded, it would be expected that when the plaintiffs were asked to respond for the default of Robinson, the principal in a bond on which they were sureties, they would have called his attention to it, and asked him to make payment, or at least for authority to apply to that purpose the amount in their hands due to him, but instead of this the case finds that "neither Mr. Ash nor Mr. Marcyes made any inquiry of Mr. Robinson about the matter, and sent the check without consulting him and without his knowledge, fearing he would leave if told of the matter, and they desired to have his wages accumulate to that amount." The payment was in no sense compulsory. Plaintiffs knew all the facts that McLellan knew, and had excellent opportunity to learn that Robinson had taken the oath provided for in the condition of his bond. They intentionally refrained from consulting him, though he was in their employ and they saw him daily, for the purpose "to have his wages

accumulate" to the amount. Both parties believed there was a legal liability of plaintiffs. The true principle applicable in such cases is stated by Walton, J. in *Parker* v. *Lancaster*, 84 Maine, 515, to be that "when one demands money, under a claim of right, and uses no other means to obtain it than importunity and persistency, or a threat, expressed or implied, or resort to litigation to obtain it if it is not voluntarily paid, and the one of whom the money is demanded has time for consideration and deliberation, and to obtain the advice of counsel or friends, and the money is then voluntarily paid to settle the demand, it cannot be recovered back, though the demand is illegal and unjust." Early in May, 1903, McLellan wrote the deputy sheriff in regard to forfeiture of the bond, and to notify the sureties. This letter was read to plaintiffs who then wrote the defendant for his terms. McLellan replied June 16, and the check was not sent till June 20th. The plaintiffs therefore had ample time for consideration.

The rule of law quoted from *Parker* v. *Lancaster*, is supported by *Norris* v. *Blethen*, 19 Maine, 351 and *Gooding* v. *Morgan*, 37 Maine, 419. In the latter case Chief Justice Shepley says, "The law is regarded as settled in this state, if one with a full knowledge of the facts, or with the means of knowledge, voluntarily pays money under a claim of right, that he cannot recover it back." To the same effect is *Norton* v. *Marden*, 15 Maine, 45. See also *Gilpatrick* v. *Sayward*, 5 Maine, 465; *Rawson* v. *Porter*, 9 Maine, 119; *Wilson* v. *Barker*, 50 Maine, 447.

The plaintiffs had at hand the means to learn all the facts by an inquiry of their servant daily seen by them. It was inexcusable, almost culpable negligence not to consult him before making the payment. They intentionally refrained from doing this from an ulterior motive insufficient to justify their non-action. In such case they should be charged with knowledge of what they might easily and ought to have learned, and ought not to be permitted to take advantage of their self-imposed ignorance. This doctrine is sustained by *East-Haddam Bank* v. *Scovill*, 12 Conn. 310; *Behring* v. *Somerville*, 63 N. J. L. 568; *Stevens* v. *Head*, 9 Vt. 174; *West* v. *Houston*, 41 Hav. (Del) 170; *Simmons* v. *Lovell*, 41 W. Va. 738; *Harner* v.

Price, 17 W. Va. 545, as well as by the cases in this state, supra. There are opposing decisions, but we are satisfied with the rule settled in this state.

By making this payment and obtaining a discharge of the execution, without informing themselves of the fact of the disclosure of Robinson, the plaintiffs placed the defendant in a worse position than he would otherwise have been, since they thereby prevented his enforcing his execution against the judgment debtor in some of the ways that were still open to him. A suit in which the plaintiffs could have been summoned as trustees would apparently have secured all or a large part of the debt, as the plaintiffs owed Robinson at the end of that season over two hundred dollars.

A majority of the court is of the opinion that the ruling below that judgment should be for the defendant is correct, and the entry must be,

Exceptions overruled.

HERBERT M. HILTON

vs.

CHARLES E. HANSON AND DAVID M. PARKS.

Somerset. Opinion December 27, 1905.

Written Contract. Waiver. Assumpsit. Evidence.

A written contract may be waived either directly or inferentially and such waiver may be proved by express direction or by acts and directions manifesting an intent not to claim the supposed advantages; or by a course of acts and conduct, or by so neglecting and failing to act as to induce a belief that it was the intention and purpose to waive.

Parol evidence of a subsequent waiver of any of the stipulations in a written contract, or of a right under such contract, is admissible even when such contract is under seal.

When a written contract has been waived, an action of quantum meruit will lie for work and labor done.

In the case at bar, the jury found and it is held that the written contract had been waived, and that the plaintiff's verdict must stand.

On motion by defendants. Overruled.

Assumpsit on account annexed for services rendered in cutting, splitting and piling wood, and for cutting and hauling logs, and for peeling hemlock bark, etc. The writ also contained an omnibus count of the common form. Tried at the December term, 1904, of the Supreme Judicial Court, Somerset County. Plea, the general issue together with a brief statement alleging that there was a written contract duly executed between the plaintiff and the defendants upon which the plaintiff's action should have been brought and that the action of assumpsit as brought by the plaintiff could not be maintained, and also alleging that the plaintiff had broken said contract thereby damaging the defendants to the amount of $500 which said sum the defendant asked to be allowed to them against the plaintiff by way of recoupment. Verdict for plaintiff for $143.44. Defendants then filed a general motion for a new trial.

The case sufficiently appears in the opinion.

Daniel Lewis, for plaintiff.

Morse & Anderson, for defendants.

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

SPEAR, J. This is an action of assumpsit containing a count for quantum meruit brought by the plaintiff to recover of defendants for the sum of $168.94 and interest thereon amounting to $15.20 for services rendered in cutting, splitting and piling wood, and for cutting and hauling timber, etc. The defendants set up in defense a written contract duly executed between the plaintiff and defendants upon which they say the plaintiff's action should have been based, and that his action of assumpsit cannot be maintained. The plaintiff admits the execution of the written contract but says that it was waived and a new oral agreement substituted in its place whereby he was thereafter to receive an agreed compensation as set forth in his account annexed for services rendered.

That a written contract may be waived either directly or inferen-

tially is too well settled to require citation. Waiver may be proved by express declaration, or acts and declarations manifesting an intent not to claim the supposed advantage; or by a course of acts and conduct, or by so neglecting and failing to act as to induce a belief that it was the intention and purpose to waive. *Peabody* v. *Maguire*, 79 Maine, 586. Parol proof of the subsequent waiver of any of the stipulations in the written contract or of any right under such contract, is admissible even when such contract is under seal. *Adams* v. *Macfarland*, 65 Maine, 152.

In *Blood* v. *Enos*, 12 Vt. 626, the court say, "It is always competent for the parties to rescind a subsisting simple contract by a naked verbal agreement to that effect, whether this was the intention of the parties is to be determined by the jury from what passed between them." Waiver is also held to be a question of fact, see *Peabody* v. *Maguire*, supra, and cases cited.

It is also well settled, when a contract has been thus waived, that an action of quantum meruit will lie for work and labor done. Abbott's Trial Evidence, 2nd. Ed. page 446, sec. 8. It is held in Greenleaf, Vol. 2, sec 104, that the plaintiff may resort to the common counts where the contract, though partly performed, has been abandoned by mutual consent, or where it appears that what was done by the plaintiff was done under a special agreement but not in a stipulated time or manner and yet was beneficial to the defendant. See also *Munroe* v. *Perkins*, 9 Pick. 298.

But the defendants reply further and assert that even if this is so, the plaintiff's action cannot be sustained, inasmuch as he has brought suit against the defendants jointly and the evidence in the case shows that the modified contract, if made at all, was made between the plaintiff and only one of the defendants to the original contract without any knowledge or consent on the part of the other, and that one joint contractor cannot thus waive the original contract and bind the other to a new or modified contract.

The defendants were owners in common of the land on which the wood and timber was to be cut by the plaintiff. The legal position of the defendants with regard to the right of one joint contractor to waive or bind the other to a new and modified contract without his

knowledge or consent may be well taken, but the plaintiff avers that the defense set up by the defendants is not warranted by the facts and that the defendant, Charles E. Hanson, instead of being without knowledge of, and not consenting to, a modified contract, was cognizant throughout the whole transaction of what was going on, of what his co-contractor was doing; that he received his share of the benefit of all the services performed by the plaintiff and that, under all the facts and circumstances in this case, the inference is fairly warranted that the defendant Parks acted as the agent of Hanson in engaging in the new agreement with the plaintiff, and that Hanson understood and ratified all that was done in pursuance thereof. The jury found that the plaintiff was entitled to recover of the defendants for the services rendered the sum of $143.44. No ground is found in the evidence equitable or legal for disturbing the amount of the verdict. The case finds that the plaintiff performed services for the defendants which were worth to them $143.44 and received and appropriated the benefit of these services to their own account.

The only remaining question is whether the evidence warrants the other conclusion which the jury must have arrived at in order to find a verdict for the plaintiff, that the defendant Hanson was represented by his co-contractor Parks in negotiating the contract under which these services were rendered, or ratified the contract while they were being performed or after they were completed. It would be practically impossible in a case like this to prove that one of the contractors was an agent for the other, in procuring the services of the plaintiff, by direct evidence of any specific agreement between them. It is not essential that the agency or the ratification claimed by the plaintiff should be so proved. These facts may be established by inference drawn from the other circumstances and facts connected with the case.

A ratification may be implied as from the principal's act. A. & E. Ency. of Law, Vol. 1, page 437. The acceptance of the moiety originally paid over to the co-tenant was held to be the ratification by him of the act in the other in making a shipment and consignment of goods for sale. *Rogers* v. *White*, 6 Maine, 193. In this case the parties were tenants in common. A party cannot claim the property

and yet deny the agency of the purchaser. When they have claimed the property purchased it is too late to deny the agency. *Newhall* v. *Dunlap*, 14 Maine, 180. If one joint debtor not a co-partner signs the name of another without authority to a promissory note, the promise of the latter to pay it with full knowledge of all the facts will amount to the ratification of an assumed authority and the court will draw the inference that he must have known of the facts when he made the promise to pay. *Waite* v. *Foster*, et al., 33 Maine, 424. When an agent without the authority or knowledge of his principal borrows money and applies it to the payment and discharge of the legal liabilities of his principal and the principal knowingly retains the benefit of such payment, the lender may recover therefor in an action against the principal. The principal cannot retain the benefit of the money hired by his agent and at the same time legally refuse to pay the lender upon the ground that the agent had no authority to borrow the money. *Perkins* v. *Boothby*, et als., 71 Maine, 91. It should not require a great quantity of evidence to warrant the legal inference of a duty to do what is right. In this case the rule would seem to apply. The undisputed facts show that the defendants were owners in common of the property upon which the plaintiff operated; that they were jointly interested in the result of the operation; that the defendant Hanson as well as Parks knew what the plaintiff was doing; that he saw the plaintiff, talked with him and personally made a partial payment to him for work performed; that he received and appropriated to his own use his share of the services rendered by the plaintiff; and had repeatedly promised the plaintiff to pay him therefor. No intimation that Hanson repudiated the action of Parks or the services done by the plaintiff was ever made until after the trial of this case. It was only after a verdict against them that they raised the defense now offered.

From all the evidence in this case we are not prepared to say that the verdict was so clearly wrong as to warrant us in setting it aside. The case was tried upon its merits. No exceptions were taken to the rules of law given by the court. The contention of both sides was therefore properly presented to the consideration of the jury. We do not think that the inference can be properly drawn that the jury

acted under a mistake, disregarded their duty or were influenced by improper motives.

Motion overruled.

In Equity.

LEONARD K. STORRS, TRUSTEE, *vs.* MARY MACKIE BURGESS et als.

Cumberland. Opinion December 28, 1905.

Wills. Construction. Intention of Testator. Gift to a Class. Contingent Remainder.

The law favors the early vesting of an estate when such construction will not defeat the intent of the testator as expressed in the will.

It is a general rule in the construction of wills that where there are in a will no words importing a gift to a class as grandchildren, except in the direction to make division among them at a period subsequent to the testator's death, the members of that class are to be ascertained as of the time fixed for the division.

Held: That upon a consideration of the provisions of the will in the case at bar, the foregoing rule appears to exactly express the intention of the testator.

In equity. On report. Decree in accordance with opinion.

Bill in equity to obtain the construction of the last will and testament of the Right Reverend George Burgess, D. D., late of Gardiner, deceased, who was the first (Episcopal) Bishop of the Diocese of Maine. This cause came on for a hearing on bill and answer at the April term, 1905, of the Supreme Judicial Court, Cumberland County, and the presiding Justice, with the consent of the parties, ordered the same to be reported to the Law Court for determination.

The case appears in the opinion.

WILL OF GEORGE BURGESS.

"In the name of God. Amen. I, George Burgess, of Gardiner, in the County of Kennebec, in the State of Maine, being in health and in the possession, through God's mercy, of all my, powers, but deeply conscious of my own frailty, and mindful of my liability to sudden removal, do make this my last will and testament, revoking, and intending to destroy, all previous instruments of the same kind, though substantially identical herewith.

I commend my soul to the precious mercies of Almighty God, my heavenly Father, through our Lord Jesus Christ; beseeching him that, all my sins being washed away by the blood of the Lamb, and my whole spirit sanctified by the Holy Ghost, I may, unworthy as I am, be admitted by grace to the society of just men made perfect.

Of my worldly estate, I give and bequeath the sum of Seven Thousand Dollars, being nearly that part of it which was not inherited from my father, to the Trustees of the Fund for the support of the Episcopate of the Diocese of Maine; to be duly invested, and the income thereof to be applied to the support of future Bishops of the said Diocese; and in the event of its division, to the support of that Bishop within whose Diocese the City of Gardiner may fall.

The remainder of my property, real and personal, I give and bequeath as follows.

I desire my dear brothers, Frederick Burgess and Alexander Burgess, to act as Trustees under my will; and it is my wish that no bonds should be required of them for the faithful execution of their trust.

I appoint my dear brother, Alexander Burgess, Executor of this my will, and desire that no bonds may be required of him; and I give and bequeath unto him all my theological books, except any which my dear wife may desire to retain.

I give and bequeath to my dear wife, Sophia Kip Burgess, all other things in my house.

I give the residue of my estate, real and personal, in trust, to my said brothers, Frederick Burgess and Alexander Burgess, with

authority to sell, change and reinvest the same at their discretion; and I hereby appoint that they shall hold the same in trust for my dear wife, and for my beloved daughter, Mary Georgiana Burgess, as follows;

The whole income to be paid to my dear wife, if she should survive and remain unmarried, till my daughter shall attain the age of twenty-five; and should my daughter be removed by death before that age and without being married; then the whole income to be paid to my dear wife throughout her own lifetime:

When my daughter shall attain the age of twenty-five, the half of the income to be paid to her; and also to be held in trust for her and used for her benefit, should my dear wife at any time previous to her attainment of that age, be herself married a second time;

Should my dear wife die before my daughter attains the age of twenty-five, the whole income to be held in trust for my daughter, and used in her behalf, till she attains that age; and then, to be transferred to her with the whole estate, and the Trust to cease;

Should my dear daughter be married and depart this life before the age of twenty-five, leaving issue, then at her death the half of the estate hereby bequeathed to the said Trustees to become vested in such issue, if my dear wife should still be living; and if not, the whole to pass to such issue and the trust to cease;

Should my dear daughter, married or unmarried, attain the age of twenty-five, half the income to be paid to her, and half to her mother, till the death of the one or the other; and then, and thereupon;

Should my daughter survive her mother, the whole estate to vest in her, and the Trust to cease; and

Should my dear wife survive our daughter, she dying without issue, the whole income to be paid to my dear wife during her lifetime, and at her death, the estate to be divided into two equal parts;

GEORGE BURGESS, [L.S.]

one of which shall be transferred to such charitable or religious purposes as she may direct, or, if she make no direction, then to the

Trustees aforesaid of the Fund for the support of the Episcopate of the Diocese of Maine, to constitute a fund for the assistance of missionaries and other clergymen of the said Diocese, and to be applied under the direction of the Bishop and Standing Committee, especially for the relief of sick, infirm or aged clergymen in the said State, without regard to any division of the Diocese; and the other half to be divided equally amongst the grandchildren of my deceased father;

Should my dear wife survive our daughter, she leaving issue, then at the death of my wife, the remaining half of the estate to pass to such issue, and the Trust to cease.

In witness whereof, I have hereunto set my hand and seal, this eighth day of January in the year of our Lord one thousand eight hundred and sixty-one; and also to another sheet, prefixed hereto, and forming a part of the same will and testament. Signed, sealed and published and declared as his last will and testament, by George Burgess, in our presence, who, in his presence, and in the presence of one another, have subscribed our names.

GEORGE BURGESS [L.S.]

ROBERT WILLIAMSON
W E S WHITMAN
CHS DANFORTH

I hereby append the following provision as a codicil to my last will and testament.

It is my will that the house and land which I occupy at Gardiner should be a part of the legacy of Seven Thousand Dollars which I have bequeathed for the benefit of the Diocese, and should be estimated at not less than Four Thousand Dollars in making up the same; but that it should not be transferred, but should be the property of my wife, and, in the event of her decease, of my daughter, so long as either of them shall continue to occupy it as a residence. It is also my will that the mortgage to me from Emma J. Lord, if unpaid at the time of my decease, should be included in the said legacy, as a part of the payment of the same.

In witness whereof, I have hereunto set my hand and seal, this

twelfth day of March, in the year of our Lord one thousand eight hundred and sixty four
Signed and sealed, and declared to be a
codicil to his last will and testament,
by George Burgess, in presence of us, GEORGE BURGESS (L.S.)
who at his request, in his presence and
in the presence of each other, have
subscribed our names as witnesses thereto"
DANIEL NUTTING
WILLIAM COOPER
NATHAN B. NORTON.

Aaron H. Latham and Bird & Bradley, for plaintiff.

H. Charles Royce of the Vermont Bar, for *Mary Mackie Burgess et als.*, defendants.

Anthoine & Talbot, for Henry R. Storrs et als., defendants.

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

POWERS, J. Bill to obtain the construction of the last will and testament of George Burgess, late of Gardiner. The will was executed Jan. 8, 1861, and the testator died April 23, 1866. After providing for the payment of certain legacies the will contained the following paragraphs in relation to the residue of his estate: "I give the residue of my estate, real and personal, in trust to my said brothers, Frederick Burgess and Alexander Burgess, with authority to sell, change and reinvest the same at their discretion; and I hereby appoint that they shall hold the same in trust for my dear wife and for my beloved daughter, Mary Georgiana Burgess, as follows: The whole income to be paid to my dear wife, if she should survive and remain unmarried, till my daughter shall attain the age of twenty-five; and should my daughter be removed by death before that age and without being married; then the whole income to be paid to my dear wife throughout her own lifetime.

When my daughter shall attain the age of twenty-five, the half of the income to be paid to her; and also to be held in trust for her and

used for her benefit, should my dear wife any time previous to her attainment of that age, be herself married a second time;

Should my dear wife die before my daughter attains the age of twenty-five, the whole income to be paid in trust for my daughter, and used in her behalf, till she attains that age; and then, to be transferred to her with her whole estate, and the Trust to cease;

Should my dear daughter be married and depart this life before the age of twenty-five, leaving issue, then at her death the half of the estate hereby bequeathed to the said Trustee to become vested in such issue, if my dear wife should still be living; and if not, the whole to pass to such issue and the Trust to cease.

Should my dear daughter, married or unmarried, attain the age of twenty five, half the income to be paid to her, and half to her mother, till the death of the one or the other; and then and thereupon

Should my daughter survive her mother, the whole estate to vest in her, and the Trust to cease; and

Should my dear wife survive our daughter, she dying without issue, the whole income to be paid to my dear wife during her lifetime, and at her death, the estate to be divided into two equal parts; one of which shall be transferred to such charitable or religious purposes as she may direct, or, if she make no direction, then to the Trustees aforesaid of the Fund for the support of the Episcopate of the Diocese of Maine, to constitute a fund for the assistance of missionaries and other clergymen of the said diocese, and to be applied under the direction of the Bishop and Standing Committee, especially for the relief of the sick, infirm or aged clergymen in the said State, without regard to any division of the diocese; and the other half to be divided equally amongst the grandchildren of my deceased father;

Should my dear wife survive our daughter, she leaving issue, then at the death of my wife, the remaining half of the estate to pass to such issue and the Trust to cease."

Mary Georgiana Burgess died May 1, 1873, before reaching the age of twenty-five years and without issue. Sophia K. Burgess died

July 7, 1904, never having remarried, leaving a will which has been duly probated containing the following paragraph:

"Whereas by the last will of my husband I am authorized, in the event which has happened of the death without issue and before me of my daughter, to dispose for such charitable or religious purposes as I may direct of one half of the trust fund by his said will established, now therefore, I hereby direct that said one-half of said trust fund shall be transferred and paid over to the Trustees of Diocesan Funds in the Diocese of Maine, a corporation organized under the laws of the State of Maine, to be held by it for the purposes of the Burgess-Neely Endowment or Memorial Fund."

At the time of the testator's death there were fifteen living grandchildren of his deceased father. At the time of the daughter's death thirteen of these were living and one additional grandchild, Christina Burgess Royce had been born. Upon the death of the wife there were eight living grandchildren of the deceased father of the testator of whom said Christina Burgess Royce was one.

The following questions are asked of the court:

"First. Shall the Trustee pay over one half of the Trust Fund to the Trustees of the Diocesan Funds in the Diocese of Maine?

Second. Shall the trustee pay over one half of the trust fund to the grandchildren of Thomas Burgess, the deceased father of the testator, who were living at the time of the death of the testator April 23, 1866, and to the legal representatives of such of said grandchildren as have since deceased, and if so, in what proportions, per stirpes or per capita?

Third. Shall the trustee pay over one half of the trust fund to the grandchildren of Thomas Burgess, the deceased father of the testator, who were living at the time of the death of Mary Georgiana Burgess, May 1, 1873, and to the legal representatives of such said grandchildren as have since deceased, and if so, in what proportions, per stirpes or per capita?

Fourth. Shall the trustee pay over one-half of the trust fund to the grandchildren of Thomas Burgess, the deceased father of the testator, who were living at the time of the death of Sophia K.

Burgess, July 7, 1904, and if so, in what proportions, per stirpes or per capita?"

It will be seen from the facts above stated that of the many contingencies provided for in the will only one happened viz: The death of the testator's daughter without issue before the death of his wife. It is therefore with the construction of only the next to the last paragraph above quoted from his will that we have to do, the other parts of the will being of importance simply as they may help to reveal the intention of the testator and thus throw light upon that part a construction of which is sought.

If Sophia K. Burgess survived her daughter, she dying without issue, then at the death of said Sophia the estate was to be divided in two equal parts one of which was to be transferred to such charitable or religious purposes as she might direct. This gave her a power of testamentary disposition over one-half of the estate subject only to the limitation that it must be exercised for charitable or religious purposes. The disposition of this part of the estate in her will was in strict conformity to the power conferred, and the first question is answered in the affirmative.

The gift of the other half of the estate is to a class, and the answer to the remaining questions depends upon the time at which the class is to be ascertained. Many general rules of construction are invoked; that the law favors the early vesting of estates; that the will speaks from the death of the testator; and that in case of contingent remainders the estate vests upon the happening of the contingency. The estate bequeathed to the grandchildren was a contingent remainder, and its vesting was suspended until the happening of the contingency. The law favors the early vesting of the estate when such construction will not defeat the intent of the testator as expressed in the will. In this case a contrary intention is shown. By the terms of the will if the testator's wife died before his daughter attained the age of twenty-five, then upon his daughter arriving at that age the whole estate was to be transferred to her and the trust to cease. Again if the daughter died before the age of twenty-five leaving issue, then at her death one-half, and if the wife was not living, the whole of the estate was to vest in such

issue and the trust to cease. Still again if the daughter survived the mother the whole estate was to vest in her and the trust to cease. In any of these contingencies the grandchildren of the testator's deceased father received nothing. A remainder is contingent when so limited as to take effect upon an event which may never happen. *Woodman* v. *Hall*, 89 Maine, 128; *Hunt* v. *Hall*, 37 Maine, 363. The only event in which the grandchildren were to share in the fund was in case the testator's daughter died before attaining the age of twenty-five without issue and his wife survived her. This event might never happen and the remainder was contingent. The estate did not vest therefore in the grandchildren at the testator's decease. It was the death of the testator's daughter, under the conditions just named, which first made it certain that any part of the estate would come to the grandchildren.

These rules invoked must be considered with reference to this particular will. What does the will say and what is the testator's intention expressed in the will? It is at the death of the testator's wife that the estate is to be divided and one-half of it to be distributed among the grandchildren of his deceased father. The testator must have had in mind those who answered to that description at the time of the distribution. He was speaking of the grandchildren of his deceased father not at the time of his own death, not at the time of the death of his daughter, but at the time of his wife's death. "At her death" he says the division is to be made. There are in the will no words importing a gift to his father's grandchildren, except in the direction to make the division among them at the time of his wife's death. His language must refer to that time, the time when the division is to be made. Nowhere in the will is any mention made of the heirs or legal representatives of such grandchildren, nor are they themselves named even as a class, except in the direction to divide one-half the estate among them after the death of both his daughter and his wife. If the estate vested at the death of the daughter before arriving at the age of twenty-five without issue her mother surviving her, then the estate so vesting was not only heritable but transmissible and devisable. It might happen thus that a large portion of the estate would at the time of the division go not to the

grandchildren of the testator's father but to their husbands or wives or devisees, strangers in blood to both the testator and his father. We find nothing in the will to lead us to infer that such a result was within the contemplation of the testator or ever intended by him. The conclusion is strengthened by the fact that while the will contains careful provision for the testamentary disposition of one-half of the estate by the testator's wife before the division of the estate, no such power is given to the grandchildren.

"When a legacy is made to a class as "grandchildren," and there is by the will a postponement of the division of the legacy until a period subsequent to the testator's death, everyone who answers the description, so as to come within that class at the time fixed for the division, is entitled to share, but no others. By this rule the heirs of a grandchild, who was living at the death of the testator but who died before the time fixed for distribution, will take nothing; but an after-born grandchild if living at the time of the distribution, will share," *Webber* v. *Jones*, 94 Maine, 429. There is nothing in the will under consideration to show a contrary intention. In fact the rule laid down in *Webber* v. *Jones* seems to exactly express the testator's intention in this case.

In *Hale* v. *Hobson*, 167 Mass. 399, it is said: "The testator provides for his widow and children and grandchildren, and gives various legacies and life annuities, and then, contemplating that a portion of his estate remains undisposed of, and looking forward to the time when the last life annuity shall have ceased and the residue be free for distribution, he directs his trustees then to divide the residue and remainder with its accumulated interest equally among his grandchildren. What grandchildren? It seems to us more reasonable to suppose that the grandchildren living at the time of the distribution are intended than the grandchildren living at his death. It is true that there are no words of survivorship, but it is as if the testator took his stand at the time of the death of the last life annuitant, and said: "I direct the remainder and its accumulations to be divided amongst my grandchildren," in which case no words of survivorship would be necessary, and those living then would take." This language is used in *Eager* v. *Whitney*, 163 Mass. 463. "There is no

gift to the legal representatives, independently of the direction to the trustees to pay over to them in the year 1901. The time is thus annexed to the gift. It is a legacy given as of that year. An arbitrary date is fixed, at which the trust is to end and the property to be paid over. The form of the expression used may not be necessarily conclusive, but it has a tendency to show that the gift was to those who should then be his legal representatives." See also In re Brown's estate, 86 Maine, 572; *Clark* v. *Cammann*, 160 N. Y. 315; Matter of Baer, 147 N. Y. 348; Matter of Crane, 164 N. Y. 71; *McLain* v. *Howald*, 120 Mich. 274; *Jones* v. *Colbeck*, 8 Ves. Jr. 38; *Michell* v. *Mitchell*, 73 Conn. 303; *Clark* v. *Shawen*, 190 Ill. 47. We therefore answer the second and third questions in the negative.

The will provides that the division shall be among the grandchildren equally. In answer to the fourth question the trustee is directed to pay over one-half of the trust fund to the grandchildren of Thomas Burgess the deceased father of the testator, who were living at the time of the death of Sophia K. Burgess, July 7, 1904, and such division among them is to be made per capita.

Costs including reasonable counsel fees to be paid all parties by the trustee and charged in his account.

Decree accordingly.

STATE OF MAINE

vs.

CHARLES J. FREDERICKSON.

SAME *vs.* SAME, Applt.

Cumberland. Opinion December 27, 1905.

Intoxicating Liquors. Cider. Nuisance. Statutory Construction. Constitutional Law. R. S., c. 22, § 1; c. 29, § 40. Constitution of Maine, Art. I. Constitution of U. S., XIVth Amendment.

1. It is well settled both by the decisions and by the rules of statutory construction that the enumeration of liquors, declared to be intoxicating, contained in section 40 of chapter 29 of the Revised Statutes is referred to by and was intended to include the words intoxicating liquors as used in section one of chapter 22 of the Revised Statutes.
2. Section 40 of chapter 29, R. S., declares that wine, ale, porter, strong beer, lager beer or other malt liquors and cider when kept and deposited with intent to sell the same for tippling purposes, or as a beverage, as well as distilled spirits, are declared intoxicating within the meaning of this chapter. *Held:* that the enumeration of liquors declared to be intoxicating and contained in said section 40, was intended to include and does include cider when it is kept and deposited with the intent to sell the same for tippling purposes, or as a beverage, even though such cider may be unfermented and non-intoxicating in fact.
3. The constitutional right of the legislature to regulate or prohibit the sale and keeping of intoxicating liquors and to declare certain liquors intoxicating within the meaning of the law governing intoxicating liquors irrespective of the intoxicating character of such liquors as a matter of fact, both under the state and Federal constitutions, have been so universally answered in the affirmative, both by the decisions in our own state and by the Supreme Court of the United States, that it is no longer a question for argument or even of doubt.

On exceptions by defendant. Overruled.

The defendant was indicted in the Superior Court, Cumberland County, May term, 1905, for keeping and maintaining a liquor nuisance. The agreed statement of facts shows that the defendant "during the period covered by the indictment, was a citizen of the

United States and a licensed victualer and kept a restaurant on India Street in Portland in said County of Cumberland, and was accustomed to keep in his restaurant, cider with intent to sell the same as a beverage, and that frequently during that period he there sold cider to be drank on the premises, and the same was so there sold and drank, but said cider was unfermented and non-intoxicating in fact."

At the trial on this indictment, the defendant requested the presiding Justice to give the following rulings as matter of law:

1. "If the respondent kept and maintained a place used for the sale, or keeping for sale for tippling purposes, or as a beverage, of cider, and where cider was kept and deposited with intent to sell the same for tippling purposes or as a beverage, he would not be guilty of maintaining a nuisance under the provisions of section one and two, chapter twenty-two of the Revised Statutes, unless such cider was in fact intoxicating, and the keeping and maintaining of such place used for the sale or for selling of unfermented, non-intoxicating cider only, would not constitute the crime of keeping and maintaining a nuisance.

2. "If the provision of section one and two of chapter twenty-two of the Revised Statutes are construed to apply to places or tenements where unfermented, non-intoxicating cider only is kept or deposited with intent to sell the same for tippling purposes or as a beverage they are to that extent null and void, because they are in violation of section one, article one of the Declaration of Rights in the Constitution of Maine.

3. "If the provisions of section one and two of the Revised Statutes are intended to apply to places or tenements used for the sale or keeping for sale of unfermented, non-intoxicating cider only, for tippling purposes or as a beverage, or in which unfermented non-intoxicating cider only is kept and deposited with intent to sell the same for tippling purposes or as a beverage, such provisions are in violation of the provisions of the fourteenth amendment to the Constitution of the United States and are therefore to that extent null and void."

These requested rulings were refused, and a verdict of guilty was returned, and thereupon the defendant excepted.

Also on the tenth day of April, 1905, the defendant was arrested on a warrant issued by the Portland Municipal Court which alleged that the defendant "on the ninth day of April, A. D. 1905, at said Portland, unlawfully did have in his possession a certain quantity of intoxicating liquor, to wit: two hundred and forty-six quarts of cider, kept and deposited with intent to sell the same for tippling purposes and as a beverage, with intent that the same be sold in this state in violation of law," etc. The defendant was found guilty by the Municipal Court as alleged in the warrant, and thereupon he appealed to the Superior Court. The material facts in this case are the same as in the above stated nuisance case. At the trial in the Superior Court substantially the same instructious varied to suit the form of the proceeding were requested and refused as in the nuisance case, and the defendant was found guilty, and the defendant excepted.

The case also appears in the opinion.

William C. Eaton, County Attorney, for the state.

M. P. Frank, for defendant.

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

SPEAR, J. This case covers two actions, one involving a complaint for keeping a tippling shop and the other an indictment for maintaining a common nuisance. Both the complaint and the indictment are based upon the same state of facts, wherein it is admitted that the respondent during the period covered by the complaint and the indictment was a citizen of the United States and a licensed victualer and kept a restaurant on India Street in Portland in the county of Cumberland and was accustomed to keep in his restaurant cider, with intent to sell the same as a beverage and for tippling purposes, and that frequently during that period he there sold cider to be drank on the premises, and the same was so there sold and drank, but said cider was unfermented and non-intoxicating in fact.

With respect to the complaint the defendant requested the instruction that section 40 of chapter 29 of the Revised Statutes did not apply to unfermented, non-intoxicating cider and that the having of

such cider on deposit with intent to sell the same as a beverage and for tippling purposes constitued no offense. Also if it should be found that section 40 did apply to the keeping and sale of such cider, imposing penalities of fine and imprisonment for the violation thereof, its provisions are contrary to and in violation of section 1, article 1, of the Declaration of Rights in the Constitution of Maine and of the fourteenth amendment of the Constitution of the United States, and to that extent are null and void.

With respect to the nuisance indictment, the defendant requested the instruction that if the respondent kept and maintained a place used for the sale or keeping for sale for tippling purposes or as a beverage, of cider, and where cider was kept and deposited with intent to sell the same for tippling purposes or as a beverage, he would not be guilty of maintaining a nuisance under provisions of sections 1 and 2, chapter 22 of the Revised Statutes, unless such cider was in fact intoxicating, and that the keeping and maintaining of such place used for the sale or keeping for sale or for selling of unfermented non-intoxicating cider only, would not constitute the crime of keeping and maintaining a nuisance. The other requested instruction raised the same constitutional questions involved in the instruction with reference to the complaint.

The two cases can be construed together inasmuch as if it is held that the enumeration of intoxicating liquors specified in section 40 of chapter 29, R. S., does not apply to the intoxicating liquors referred to in sections 1 and 2, chapter 22, R. S., then that is the end of the nuisance case and the exceptions must be sustained. If on the other hand it is held that said enumeration does apply, then the two cases with respect to all the points raised fall within the same category and involve the simple questions, whether the keeping and selling of unfermented non-intoxicating cider as a beverage and for tippling purposes is inhibited by chapter 29, and if so inhibited if said chapter is constitutional.

We will therefore determine first whether the enumeration of intoxicating liquors found in section 40, chapter 29 shall be held to define the meaning of the words "intoxicating liquors," as used in sections 1 and 2, chapter 22, relating to nuisances. To determine

this proposition, we assume, arguendo, that unfermented, non-intoxicating cider, kept for sale and sold as a beverage and for tippling purposes, comes within the above enumeration of liquors classed as intoxicating. The question raised by this exception whether such cider does as a matter of law come within the purview of section 40, will be discussed later.

The proposition before us has been lately considered and we think fully settled in the recent case of *State* v. *O'Connell*, 99 Maine, 61. Like the case at bar, it arose under an indictment for maintaining a nuisance. The respondent was indicted for selling uno beer, a malt liquor. The question involved in the trial and under the exceptions, was not whether this beer was in fact intoxicating but, regardless of this fact, whether it came within one of the classes of liquors denominated intoxicating under section 40, chapter 29.

The court by necessary implication squarely held that, although one of the indictments was under chapter 17, R. S. 1883, now chapter 22, the question of whether the liquor was to be regarded as intoxicating was to be determined by reference to chapter 27 R. S. 1883, now chapter 29. In deciding the character of the liquor the opinion says: "Revised Statutes 1883, chapter 27, section 33, amounts to a prohibition of the sale of malt liquor." But malt liquor is not mentioned under chapter 17, yet being classed as intoxicating under chapter 27, it was held to be intoxicating under chapter 17.

But under the established rules of construction the two sections of the statutes should be construed together. Both sections are part of the same body of revised laws. We see no good reason why chapters of the same statute should not be construed with reference to each other as well as sections of the same chapter. Chief Justice Shaw in *Com.* v. *Goding*, 3 Met. 130, says: "In construing the Revised Statutes, we are to bear in mind that the whole were enacted at one and the same time, and constitute one act; and then the rule applies, that in construing one part of a statute, we are to resort to every other part to ascertain the true meaning of the legislature in each particular provision. This rule is peculiarly applicable to the Revised Statutes in which, for the convenience of analysis, and classification of subjects, provisions are sometimes widely separated from each

other in the code, which have so immediate a connection with each other, that it is quite necessary to consider the one, in order to arrive at the true exposition of the other."

The suggestion in the above quotation that "the whole were passed at one and the same time" was not intended we apprehend to in any degree limit the rule of comparing statutes, whenever enacted, in pari materia, a principle well established by our own as well as other courts. *Gould* v. *B. & P. R. R.*, 82 Maine, 126; *Cotton* v. *W. W. & F. R. R. Co.*, 98 Maine, 511; *Com.* v. *Sylvester*, 13 Allen, 247.

Black on Interpretation of Laws, page 6, in discussing this principle says: "The phrase 'statute in pari materia' is applicable to private statutes or general laws made at different times, and in reference to the same subjects. . . . . So, also, all the laws of the state, whenever passed, relating to the subject of the regulation of the liquor traffic, are in pari materia."

Commonwealth v. *Shea*, 14 Gray, 386, is a case precisely analogous in principle to the phase of the case now under consideration, and declares that "the provisions of St. 1855, c. 405, sec. 1, by which 'all buildings, places or tenements used for the illegal sale or keeping of intoxicating liquors are declared to be common nuisances, and are to be regarded and treated as such,' is to be construed by reference to the St. of 1855, c. 215, in pari materia, to which it is necessary to refer in order to ascertain what intoxicating liquors it is illegal to sell; and the first section of which declares that "ale, porter, strong beer, lager beer, cider and all wines, shall be considered intoxicating liquors within the meaning of this act. Proof of sales of cider was therefore competent in support of this indictment."

State v. *Hughes*, 16 R. I. 405, is a case also directly in point, and holds that statutes, although enacted at different times, if they have a common object and are parts of one system for the punishment of illegal selling and keeping of liquors, are to be construed together. See also *United States* v. *Freeman*, 44 U. S. 556; *Luiton's Appeal*, 104 Pa. 226; *United Soc.* v. *Eagle Bank*, 7 Conn. 456; *State* v. *Gerhardt*, 145 Ind. 439.

Our conclusion is that the proposition is well settled both by the

decisions and by the rules of statutory construction that the enumeration of liquors, declared to be intoxicating, contained in section 40 of chapter 29 of the Revised Statutes is referred to by and was intended to include the words "intoxicating liquors" as used in section 1 of chapter 22 of the Revised Statutes. It is therefore manifest that if unfermented and non-intoxicating cider is found to be an intoxicating liquor within the definition laid down in section 40, chapter 29, it is also an intoxicating liquor within the meaning of sections 1 and 2 of chapter 22, and if kept for sale and sold in violation of said sections, the premises where so kept would be subject to indictment as a nuisance.

This brings us to the consideration of the second proposition, whether the enumeration of liquors, declared to be intoxicating, contained in section 40 of chapter 29, was intended to include cider which is kept and deposited with intent to sell the same for tippling purposes or as a beverage, which is unfermented and non-intoxicating in fact. If it is found to be so included, then both the complaint and indictment are sustainable unless it appears that section 40, with respect to the kind of cider herein specified, is in contravention of the state or Federal constitutions. Section 40 declares that "wine ale, porter, strong beer, lager beer or other malt liquors and cider when kept and deposited with intent to sell the same for tippling purposes, or as a beverage, as well as distilled spirits, are declared intoxicating within the meaning of this chapter." The liquors above enumerated are declared intoxicating by law.

In determining whether or not a liquor is to be regarded as intoxicating under this enumeration it is entirely immaterial whether it is intoxicating in fact. As was well said in *State* v. *O'Connell*, "It is not for the jury to revise the judgment of the legislature and determine whether liquor is or is not in fact intoxicating." When it appears that a liquor comes within the scope of the forbidden enumeration, that moment its intoxicating character becomes fixed by law and its non-intoxicating character, as a matter of fact, becomes entirely immaterial with respect to the application of the statute. *State* v. *Piche*, 98 Maine, 348; *State* v. *O'Connell*, 99 Maine, 61; *Com.* v. *Blos*, 116 Mass. 56; *Com.* v. *Anthes*, 12 Gray, 29; *Com.* v. *Brelsford*,

161 Mass. 61; *Com.* v. *Snow*, 133 Mass. 575; *State* v. *Intoxicating Liquors*, 76 Ia. 243; *State* v. *Guiness*, 16 R. S., 401.

Does unfermented, non-intoxicating cider fall within the above rule? Unless we read into the statute, enumerating the kinds of prohibited liquors, some adjective modifying the word cider, that shall have the effect of differentiating between intoxicating and non-intoxicating cider, then it is evident that both cases at bar come, by the express terms of the statement of facts, within the prohibition of the respective statutes under which they are brought.

We do not feel authorized to modify the statutes by the interpolation of any such adjective. It is not the province of the court to legislate. Had the legislature, during all the years that the prohibitory statutes have been upon the books, intended that any differentiation should be made with respect to new and old cider they unquestionably would have seen that it was effectuated by proper legislation. A moment's reflection will readily suggest that such legislation has been witheld advisedly. Unfermented, non-intoxicating cider by the simple lapse of time becomes intoxicating. There is a dividing line somewhere in the course of time over which the same cask of cider, in the process of fermentation, passes from a non-intoxicating to an intoxicating liquor. But where? To locate this line is to nullify the statute. Hence the absence of legislation. This view is sustained not only by reason but by authority.

State v. *Spaulding*, 61 Vt. 505, is precisely in point. It involved the construction of a statute which provides that "no person shall sell or furnish cider or unfermented liquor at or in a victualling house, tavern, grocery shop, cellar or other place of public resort." The point raised in this case is identical with that raised in the cases before us. The court say: "The only prohibition as to cider is at the places specified in the sixth paragraph, but not there or anywhere in the statute is there any word qualifying the kind of cider prohibited at such places. The term used is "cider." It is said that the juice of apples is not cider until it is fermented. This is perhaps technically correct, but not in popular understanding. The apple juice when it comes from the cider press, is immediately and universally called "cider" by the people generally. The term should be

construed according to such universal use and understanding. Presumably no class of men understand better the difference between sweet and sour or new and old cider than our legislators, because they are mostly farmers who make the cider, and those who are not living in the cider producing state could hardly claim ignorance on so familiar a subject; yet in their prohibitory enactment they ignore all distinction, and simply say cider. The prohibition is limited to certain specified places, and such as indicate an intent only to prevent cider selling and drinking at public resorts, not to interfere with the manufacturer who does not make his establishment a public resort for drinking purposes like the saloon. It is well known, also, that the fermentation of cider, and the change from sweet to sour, so as to become more or less alcoholic, greatly varies,— sometimes being very rapid, at other times very slow. It would be practically impossible to prove whether a particular mug of cider that had been drank was intoxicating, and to require it would therefore render the statute nugatory. In view of all these facts, we think it would be more likely carrying out the legislator's intent to construe the enactment according to its plain and common meaning rather than to interpolate qualifying terms, and hold that the legislature meant something different from what it said. We therefore hold that the prohibition as to the places named is absolute, regardless of the stage of fermentation or the intoxicating quality of the cider."

Our conclusion is that the enumeration of liquors declared to be intoxicating and contained in section 40 of chapter 29, R. S., was intended to include and does include cider when it is kept and deposited with intent to sell the same for tippling purposes or as a beverage, even though such cider may be unfermented and non-intoxicating in fact.

The third question raised by the exceptions is whether section 40 with respect to cider that is unfermented and non-intoxicating in fact is in violation of section 1 of article 1 of the Constitution of the State of Maine. This involves the consideration of, first, the constitutional right of the legislature to regulate or prohibit the sale and keeping of intoxicating liquors; and second, the constitutional right of the legislature to declare certain liquors intoxicating within the

meaning of the law governing intoxicating liquors, irrespective of the intoxicating character of such liquors as a matter of fact.

Both of these questions are so universally answered in the affirmative by the decisions in our own state and those of other states under similar constitutional provisions that it is no longer a question for argument or even of doubt. *Lunt's Case*, 6 Maine, 412; *Gray* v. *Kimball*, 42 Maine, 299; *State* v. *Miller*, 48 Maine, 576; *State* v. *O'Connell*, 99 Maine, 61; *State* v. *Roach*, 75 Maine, 123. There are also numerous cases in other states to the same effect.

The affirmative of the second question is equally well established. *State* v. *O'Connell*, 99 Maine, 61; *Com.* v. *Anthes*, 12 Gray, 29; *Com.* v. *Brelsford*, 161 Mass. 61; *State* v. *Guiness*, 16 R. I. 401; *State* v. *Gravelin*, 16 R. I. 407; *State* v. *Intoxicating Liquors*, 76 Ia. 234.

We now come to the last proposition raised by the exceptions and that is whether section 40 with respect to the sale of cider which is unfermented and non-intoxicating in fact is in violation of the Fourteenth Amendment to the Constitution of the United States. And here two questions must be considered; first, whether this provision of the Federal Constitution is violated by a state law regulating or prohibiting the sale and keeping for sale of intoxicating liquors, and second whether it is violated by a state law declaring certain liquors intoxicating, within the meaning of the law governing intoxicating liquors, irrespective of the intoxicating character of such liquors as a matter of fact. The answer to both these questions is that a state law regulating or prohibiting the selling or keeping for sale of intoxicating liquors is a legal exercise of police power, and is not in contravention of the Fourteenth Amendment to the Federal Constitution. This has been repeatedly held and can be no longer an open question. *United States* v. *Ronan*, 33 Fed. Rep. 120; *Re Hoover*, 30 Fed. 55; *Bartemeyer* v. *Iowa*, 85 U. S. 18 Wall, 129; *Kidd* v. *Pearson*, 126 U. S. 1; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Mugler* v. *Kansas*, 123 U. S. 655; *License Cases*, 46 U. S. *How.* 504; *Foster* v. *Kansas*, 112 U. S. 206; *Eilenbecker* v. *Plymouth County*, 134 U. S. 40.

Exceptions overruled.

STATE OF MAINE

vs.

STEPHEN COMOLLI.

Hancock. Opinion December 27, 1905.

Intoxicating Liquors. Search Warrant. Description of Premises. Dwelling House. R. S., c. 29, § 52.

A search and seizure warrant issued by a trial Justice for the search of a dwelling house for intoxicating liquors contained among other allegations, the following in relation to the place to be searched: "That intoxicating liquors were and still are kept and deposited by Stephen Comolli of Stonington in the story and one-half wooden, frame dwelling house now occupied by said Stephen Comolli and situated near the turn of the road leading from Stonington Village to West Stonington in said town of Stonington." *Held:* That this description of the place to be searched is sufficiently definite and certain.

A complaint and warrant must be construed together and if the descriptive words are perfectly clear and designate the place to be searched, that is all the constitution and the law require. The rules of construction are not to be invoked to make that clear which is obvious without it.

On exceptions by defendant. Overruled.

Search and seizure warrant issued by a trial justice in Hancock County for the search of a dwelling house for intoxicating liquors. Liquors were found, and the defendant was arrested and brought before the Hancock Municipal Court at Deer Isle for trial. The defendant was found guilty and appealed to the Supreme Judicial Court. A general demurrer was filed to the complaint and warrant which was overruled and the defendant took exceptions.

The case appears in the opinion.

Charles H. Wood, for the state.

L. M. Staples, for defendant.

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

SPEAR, J. This case comes up on exceptions and involves the validity of a complaint and warrant issued by a trial justice for the

search of a dwelling house for intoxicating liquors. A general demurrer was filed and overruled by the court to which exceptions were taken. The main question raised by the exceptions is whether the description in the complaint and warrant of the premises to be searched was sufficiently definite and certain to comply with the requirements of the constitution and the law. The complaint alleges "that intoxicating liquors were and still are kept and deposited by Stephen Comolli of Stonington, in a story and a half wooden frame dwelling house now occupied by said Stephen Comolli and situate near the turn of the road leading from Stonington Village to West Stonington in said town of Stonington."

The warrant issued to the officers by the trial justice, in setting forth the complaint, designates the locus in the exact language of the above description, and then alleges that the complainant "prayed that due process be issued to search the premises hereinbefore mentioned." As we understand the defendant's brief, the point which he here raises is that the word dwelling house should have been used instead of the word "premises" in the above prayer in describing the place to be searched. If the term premises was not limited by the phrase "hereinbefore mentioned" the point might be well taken. A complaint and warrant merely to search the premises of a person would not authorize the search of a dwelling house, but that is not the case at bar. We fail to see how a description could be more definite as to the place intended to be searched than that contained in the complaint and warrant in this case. It describes the place to be searched as a story and a half wooden frame dwelling house now occupied by said Stephen Comolli. If other houses were situated near the one described also owned by Stephen Comolli, then the description would be perfectly definite and certain. One body cannot occupy two places at the same time. But one dwelling house, then, in this vicinity could be occupied by the respondent at the same time. And it was not the appurtenances, not a part of it used as a shop or inn or for purposes of traffic, but the dwelling house *now occupied* by Comolli that is described in the complaint and warrant. The description eliminates every other house except the one designated by the words "now occupied."

The complaint and warrant must be construed together and if the descriptive words are perfectly clear and designate the place to be searched, that is all the constitution and the law require. *State* v. *Bartlett*, 47 Maine, 388. The rules of construction are not to be invoked to make that clear which is obvious without it.

The defendant's counsel intimates also that the warrant fails to comply with R. S., chapter 29, section 52, which provides that "no warrant shall be issued to search a dwelling house occupied as such unless it or some part of it is used as an inn or shop for purpose of traffic, or unless the magistrate before whom the complaint is made, is satisfied by evidence presented to him, and so alleges in said warrant, that intoxicating liquor is kept in such house or its appurtenances, intended for sale in the state, in violation of law." He claims that a warrant to search a dwelling house must state that it is not used for a shop, etc.

It will be observed that this statute contemplates two contingencies upon which the magistrate may issue his warrant; first, that some part of the house is used as an inn or shop, or for purposes of traffic; second, that he is satisfied by evidence presented to him and so alleges in the warrant that intoxicating liquor is kept in such house or its appurtenances, intended for sale in this state in violation of law. *State* v. *Whalen*, et al., 85 Maine, 469. The first part of this section has no application because the warrant is for the search of the dwelling house only. The second contingency is fully complied with by the allegation inserted in the warrant by the magistrate, "and whereas I am satisfied by evidence presented to me that intoxicating liquor is kept in the premises described in the foregoing complaint intended for sale in this state in violation of law," etc. The premises alluded to as already seen was a dwelling house definitely located and clearly described. The complaint and warrant are in full accord with the requirements of the constitution and the statutes.

Exceptions overruled.

CHARLES H. MERRILL et al.

vs.

ELIAS MILLIKEN.

Waldo. Opinion December 27, 1905.

Appeal. Review. Exclusion of Evidence. Burden to Show Error. Harmless Error. Contracts. Action for Breach. Evidence.

When evidence is offered by a plaintiff and the same is excluded, it is incumbent upon such plaintiff to show affirmatively that he is aggrieved by such ruling.

When a plaintiff has full opportunity under the rulings of the presiding Justice to introduce evidence to prove all the allegations respecting the defendant's liability, but fails to present sufficient evidence to make out a prima facie case against him, such plaintiff is not aggrieved by the exclusion of evidence, which, even if admissible, would not affect the result of the case.

The plaintiffs in this action offered in evidence a certain "construction contract," so called, dated May 7, 1898, and under the facts as disclosed by the case the presiding Justice refused to admit the same. *Held:* that this ruling was correct.

On exceptions by plaintiffs. Overruled.

Assumpsit on a written contract made by the plaintiffs and one I. C. Libby with the defendant, Elias Milliken. Libby died before the commencement of the suit, and the action was brought by the plaintiffs who are the surviving joint contractors. The defendant died after the action was brought, and his administrators duly appeared as parties defendant. Tried at the September term, 1903, of the Supreme Judicial Court, Waldo County. Plea, the general issue. During the progress of the trial, the plaintiffs offered certain evidence which was excluded by the presiding Justice, and at the conclusion of the testimony the plaintiffs were nonsuited. Thereupon the plaintiffs excepted to the rulings of the presiding Justice n excluding the evidence offered by them and also to the order of nonsuit.

The case sufficiently appears in the opinion.

Charles F. Johnson, Enoch Foster and Reuel W. Rogers, for plaintiffs.

Herbert M. Heath, C. L. Andrews and Wm. P. Thompson, for defendant.

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

WHITEHOUSE, J. November 20, 1897, ten individuals, viz. I. C. Libby, A. F. Gerald, G. C. Moses, A. H. Shaw, J. M. Robbins, C. G. Totman, S. A. Nye, E. J. Lawrence, H. B. Goodenough and the defendant Elias Milliken, subscribed to the following agreement, to wit:

1. "They hereby form a syndicate to acquire the franchises and property of the Lewiston & Auburn Horse Railroad Company, the Brunswick Electric Railroad Company, the Bath Street Railway Company, and such extensions as may be agreed to later.

2. "Negotiable paper not to exceed $350,000 at any one time is to be signed and so outstanding at any one time. All notes are to be taken up on or before January 1, 1899.

3. "M. G. Shaw, Elias Milliken and J. M. Robbins, are agreed upon as Trustees hereunder to issue all notes to be negotiated by I. C. Libby hereby agreed to as Treasurer. They shall hold all bonds, securities and valuable papers connected with the purpose hereof.

4. "Said Moses, Gerald and Libby hereby agree to sell and deliver all of the stock of the Brunswick Electric Railroad Company to the syndicate, free of debt, to be equally divided, for the actual cost thereof, not to exceed $35,000. All of the parties hereto shall then be elected Directors of said Brunswick Electric Railroad Company.

5. "Under the direction of said Directors said Brunswick Electric Railroad Company is to extend its road to a connection with the Bath Street Railway Company, and with the Lewiston and Auburn Horse Railroad Company, and the funds hereby raised devoted to that purpose.

6. "The outstanding second mortgage bonds of the Lewiston and Auburn Horse Railroad Company are to be bought from the proceeds of said notes and delivered to the Trustees to be held as before agreed. The proceeds shall also be used in purchasing the power plant used by the said company to be deeded to said Trustees in trust herefor. It is further agreed, however, that said Trustees may acquire said second mortgage bonds by exchange for new bonds, if the holders thereof so require.

7. "Said Gerald, Libby and Moses hereby transfer to the syndicate their present right to acquire the stock of the Bath Street Railway Company at four per cent rental thereon, or in cash $66,667, the option to be exercised within nine months herefrom.

8. "The parties have this day signed and delivered to the Trustees, ten notes of $5,000 each and ten notes of $10,000 dated in blank, the payee blank, the time blank, and when negotiated; the Trustees as our agents are authorized to fill in said blanks, or the Treasurer, with written directions from the Trustees, may so fill in said blanks."

Two days later on the 22nd day of November, 1897, I. C. Libby, C. E. Libby and C. H. Merrill entered into an agreement with the defendant as follows:

"We hereby agree to pay Elias Milliken Five Thousand Dollars and 30 shares of stock for subscribing one tenth in the Lewiston, Brunswick & Bath deal. We are to protect him against loss and he is to give us all incomes or interests this one tenth gives him in the stock of these companies or of any new road or extension that the syndicate formed at Lewiston, Nov. 20th for the purpose of purchasing the three roads, the Lewiston & Auburn, the Brunswick Road and the Bath Road and their extensions, may construct or acquire except one share given him as a director, meaning to stand in his place as far as liability goes and we are to have all benefits accruing from same."

The case at bar was an action of assumpsit to enforce the latter contract against the defendant Milliken and recover one tenth of the income and profit alleged to have been realized by him as a member of the syndicate by virtue of the agreement of November 20 signed

by him. I. C. Libby, one of the parties to the agreement in suit, having deceased, the action was brought by C. H. Merrill and C. E. Libby the surviving joint contractors of the first part as parties plaintiff, and Milliken having deceased after the commencement of the suit, the administrators on his estate now appear as parties defendant.

It is alleged in the declaration that the enterprise thus inaugurated by the syndicate formed Nov. 20, to acquire and extend certain street railway properties in Lewiston, Brunswick and Bath, was carried to a successful termination, and that profits to the amount of $325,000 accrued therefrom to be shared equally among the ten members of the syndicate; that the plaintiffs in the performance of the agreement on their part, duly protected Milliken against any loss by reason of his becoming a member of the syndicate, delivered to him twenty shares of the stock mentioned in the agreement and had always been ready and willing to deliver to him the remaining ten shares of stock and the $5,000 therein specified. They accordingly seek to recover in this action $32,500, being one tenth part of the $325,000 alleged to have been realized by the syndicate as the profits of the enterprise.

These averments in the declaration thus obviously involve the direct implication that Milliken fully performed his part of the contract of November 20, and continued a member of the syndicate then organized, until the enterprise was completed. The plaintiffs' claim necessarily rests upon the assumption that Milliken had substantially observed all of the obligations imposed upon him by the terms of the syndicate agreement, so as to become entitled to receive one tenth of the profits alleged to have been realized from the construction of the "Lewiston, Brunswick and Bath Street Railway." But it appears from the testimony of one of the plaintiffs' witnesses and is not controverted, that for reasons which will hereafter more fully appear, Milliken never attended any meeting of the syndicate after that of Nov. 20, when it was formed, but refused to participate in any of its subsequent transactions.

It appears, however, that at sometime between Nov. 20, 1897, and May 7, 1898, the Brunswick Electric Railroad Company changed its name to the "Lewiston, Brunswick and Bath Street Railway,"

and on this latter date a "construction contract" was entered into between the Lewiston, Brunswick and Bath Street Railway, by A. H. Shaw, President, and I. C. Libby, Treasurer, and the Lewiston, Brunswick & Bath Street Railway Syndicate, by I. C. Libby, Trustee." As no other syndicate appears to have been formed in connection with the enterprise it is not in controversy that this designation of it had reference to the syndicate formed November 20 under the agreement signed by the defendant Milliken. No evidence was offered to show that Milliken at any time assented to any modification of the original syndicate agreement signed by him or that he or the syndicate ever agreed that I. C. Libby should act as trustee in place of M. G. Shaw, Elias Milliken and J. M. Robbins named as trustees in the syndicate agreement. There was no evidence that I. C. Libby was ever legally authorized to act as trustee for the syndicate for the purpose of entering into this construction contract in question; yet by the terms of this contract with the Lewiston, Brunswick & Bath Street Railway, he assumed to make the syndicate agree to deliver to the Railway Corporation $265,000 of the mortgage bonds of the Lewiston & Auburn Horse Railroad Company; to purchase the power plant in Lewiston used by the Horse Railroad Company; to construct a street railway from Lewiston to Sabattus; to construct and complete the proposed line of the Lewiston, Brunswick & Bath Street Railway from Lewiston to Topsham and from Brunswick to Bath; to construct an electrical power plant in the town of Brunswick sufficient to operate all the lines old and new and to furnish suitable equipment of cars and a car barn; to purchase the Patten car works in the city of Bath and to expend the sum of $2,500 on the buildings; to expend $20,000 in the purchase and improvement of the Merrymeeting Park property; to expend $25,000 for a power station and barn in Lewiston and to advance money to repair and improve all the railway lines in Lewiston, Auburn, Brunswick and Bath. In consideration of all which, the Lewiston, Brunswick & Bath Street Railway agrees to deliver to I. C. Libby the alleged trustee of the syndicate 4800 shares of the capital stock of the Lewiston, Brunswick & Bath Street Railway and $700,000 of its bonds.

It will be seen at once that all of these stipulations which I. C. Libby undertook to make in behalf of the syndicate in the construction contract of May 7, 1898, are a radical departure from the obligations assumed by Milliken in the agreement of Nov. 20, 1897, signed by him. This construction contract and the original syndicate agreement differ toto coelo in their scope and purpose. Milliken agreed to sign notes and advance money to the corporation to the extent specified. He had not agreed to become a member of a different syndicate involving unknown business risks in the construction of railroads. The original scheme involved a maximum personal credit on the part of the syndicate of $385,000. According to the plaintiffs' claim, the construction contract executed by Libby, but repudiated by Milliken involved a personal credit of the syndicate as individuals to the extent of $1,000,000.

Milliken had evidently become alarmed at the proposition thus to remove the express limitations and personal safeguards provided by the syndicate agreement and refused to consent to such an unwarranted extension of the liability of the members of the syndicate. He thereupon withdrew from the syndicate and severed his connection with the enterprise; but although no other syndicate appears to have been formally organized, Milliken's nine associates of November 20, apparently acquiescing in his withdrawal proceeded to formulate a new scheme in entire disregard of the provisions of the syndicate agreement, and under the leadership of I. C. Libby, became committed to the obligations of the construction contract in question, without even the knowledge of the defendant Milliken. In consideration of $5,000 in cash and $3,000 in stock, Milliken might be willing to become one of ten associates who were to loan their credit to the extent of $385,000 in a street railroad enterprise between Lewiston and Bath under an agreement that all the bonds, stocks and securities received as collateral for their credit, were to come into his hands as one of the trustees of the syndicate, but it was a startling change to have his credit pledged for $1,000,000, in a totally different undertaking in which all of the negotiable securities were to be deposited with I. C. Libby as trustee. It was obviously for

that reason that Milliken ignored the syndicate immediately after its creation.

Notwithstanding this practically undisputed history of the syndicate, the plaintiffs offered in evidence at the trial the construction contract of May 7, 1898, for the purpose of showing that the syndicate ultimately performed all of the things agreed to be done under the syndicate agreement and that Milliken was therefore entitled to receive one tenth of the profits of the contract. The presiding judge ruled that the contract was not admissible as evidence against the defendant and the plaintiffs took exceptions to this ruling. But for reasons already sufficiently explained the ruling of the presiding judge excluding the construction contract must be deemed correct. As before shown there was no evidence that I. C. Libby was ever expressly authorized to execute the construction contract in behalf of the syndicate, and he obviously had no greater implied power than that possessed by every other member of the syndicate. If the syndicate is to be termed a copartnership, it must be considered that it was only a special partnership with its scope and purpose explicitly defined and limited and the rights and liabilities of the members carefully guarded by express provisions of the agreement under which the syndicate was constituted. If therefore I. C. Libby as a member of the syndicate had implied authority to bind his nine associates under any circumstances, it is plain he had no implied power to sign the syndicate name to a construction contract involving important duties and extensive liabilities not specified or contemplated by the syndicate agreement and manifestly not within the scope and purpose of it. Neither were the new matters in the contract of May 7, necessary or incidental to the performance of the contract of Nov. 20, or among "extensions that were agreed to later" by the defendant Milliken.

It was not claimed that Libby had any implied power as treasurer to bind the syndicate, and his express powers as treasurer were limited by the written agreement to the negotiations of the syndicate notes, the custody of their proceeds and their disbursement as therein specified. The construction contract therefore was not admissible

without evidence tending to prove Milliken's assent or ratification and no such evidence was introduced or offered.

But it appears from the report of the case that by subsequent rulings of the court full opportunity was given to the plaintiffs to prove everything that was in fact done by the syndicate, either with or without the participation of Milliken, either under the contract of Nov. 20, or the construction contract of May 7. Under these rulings they were expressly permitted to show that Milliken "actually participated in the result of the construction contract," but no such evidence was introduced or offered.

Furthermore no evidence was introduced or offered to prove the allegations in the writ that the plaintiffs ever delivered or offered to deliver or were ready and willing to deliver to the defendant the thirty shares of the capital stock of the corporation, or that they ever paid, or offered to pay the $5,000 in cash, or that they duly protected him against loss by reason of his becoming a member of the syndicate, according to the stipulation of the agreement in suit.

But for the purpose of showing the amount of profits alleged to have accrued to the syndicate from the completed enterprise and as bearing upon the question of damages in this action, the plaintiffs offered in evidence the account book of I. C. Libby, as treasurer, kept in the handwriting of his confidential clerk, showing the amounts claimed to have been received and disbursed by him as treasurer of the syndicate. As stated by plaintiffs' counsel this book was offered "to prove the dispositions and the sale of the stock and bonds committed to him as treasurer of that syndicate." The presiding judge ruled that the book was not admissible for that purpose and accordingly excluded it and ordered a nonsuit. To these rulings the plaintiffs also took exceptions and insist on these exceptions in argument.

It has been seen that by the express terms of the syndicate agreement I. C. Libby was "agreed to as treasurer" with special authority to negotiate all notes issued by the trustees. He was thus made treasurer of the syndicate, and with respect to syndicate business, of every individual member of the syndicate. In addition to the express authority to negotiate the notes issued by the trustees he was invested

with implied authority to perform the duties ordinarily pertaining to the office of treasurer. The receipt and disbursement of moneys and the keeping of a suitable book of accounts showing in detail all of such receipts and expenditures, are among the most obvious of these duties. For both of these purposes every member of the syndicate in signing the agreement constituted I. C. Libby his agent. The treasurer's book offered in this case has been produced for the inspection of the court. The entries were shown to have been made in the regular course of business and were duly authenticated by the testimony of the clerk who made them. The book was admissible evidence for the purpose for which it was offered in this proceeding against a member of the syndicate, involving a question respecting the profits of its business; but it is not claimed in behalf of the plaintiffs that the book contains any entries that would be material upon the question of defendant's liability. Its relevancy is confined solely to the question of damages. It contains no entries tending to show that the defendant Milliken actually received any of the profits alleged to have been received from operations under the syndicate of November 20 or the construction contract of May 7. It affords no evidence that the plaintiffs ever delivered or offered to Milliken the thirty shares of the stock of the corporation or paid or tendered to him the $5,000 in cash, or protected him from loss according to the terms of their agreement.

If therefore the construction contract of May 7, and the treasurer's account book in question had been admitted as evidence, it would still have been the duty of the court to order a nonsuit for want of proof of the several propositions essential to establish the defendant's liability. As already seen the plaintiffs had full opportunity under the rulings of the court, to introduce evidence to prove all of the material allegations respecting the defendant's liability, but failed to present sufficient evidence to make out a prima facie case against him. Under these circumstances as it was not shown that the defendant was liable for any damages at all, the treasurer's account book relating solely to the question of damages, was entirely immaterial, and as the case was tried the plaintiffs were not aggrieved by the exclusion of this evidence. It was incumbent upon the plaintiffs

to show affirmatively that they were aggrieved by the ruling complained of. *Littlefield* v. *Cook*, 98 Maine, 299; *Freeman* v. *Dodge*, 98 Maine, 531; *Copeland* v. *Hewett*, 96 Maine, 525; *Look* v. *Norton*, 94 Maine, 547. This the plaintiffs have failed to do, and the entry must be,

Exceptions overruled.

In Equity.

RANDALL D. BIBBER *vs.* EDWARD E. CARVILLE.

Sagadahoc. Opinion December 28, 1905.

Contracts. Rescission. Mistake. Cancellation. Relief Against Mistakes.

A court in equity may decree the rescission of a contract for a mistake which is unilateral, but the power should not be exercised against a party whose conduct has in no way contributed to or induced the mistake, and who will obtain no unconscionable advantage thereby.

If a grantor gives a warranty deed of land which he does not own, under the mistaken belief that he has title thereto, the deed will not be cancelled when no fraud, falsehood, misrepresentation or concealment on the part of the grantor is alleged.

Equity does not relieve against mistakes which ordinary care would have prevented. Conscience, good faith and reasonable diligence are necessary to call the powers of a court of equity into activity.

In equity. On exceptions by plaintiff. Overruled.

Bill in equity wherein the plaintiff prayed that a certain deed of warranty made, executed and delivered by him to the defendant might be cancelled, alleging that by a mistake on his part, arising from his ignorance of certain facts, he had included in such deed certain land to which he had no title at the time he gave the deed. Plaintiff also alleged that the defendant had begun an action at law against him for breach of a covenant in said deed claiming damages in the sum of one thousand dollars, and asked that injunctions, both temporary and perpetual, be issued against the defendant to restrain

him from further prosecuting his action at law. Defendant demurred to the bill. The demurrer was sustained by the Justice of the first instance. Plaintiff then took exceptions.

The case appears in the opinion.

Frank E. Southard, for plaintiff.

Rufus F. Springer, for defendant.

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

POWERS, J. Exceptions to a decree sustaining a demurrer to the plaintiff's bill and dismissing the bill with costs.

In substance the bill alleges that Denham Hall, being the owner of a lot of land in Bowdoin containing about one hundred acres mortgaged the same to James M. Hall in 1866 and to one Bibber in 1870. In 1880 James M. Hall assigned the mortgage to Bibber, who in 1888 foreclosed the mortgage given to him and the foreclosure became absolute. Bibber died in 1897, leaving as his sole heir at law the plaintiff, who in 1902 conveyed the premises to the defendant by warranty deed. At the time he gave the deed, the plaintiff believed that he had full title to the premises, but being afterwards notified by the defendant that such was not the case, he investigated the matter in the registry of deeds, and found by the records therein that Bibber and Denham Hall, the mortgagor, in 1873 conveyed about twenty-five acres of the premises to one Cox, who, the plaintiff alleges he is informed and believes, has ever since claimed to be in possession thereof. Thereupon the plaintiff offered to return the consideration and asked the defendant to reconvey. The defendant declined to accept the money or reconvey, and brought suit for covenant broken, which is now pending in court. Plaintiff in his bill further offers to pay back the consideration received from the defendant and also such other sum, if any, as justice and equity may require; and prays that the deed to the defendant may be cancelled and for an injunction against the prosecution of said suit.

Does the plaintiff present a case for equitable relief? No fraud, falsehood, misrepresentation or concealment on the part of the defendant, the grantee, is alleged. There was no mistake as to the terms

of the deed. It expressed precisely what the parties intended. There was a mistake on the plaintiff's part as to the title, resulting in the not uncommon case of a man giving a warranty deed of land which he does not own. Our attention has been called to no case where under the circumstances such as are here alleged a deed has been cancelled on the prayer of the grantor.

"Defects in the title do not entitle the grantor to a rescission of the conveyance." 8 A. & E. Ency. L. 2 Ed. 222. We see no reason why the grantee, who acted in good faith, is not entitled in good conscience to retain the benefit of the contract which he made. The grantor, who received the full price he set upon the property, has no equitable right to deprive him of it simply because he was mistaken as to his title and is liable upon his covenants. While a court of equity may decree the rescission of a contract for a mistake which is unilateral, the power should not be exercised against a party whose conduct has in no way contributed to or induced the mistake, and who will obtain no unconscionable advantage thereby.

There is another reason why the plaintiff cannot prevail. Equity assists only the vigilant. It does not relieve against mistakes which ordinary care would have prevented. Conscience, good faith and reasonable diligence are necessary to call a court of equity into activity. *Bonney* v. *Stoughton*, 122 Ill. 536. The plaintiff claimed title as heir at law of Bibber. The true state of the title appeared on record. He does not allege that before the conveyance he ever examined the records to ascertain what title at the time of his decease Bibber had to the premises. After the conveyance he examined the records and found that Hall, the mortgagor, and Bibber, the mortgagee, had united in conveying a part of the premises to Cox, who, the plaintiff says he is informed and believes has ever since, for more than thirty years, claimed to be in possession of the part so conveyed. The same investigation before he gave his deed would have revealed to the plaintiff the extent of his title and corrected his mistake. The bill alleges no reason whatever for the mistaken belief which he entertained. We cannot think it reasonable diligence for a man to assume, without examination of the records, that as heir at law he has a perfect title to land conveyed to the intestate twenty-seven

years before his decease, and of which it is not claimed he ever had possession. "When a party has acted in ignorance of facts merely, courts of equity will never afford relief when actual knowledge would have been obtained by the exercise of due diligence and inquiry." *McDaniels* v. *Bank*, 29 Vermont, 231. To relieve a party under such circumstances would be to encourage culpable negligence. *Durkee* v. *Durkee*, 59 Vt. 70. In that case an examination of the records in the town clerk's office would have given the complainant the information. To the same effect is *Deare* v. *Carr et al.*, 3 N. J. Eq. 513. In a later case *Graham* v. *Berryman*, 19 N. J. Eq. 29, the same court thus states the principle: "When a party ought in the exercise of ordinary prudence to have made inquiry, and neglects to ascertain the facts upon which his contract is based, in cases where it is not necessary to repose confidence in the other party, or where it is as much his duty as that of the other party with whom he deals to know the facts, courts of equity will not relieve against his own negligence."

In conclusion it is to be noted that this is not a case where a court of equity is asked to reform a deed which, on account of mutual mistake, does not represent the intention of the parties. In this case the court is asked to cancel a deed which expressed just what the plaintiff intended it should. The mistake was unilateral, on the part of the grantor alone, induced by no fraud, falsehood, misrepresentation or concealment of the grantee, relating to the grantor's own title, the true state of which ordinary care and diligence on his part would have revealed to him. It does not appear that the grantor will obtain an unconscionable advantage by the deed or that he will not be fairly compensated for his liability on his covenants by the purchase money which the grantee paid him. Under these circumstances equity will not interfere to cancel the deed and deprive the grantee of the benefit of a contract fairly made.

Exceptions overruled.

EMMA S. MAYO

vs.

LLEWELLYN M. LEIGHTON.

Cumberland. Opinion December 28, 1905.

Accord and Satisfaction. Offer and Tender. Payment. Intention of Parties.

In order to support a plea of accord and satisfaction payment must be received as well as made. Neither offer to perform nor tender is sufficient. Nothing short of actual performance, meaning thereby performance accepted, will sustain such a defense.

Payment made and accepted for the assignment of a mortgage, is not a settlement of a claim for the breach of another and different contract unless so intended by the parties. Whether it is so intended is a question of fact for the determination of the jury.

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

Assumpsit. Plaintiff alleged that she placed in the hands of the defendant, a real estate broker and investor of money on real estate security, $2,000 to be loaned to one McDonnell on a first mortgage of certain real estate in Portland, and that the contract made by the defendant with her was broken by the defendant and that she had suffered damage thereby. Plea, the general issue with a brief statement of accord and satisfaction. Tried at the April term, 1905, of the Supreme Judicial Court, Cumberland County. Verdict for defendant. Plaintiff then filed a motion for a new trial and also took exceptions to certain rulings made by the presiding Justice during the trial.

The case is sufficiently stated in the opinion.

I. W. Parker and M. P. Frank, for plaintiff.

A. W. Coombs, for defendant.

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

POWERS, J. Exceptions and motion for new trial by plaintiff.

This is an action of assumpsit. The first count in the writ sets out in substance that the plaintiff at the request of the defendant, who was a real estate broker and investor of money on real estate security, placed in the defendant's hands two thousand dollars to be loaned to one McDonnell on a first mortgage in Portland; that the defendant "in consideration thereof then and there promised the plaintiff to loan said money for her accordingly, and that before loaning and delivering said two thousand dollars to said McDonnell, he would see that the title to said real estate upon which said mortgage was to be made and given was all right, and a safe security for said loan, and that he would prepare the mortgage and note, and see to it that said loan and interest was safely secured to the plaintiff thereby." It is further alleged that the loan was made by the defendant to said McDonnell "not on real estate as defendant promised, but instead thereof, said mortgage was made on only all the right, title and interest which said McDonnell had under a certain lease" of the premises, which lease was then and there forfeited and McDonnell's title thereunder, as the defendant well knew or ought to have known, lost and worthless; that said mortgage was then and there worthless and no security for said loan, and that the plaintiff, as soon as she learned of these facts, assigned and surrendered said mortgage and the notes thereby secured to the defendant at his request. The plaintiff further avers that she has never received any security "for said loan and interest;" that no part of said $2,000 loan has been paid to her by the defendant or anyone else, except six months interest, and that the whole sum of the two thousand dollars and interest from September 8, 1903, has been lost to her. The remaining three counts contain in substance similar averments together with certain other allegations in reference to the defendant's subsequent dealings with the property, and each concludes with the statement that the two thousand dollars and interest has been wholly lost to her "by reason of said defendant's non-fulfilment of his said

promise." There is also an omnibus count with the specification that under it and each of the preceding counts the plaintiff claims to recover the sum of $2000 and interest thereon from September 18, 1903.

The plea is the general issue, with a brief statement of accord and satisfaction by the delivery to the plaintiff of a deed of four lots of land in South Portland and the defendant's four notes of one hundred dollars each with the averment that the plaintiff accepted the same as a full consideration of the assignment to the defendant of the McDonnell mortgage "and in full discharge and satisfaction of any alleged claim against the defendant arising out of the premises declared upon."

The pleadings therefore show that the plaintiff claimed that she had surrendered the mortgage and was entitled to recover back the money placed in the defendant's hands to be loaned, and the defendant claimed that she had accepted a deed and four notes in full satisfaction of this demand and of the assignment. The evidence is made a part of the exceptions, and it appears that there was testimony tending to support the position of the plaintiff. She strenuously denied that she had ever accepted or agreed to accept the deed and notes in satisfaction of her claim. Her testimony was that, at the time she assigned the mortgage to the defendant, she refused to receive the deed, told the defendant's agent she would not take it, that he left the deed and notes on the piano at her home and that she afterwards returned them to the defendant. The defendant's testimony was that he agreed to buy and the plaintiff to sell him the mortgage for the deed and four notes and that this trade was fully executed by both parties. It is evident that his testimony does not support his plea of accord and satisfaction. The suit was to recover damages which the plaintiff claimed to have suffered through the breach of the defendant's promise to her to see that her money was loaned on a first mortgage of real estate with a good title, and not to recover the consideration for a mortgage sold to the defendant. If the mortgage was sold to the defendant and payment for it made or tendered to the plaintiff, the amount which she received for it would have a bearing upon the question of damages, but the mere sale of and payment

for the mortgage would not operate as a settlement of her alleged claim against him as set out in the several counts of her writ, unless it was so intended by the parties. Whether it was so intended was a question of fact for the jury.

The presiding justice, after stating that the point of the case was whether the defendant had paid for the mortgage, at the close of his charge gave the following instructions:

"First. Did the plaintiff agree to accept as payment for her assignment the four notes of the defendant (being Deft. Ex. D. E. F. & G.) and the lots of land as described in his deed to her (Deft. C.) which you have? If yes, then the verdict must be for the defendant that he did not promise.

Second. Did the plaintiff in fact accept said notes and lots in payment for her assignment? If yes, then the verdict must be for the defendant that he did not promise."

The exceptions to these instructions must be sustained. They are correct as applied to the question of payment, it being undisputed that the defendant tendered performance on his part; but in order to be an accord and satisfaction of the plaintiff's claim set out in her writ and supported by her evidence, the agreement must have been executed. Payment must be received as well as made. *Mayo* v. *Stevens*, 61 Maine, 562. Neither offer to perform nor tender is sufficient. Nothing short of actual performance, meaning thereby performance accepted, will sustain such a defense. *White* v. *Gray*, 68 Maine, 579. The first instruction omits this important element and both instructions, as applied to this case, overlook the fact that this was not a suit to recover payment for the assignment of a mortgage, but damages for an alleged breach of the defendant's promise to see that the plaintiff's money was loaned on a first mortgage of real estate and a good title. Payment for the assignment of the mortgage, even if made and accepted, would not work a settlement of the claim in the writ unless so intended by the parties. Whether it was so intended was an issue of fact which the second instruction withdrew from the jury.

It is unnecessary to consider the motion.

Exceptions sustained.

JOHN WELLS

vs.

FRANCIS DANE et als.

Cumberland. Opinion December 28, 1905.

Amendment After Demurrer Sustained. Waiver. No Action by Corporation Stockholder, When. Stockholder may Proceed in Equity, When. Torts by Corporation Officers.

When a plaintiff amends his writ, after a demurrer to it has been sustained, he waives the right to except to the ruling sustaining the demurrer.

A shareholder cannot sue individually for damages caused by wrongful acts impairing the value of his shares through the invasion of the corporate or collective rights.

In such cases, if the regular officers of the corporation are unable or unwilling to take the necessary steps to protect the corporate property and interests, a shareholder may proceed in equity on behalf of himself and other shareholders and the company.

When the direct injury is not to the shares but to the corporate rights and interests, the right to share in the compensation which the corporation may recover passes to the transferee of the shares. A stockholder who, after such an injury, assigns his stock is in no better position to sue at law than if he had retained it.

Notwithstanding the wrongful acts were done with the specific design and malicious and fraudulent intent of injuring the plaintiff, he can maintain no action when he has sustained no loss in addition to that suffered by the corporation.

On exceptions by plaintiff. Overruled.

Action on the case brought by the plaintiff, a stockholder in the Centrifugal Leather Company, a corporation, against the defendants as officers of said corporation, to recover damages claimed to result from alleged fraudulent action of the defendants as officers of said corporation.

The writ originally contained three counts to which the defendants filed a demurrer which was sustained. The plaintiff was then allowed to amend whereupon he filed two new counts to his declaration. To

these two counts the defendants demurred, and which last demurrer was also sustained. The plaintiff then took exceptions to the rulings sustaining both the former and the latter demurrer.

The case appears in the opinion.

John Wells, pro se.

Bird & Bradley, for defendants.

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

POWERS, J. Exceptions to sustaining a demurrer to plaintiff's writ. The writ originally contained three counts. After a demurrer was sustained the defendant was allowed to amend by filing two counts. The defendant filed a new demurrer which was sustained, and the plaintiff then excepted to sustaining both demurrers.

Only the amended counts need be considered. By amending plaintiff waived his right to except to the ruling sustaining the first demurrer. He could not both amend and except, a course which would in effect ask the judgment of this court upon the sufficiency of pleadings which he himself had abandoned.

The amended counts charge that the defendants were directors in the Centrifugal Leather Company, a corporation whose capital stock was one hundred and fifty thousand dollars in shares of the par value of one hundred dollars each; that the legally issued shares of the corporation were nine hundred of which the plaintiff owned three hundred and sixty and controlled one hundred and eighty more; that on Sept. 10th, 1900, the corporation entered into a contract with Francis Dane one of the defendants, which contract is set out in full and related to the developement of the corporate plant and business; that the defendants, wickedly designing to injure and harass the plaintiff, and intending and contriving to cheat and defraud him by depriving him of his right to control the corporation, conspired to mutilate and falsify and did mutilate and falsify the records of the corporation by inserting in the original stockholders' and directors' records the following false and forged vote of the directors purporting to have been passed at a meeting of the directors held on April 4th, 1899, viz:

"Voted, — That in consideration of the services, moneys, rents, machinery, skill and knowledge of the leather business contracted for with the said Francis Dane, as set out in the memorandum of agreement between him and the Centrifugal Leather Company, entered into on April 4th, 1899, there be issued to said Francis Dane, Sixty Thousand Dollars of the capital stock of this company."

It is further alleged that the defendants cut out four pages of the corporation records, which showed that all said Dane's former contracts and agreements with the corporation had been cancelled and annulled and that he did not own said six hundred shares of treasury stock, and inserted in those records the following false and forged vote purporting to have been passed on Sept. 3, 1900:

"Voted,—That the memorandum of agreement entered into between Francis Dane of Hamilton, Massachusetts, and the said Centrifugal Leather Company, being dated at Portland, Maine, April 4th, 1899, in consideration of a certain new contract this day entered into and executed by and between the said Francis Dane and said company, be cancelled and annulled;" and that they altered and falsified the original cancellation of the first contract between said Dane and the corporation by substituting for the following original record of cancellation, viz: "The above contract is hereby cancelled and annulled by consent of the parties thereto," a falsified record of the cancellation of said contract which now appears on the records of the corporation as follows:

"Portland, Maine, September 10th, 1900.

The above contract is hereby cancelled and annulled in consideration of a contract entered into this day between the Centrifugal Leather Co. and Francis Dane of Hamilton, Massachusetts."

Then follows an allegation that by this mutilation and falsification of the records the true relation and legal rights of the plaintiff in and to his property rights in said corporation were wickedly and wrongfully misrepresented, that in consequence and in pursuance of said corrupt and fraudulent conspiracy and agreement he was defrauded and cheated out of a large amount of property in the corporation, that in consequence of said wrongful and corrupt acts of the defend-

ant the plaintiff was forced into litigation in an effort to maintain his legal rights in the corporation, that he was finally forced to part with his interest in said corporation at a price far below its true value to him, and was unjustly, unlawfully and wrongfully deprived, defrauded and cheated out of a large sum of money.

The wrongful acts charged against the defendants consist in the falsification, mutilation and destruction of the corporate records. These acts were an invasion of the corporate rights. The wrong was done primarily to the whole corporation, and the plaintiff was affected and injured in the value of his shares only through his interest in the corporation and the injury done to its property. Redress for such a wrong must be obtained by the corporation itself through its regularly constituted agents. The plaintiff was not the corporation notwithstanding he owned and controlled a majority of its stock. He did not own or control its property or make or cancel its contracts with the defendant Dane. *Ulmer* v. *Railroad Co.*, 98 Maine, 579. He was injured the same as every other shareholder because of and through the injury to the corporation property and rights. There was no special injury to the plaintiff different from that to all other shareholders, nor were his individual rights injured outside of the injury suffered by the collective entity the corporation. "A shareholder cannot sue individually for damages caused by wrongful acts impairing the value of his shares through an invasion of the corporate or collective rights." *Morawetz Pri. Corp.* section 236 a. In such cases, if the regular officers of the corporation are unable or unwilling to take the necessary steps to protect the corporate property and interests, a shareholder may proceed in equity on behalf of himself and other stockholders and the company. At law, however, the corporation itself representing all those rights can alone recover for such injury. Any other rule would admit of as many suits against the wrongdoer as there were stockholders in the corporation. In fact, by becoming a stockholder in the corporation, the plaintiff entered into an agreement that its management should be delegated to certain officers as its agents, including the power to protect its property, enforce its rights, and seek redress for injuries to the corporate property and rights. If for any reason these agents

are unwilling to act a shareholder may proceed in chancery for the protection of his equitable rights.

There may be cases of injuries to the individual rights of the shareholder where he and not the corporation must seek redress, such for instance as the levying of an unlawful tax on shares held by the individual stockholder, mutilation or destruction of his certificate, or circulating false and scandalous reports or issuing spurious certificates thus creating uncertainty as to the title or validity of existing shares. In all such cases, however, the wrongful act affects the shares directly. They are readily distinguished from the case at bar where the plaintiff claims his shares were depreciated by wrongful acts making possible the issue of six hundred shares of stock without payment therefor. Such a wrong being primarily against the corporation, the redress for it must be sought by the corporation. *Hersey et al.* v. *Veazie*, 24 Maine, 9; *Smith* v. *Poor et als.*, 40 Maine, 415; *Smith* v. *Hurd et als.* 12 Metc. 371. *Allen* v. *Curtis*, 26 Conn. 456, a case charging the making of false entries in the books of the corporation and a resulting depreciation of the plaintiff's stock. *Conway* v. *Halsey*, 44 N. J. L. 462.

It is urged that this is a suit by an individual against individuals and that a different rule applies than in a suit by a stockholder against directors. The fact that the plaintiff has parted with his stock can place him in no better position than that of a stockholder. Whatever injury befell him he suffered as a stockholder; and in a case like this, where the direct injury was to corporate rights and interests, the right to share in the compensation which the corporation may recover passes to the transferee of the plaintiff's shares. *Winsor* v. *Bailey*, 55 N. H. 218. Neither does it matter that the misconduct is charged against the defendants as individuals and not as officers. By whomsoever the wrongful acts were committed and in whatsoever capacity the wrongful doers acted, their acts directly injured the corporate body. Redress must be sought by the party injured. The plaintiff was injured only indirectly and collaterally. When the corporation is indemnified the plaintiff ceases to be a loser.

It is for this reason, viz: that the plaintiff sustained no loss in addition to the loss to the corporation, that the action cannot be

maintained notwithstanding the allegation that the wrongful acts were done with the specific intent and malicious and fraudulent design of injuring the plaintiff. If the plaintiff had suffered any loss in addition to that suffered by the corporation such an allegation would be sufficient although the injury suffered was indirect and consequential.

Gregory v. *Brooks*, 35 Conn. 437 ; *St. J. & L. C. R. Co.* v. *Hunt*, 55 Vt. 568. In those cases a wrongful act was done to one with an unlawful intent and design to indirectly injure another, and both were injured. Here there is but one loser and one injury. When the injury is to the collective rights of the shareholders and the corporate property is made good, the plaintiff, who has suffered only in these, will be fully indemnified. There is therefore nothing for which he can maintain a separate suit. Where there is but one loss and one loser there can be but one suit, and that must be by the party who has suffered the loss.

Exceptions overruled.

H. O. GURDY, Executor, Appellant from Decree of Judge of Probate.

Knox. Opinion December 28, 1905.

Probate Appeal. Reasons of Appeal. What Appeal Must Show. Dismissal of Appeal. Different Decrees. Amendment not Allowable, When.
R. S., c. 66, § § 8, 9.

While technical precission of statement and pleading are not required in probate appeals, to the same extent as in actions at law, two things are indispensable:

First, the appeal must show what order, sentence, decree or denial of the judge of probate is appealed from.

Second, taking all allegations in the appeal and the reasons therefore to be true, it must appear that there was error.

The allowance or probate of a will and the granting of letters testamentary are two distinct things, involving two different judgments or decrees of the judge of probate, and dependent upon different conditions; though the record evidence of both decrees may be and often is contained in the same paper.

An appeal from a decree, refusing to grant letters testamentary, will be dismissed when it does not appear that the will has been allowed and admitted to probate.

An appellant cannot appeal from a decree named, and sustain his appeal by showing that a decree not named was erroneous.

An amendment, converting an appeal into an appeal from another and different decree from that appealed from, introduces a new cause of action and is not allowable.

On exceptions by appellant. Overruled.

Appeal from the decree of Judge of Probate, Knox County, refusing "to grant letters testamentary as on the last will and testament" of Harrington Osgood, late of Rockland, deceased, to the Supreme Judicial Court, sitting as the Supreme Court of Probate. The appeal was duly entered in the Supreme Court of Probate, and the appellees appeared and "moved to dismiss the appeal because of the insufficiency of the reasons of appeal." The appellant then moved to amend his appeal. "The presiding Justice held as matter of law the reasons of appeal insufficient and refused to allow the amend-

ment, holding as matter of law the amendment could not be allowed." To these rulings the appellant excepted.

The case appears in the opinion.

Arthur S. Littlefield, for appellant.

J. H. Montgomery, for appellees.

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

POWERS, J. Exceptions to the ruling of the presiding justice denying an amendment to the following probate appeal and reasons of appeal and dismissing the appeal.

"Respectfully represents H. O. Gurdy, of Rockland, Knox County, Maine, that he is interested as executor and legatee, under will of deceased, in the estate of Harrington Osgood, late of Rockland, in said County of Knox, deceased, of which said Court has now jurisdiction, that he is aggrieved by your Honor's decree made at a Probate Court, held at Rockland, in and for said County of Knox, on the fifteenth day of November, A. D. 1904, whereby you refused to grant letters testamentary as on the last will of said Osgood upon the execution and contents of said will being proved by a copy thereof, and the testimony of the subscribing witnesses, and upon proof that the original had been lost or accidentally destroyed, and of the continued existence of such will unrevoked up to the time of the death of said Osgood, and upon further proof that said original will could not be obtained after reasonable diligence, and hereby appeals therefrom to the Supreme Judicial Court, being the Supreme Court of Probate, to be held at Rockland, within and for the County of Knox, on the first day of January, A. D. 1905, and alleges the following reasons of appeal, viz:

1. Because upon the circumstances above set forth, letters testamentary should have been issued.

2. Because the copy of the will of said Osgood presented should have been allowed as his last will and testament.

3. Because all the requirements of the statutes and of law were complied with for the proof of a lost or destroyed will of said deceased.

4. Because said Osgood legally executed his last will and testa-

ment, and the same remained as his will unrevoked to the time of his death, and his estate should be administered in accordance with the terms and provisions of said will, which has been lost or destroyed but not revoked."

The appellees moved to dismiss the appeal on the ground that the reasons of appeal as stated were not sufficient. This is in effect a demurrer. In passing upon the issue thus raised all allegations in the appeal and reasons of appeal must be taken as true. Technical precision of statement and pleading are not required in probate appeals to the same extent as in actions at law. *Danby* v. *Dawes*, 81 Maine, 30. Two things, however, are indispensable. The appeal must show what order, sentence, decree or denial of the judge of probate is appealed from; and taking all allegations in the appeal and the reasons therefor to be true, it must appear that there was error. This much is necessary in order to inform interested parties what is the issue, and to show prima facie that the appellant is aggrieved. Anything short of this would do away with all rules of pleading and defeat the salutary purposes for which they have been adopted. Even this requirement in some instances may appear to cause hardship, but in the vast majority of cases an adherence to it must tend to the sure and speedy administration of justice. However much the rules of pleading may have been relaxed when applied to probate proceedings, we are not aware of any case in which either of these requisities has been dispensed with.

The general statute relating to the probate of wills and granting of letters testamentary is as follows: "When a will is proved and allowed, the judge of probate may issue letters testamentary thereon to the executor named therein, if he is legally competent, accepts the trust, and gives bond to discharge the same when required; but if he refuses to accept on being duly cited for that purpose, or if he neglects for twenty days after probate of the will so to give bond, the judge may grant such letters to the other executors, if there are any capable and willing to accept the trust." R. S., c. 66, section 8. Plainly under this statute the allowance or probate of the will and and the granting of letters testamentary are two distinct things, involving two different judgments or decrees of the judge of probate and

dependent upon different conditions; though the record evidence of both judgments may be and often is contained in the same paper. Letters testamentary issue after the will is allowed and, in some instances, not for at least twenty days after. The probate of the will does not determine the person to whom, or the time when, letters testamentary shall issue. These may depend upon the executor named being a suitable person, accepting the trust, and giving bond if a bond is required. If he refuses to accept the trust, or neglects for twenty days after the probate of the will to give bond, then letters testamentary cannot be issued until some other person is found capable and willing to accept the trust.

The special statute relating to wills lost or destroyed is found in section 9 immediately after that above quoted and is as follows: "When the last will of any deceased person, who had his domicile in the state at the time of his death, is lost, destroyed, suppressed or carried out of the state, and cannot be obtained after reasonable diligence, its execution and contents may be proved by a copy, and by the testimony of the subscribing witnesses thereto, or by any other evidence competent to prove the execution and contents of a will, and upon proof of the continued existence of such lost will, unrevoked up to the time of the testator's death letters testamentary shall be granted as on the last will of the deceased, the same as if the original had been produced and proved." R. S., c. 66, section 9. This statute does not use the express terms "allowed" as does the preceding section but says "letters testamentary shall be granted as on the last will of the deceased, the same as if the original had been produced and proved." If the original had been produced and proved, it must still have been allowed by the judge of probate as the last will and testament of the deceased before letters testamentary could issue. The admission of the will to probate is therefore made, in the one case as in the other, a condition precedent to the issuing of letters testamentary. It is not reasonable to believe that the legislature intended that in the case of a lost will letters testamentary should issue and the estate of the deceased be administered in accordance with such will, without a finding by the probate court that such will was his last will and testament and its allowances as such. In Bou-

vier's Law Dict. we find: "Letters testamentary. An instrument in writing granted by the judge or officer having jurisdiction of the probate of wills, after the probate of a will, to an executor, authorizing him to act as such."

The decree appealed from in this case is a decree whereby the judge of probate "refused to grant letters testamentary as on the last will of said Osgood;" but neither in the appeal nor in the reasons therefor is there any statement direct or by implication that said will had been allowed or admitted to probate. Without such allegation it does not appear that there was error in refusing to grant letters testamentary.

It is urged that the appeal is to be regarded as an appeal from a decree denying probate of the will. We have seen that the two things are entirely distinct. The appellant has expressly stated that he appeals from a decree refusing to grant letters testamentary. To treat this as an appeal from a decree refusing to admit the will to probate is to do violence to the language used, and would be subversive of all rules of construction and of pleading. It is true that some of the reasons of appeal assigned might be sufficient to sustain an appeal from a decree other than that stated as the one appealed from,—but does that override the appellant's express statement of the particular decree by which he says he was aggrieved? He cannot allege one decree in his appeal, and then sustain that appeal by showing that some other decree not named was erroneous. That the construction contended for is necessary, to suit the exigencies of the appellant's case as here presented, makes it none the less forced and unnatural.

The appellant was not aggrieved by the refusal to allow his amendment. There is in the amendment no allegation of the allowance of the will, and it therefore failed to supply the missing averment in his appeal. If the amendment is to be regarded as converting the appeal into an appeal from another and different decree, viz: one denying the probate of the will, then it introduces a new cause of action and for that reason is not allowable.

Exceptions overruled.

In Equity.

CAMDEN LAND COMPANY

vs.

WALTER E. LEWIS AND WALTER E. LEWIS, Trustee.

SAME *vs.* ANNIE F. LEWIS, et als.

SAME *vs.* ANNIE F. LEWIS, Admx., et als.

York. Opinion December 27, 1905.

Bill in Equity. Multifariousness. Enforcible Trust. Corporations. Fiduciary Relations of Promoters. Secret Profits. Treasury Stock. Interested Directors. Salaries. Authority of Corporation President. Unauthorized Issue of Stock. Accounting for Sale of Stock. Ratification. Trust Funds Changed Into Real Estate.

1. A bill in equity which charges (1) that certain real estate was bought for the plaintiff corporation by its president, and was paid for in whole or in part with its funds, or with the proceeds of its stock unlawfully issued and sold, and not properly accounted for, and that its president fraudulently caused the real estate to be conveyed to his son, one of the defendants through whom several other defendants, but not all the defendants, have legal or equitable titles, which they should convey to the plaintiff, (2) that a part of the above defendants, and two other defendants, have unlawfully received stock in the plaintiff corporation, which they should account for to it, and (3) that still another defendant has unlawfully received and sold the stock of the plaintiff, in part, at least, other than that mentioned in the preceding class, for the proceeds of which he should account to it, is bad for multifariousness.
2. An enforcible trust in lands purchased by the president of a corporation with his own money, or with money which he supposed belonged to him, was not created in this case for the benefit of the corporation, though it had authorized him to act for it in the purchase of real estate, and though he may have intended ultimately to sell the land to the corporation.
3. Promoters of a corporation stand in a fiduciary relation to the corporation and to its subscribers for stock, and to those who it is expected will afterwards buy stock from the corporation. If they undertake to sell their own property to the corporation they are bound to disclose the

whole truth respecting it. If they fail to do this, or if they receive secret profits out of the transaction, the corporation may elect to avoid the purchase, or it may hold the promoters accountable for the secret profits.

4. Treasury stock in a corporation which is issued to trustees whose duty is immediately to return it to the corporation is still treasury stock.

5. Directors of a corporation have no authority to act for the corporation in matters in which they themselves are interested.

6. Directors of a corporation cannot vote salaries to themselves. Nor can they vote a salary to one of their number as president at a meeting where his presence is necessary to a quorum.

7. The president of a corporation has no implied authority to sell its treasury stock. Nor, in the absence of a valid vote of a quorum of disinterested directors can he cause treasury stock to be issued to himself in payment of the corporation's debt to him.

8. The unauthorized issue of treasury stock to the president in such a case conveys no rights to him as against the corporation. He is regarded as holding the stock in trust for the corporation, and if he sells it, the proceeds in his hands are impressed with the same trust, and may be followed into his estate, so long as distinguishable.

9. An officer of a corporation, employed on a salary, to sell its stock for the benefit of the corporation, cannot charge it to himself, or account for it at an arbitrary price, when sold, and pocket the surplus, if any. He must truly account for the whole price received. The whole amount received belongs to the corporation and in his hands is trust money, which the corporation may follow.

10. A vote of stockholders "that all acts of the directors and officers be hereby ratified and approved" is held not to be effective in this case, to ratify the unauthorized and illegal voting of salaries by directors to themselves, or the unauthorized and illegal issue of treasury stock by the president himself, when it does not appear that the stockholders generally had any knowledge of the transactions. Knowledge by stockholders of such transactions is not to be presumed.

11. When trust funds of a personal character have been changed into real estate they can be followed, and the rights of the cestui que trust can be maintained, if the rights of third parties have not intervened.

12. In this case it is *held* that the proceeds of treasury stock unlawfully issued to the president of the plaintiff corporation and sold by him, and the proceeds of treasury stock lawfully issued and sold by him so far as not accounted for, are traced $3,000 into the Sagamore farm, and $1,000 into the Sherman farm, mentioned in the bills, and are charges upon those farms respectively, so far as concerns the interests of such defendants as have no other or greater rights than William D. Lewis would have had, had he purchased those farms in his own name.

In equity. On appeal by plaintiff corporation. Decrees in accordcnae with opinion.

Three suits in equity and heard together on appeal.

The first above named suit is based on the allegation that while the legal title to a certain tract of land in Camden known as the Sagamore farm is in the defendants, the land was purchased for the plaintiff by its president, Wm. D. Lewis, and was paid for with funds of the plaintiff corporation, or with proceeds of stock of the plaintiff corporation unlawfully issued and sold and not properly accounted for. The prayer is for an adjudication that the defendants hold the legal title as trustee for the plaintiff and for a conveyance.

The second above named suit is similar to the first suit but relates to a tract of land in Camden known as the Sherman farm. The allegations and prayer are substantially the same as in the first suit, mutatis mutandis.

In the third above named suit, the original bill was demurred to and the demurrer sustained. The bill was then amended by leave of court. As amended the bill charges that the Sagamore farm named in the first above mentioned suit, the Sherman farm named in the second above mentioned suit were purchased for the plaintiff corporation by its president, Wm. D. Lewis, and were paid for in whole or at least in part by funds of the plaintiff corporation or by proceeds of stock of plaintiff company unlawfully issued and sold, and not properly accounted for. It charges that Walter E. Lewis, Kenneth H. Lewis, Annie F. Lewis, Jessie Lewis, Lenora L. Jackson, Dexter Lewis, Edison Lewis, James M. Jackson, and Walter E. Lewis and Kenneth H. Lewis as Trustees have legal or equitable titles to both tracts which they should convey to the plaintiff. It further charges that Charles H. Lewis, Walter E. Lewis, Annie F. Lewis, Jessie Lewis, Emma J. Call and Florence L. Abbott, have received stock of the plaintiff company unlawfully which they should restore or account for.

The Justice of the first instance decreed that all three bills be dismissed and that one bill of cost be allowed the defendants in each case. Thereupon the plaintiff corporation appealed in each case.

The cases fully appear in the opinion.

Arthur S. Littlefield and Reuel Robinson, for plaintiff.

Joseph E. Moore and J. H. Montgomery, for defendants.

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

SAVAGE, J. The first bill, dated Nov. 8, 1902, alleges in substance that on February 26, 1901, one William D. Lewis, president of the plaintiff corporation, acting for and in behalf of the plaintiff, contracted for the purchase of a parcel of real estate in Camden, known as the "Sagamore Farm," and took a written agreement from the owner to convey the same to Walter E. Lewis "trustee," the defendant, who was the son of William D. Lewis, upon payment of the consideration, that afterwards William D. Lewis paid towards the consideration large sums of the plaintiff's money, or the proceeds of plaintiff's stock unlawfully issued and sold, and not properly accounted for, that after the death of William D. Lewis, the defendant, on June 3, 1902, procured a deed of the premises from the owner, running to himself as "trustee," giving for the unpaid balance of the consideration his notes as trustee, secured by a mortgage of the premises, and that the defendant took title as trustee for the plaintiff, and for no one else. The prayer is that the defendant may be adjudged to hold the premises as trustee for the plaintiff, and that he may be ordered to convey to the plaintiff.

The second bill, dated Nov. 7, 1902, contains similar allegations and a similar prayer with respect to another parcel of land in Camden, called the "Sherman Farm," reciting a contract of purchase dated April 7, 1899, between the owner and W. E. Lewis, but that W. E. Lewis was acting as trustee, and said Lewis procured a deed of the same, on Dec. 23, 1901, in accordance with the contract. It also alleges that the defendant Lewis, disregarding his trust duty to the plaintiff, conveyed the premises to one Jackson, and that Jackson on the same day conveyed them to two of the defendants, in trust for the benefit of themselves and the other defendants.

The third bill, dated July 21, 1903, alleges in substance, that prior to 1894 William D. Lewis and Walter E. Lewis owned or had some interest in sundry pieces of land in Camden and vicinity, but that prior to June, 1894, they had been divested of title to all, except a technical right to redeem a part, which right was of no value, that pretending and representing themselves to own all of said prop-

erty, they undertook to "stock" it, with a design of obtaining for themselves, or for themselves and the other defendants, large amounts of stock in the corporation to be organized, without giving the proposed corporation any equivalent therefor, and with a design to sell the same for their own benefit, in fraud of the corporation, of the organized stockholders who should pay cash for their stock, and of those who should subsequently purchase stock from the corporation; that to carry out such fraudulent design, they organized a corporation under the name of The Camden Land Company, with a capital stock of $360,000, divided into 120,000 shares of the par value of $3 each. It is alleged that William D. Lewis was a director and controlled the corporation, and that two other persons became directors at his solicitation and for his accommodation, and voted as he directed, relying upon his representation that he and Walter E. Lewis still owned, and the corporation was to receive, title to the lands which the Lewises had previously owned, and that each of these other directors subscribed for and paid cash for a few shares of stock. It is further alleged that the directors, under the control and direction of William D. Lewis, and by means of the false and fraudulent representations made by him as to the title to said property, voted, on July 2, 1894, to buy of the Lewises, "all their right, title and interest" in certain specified properties, and to pay therefor 119,900 shares of stock of The Camden Land Company, which was all of its stock except 100 shares subscribed for by the three directors, that the representations as to title were false and fraudulent, of which the stockholders and directors other than William D. Lewis were ignorant. It is alleged that the Lewises received a portion of the 119,900 shares of stock, sold a part of it and retained the proceeds; also that Walter E. Lewis on July 3, 1894, before any of the stock had been issued to him, released to the company 30,000 shares of stock, the same to be for the purpose of the development and expenses of the company. It is further alleged that the Lewises, being the majority stockholders of The Camden Land Company, for their own personal benefit, profit and advantage, that they might have more stock to sell, and in fraud of the plaintiff, and of the parties who have become stockholders therein, and have paid cash for stock,

both at the reorganization, and since, and for the further stocking of the pretended property of The Camden Land Company, on Feb. 10, 1896, organized the plaintiff corporation, with a capital stock of $720,000, divided into 240,000 shares of the par value of $3 each, that said William D. Lewis was a director, that at his solicitation two other persons were made directors, that they each subscribed and paid for 10 shares of stock, and that, relying upon the representations of Lewis, which were false, as to the title and value of the property owned by The Camden Land Company, these other directors, with said Lewis undertook to carry out an arrangement whereby the plaintiff was to issue 239,970 shares of its stock in exchange for the franchise and other property of The Camden Land Company. It is further alleged that The Camden Land Company voted to sell and the plaintiff corporation to buy such franchise and other property, for said 239,970 shares of stock, the plaintiff assuming the debts of The Camden Land Company, and that the plaintiff was induced to make said purchase by the false representations of William D. Lewis as to the title and value of the property of The Camden Land Company. It is also alleged that said Lewis and one Symonds were appointed by The Camden Land Company trustees to receive and distribute the stock of the plaintiff among its stockholders, giving them two shares of new stock for one of the old, that there were then 24,500 shares of treasury stock of the old company unissued, and that said trustees released to the plaintiff 49,000 shares of the new stock, not then issued, to be held as treasury stock. It is also alleged that the plaintiff, through such pretended sale, received no property or interest in any, but that under the direction of said Lewis it issued 191,000 shares of its stock in fraud of the rights of the plaintiff, and of existing stockholders, and future purchasers of stock, and that 35,000 shares of treasury stock have been sold by the plaintiff, and purchased by holders thereof on the faith of and upon a belief in the representations alleged to be false and fraudulent. It is also alleged that the above mentioned 191,000 shares were issued without consideration, and that by direction of said William D. Lewis and Walter E. Lewis, 99,000 of these shares were issued, also without consideration, to certain of these defendants, who were

relatives or members of the family of William D. Lewis, namely, to Walter E. Lewis, son, 20,000 shares; to Annie F. Lewis, wife, 21,000 shares; to Jessie Lewis, daughter, 20,000 shares; to Emma J. Call, sister, 20,000 shares; and to Florence L. Abbott, niece, 19,000 shares. It is also alleged that other shares of the 191,000 were issued under the direction of William D. Lewis, and of Charles H. Lewis, brother of William D., to purchasers, and that they have personally received the pay for the stock so sold to purchasers, and that the stock issued to the parties above named, or to William D. or Walter E. or Charles H. Lewis, or which has been sold by any of them, has been issued or sold in fraud of the plaintiff and of stockholders who were such at the time of the pretended sale by The Camden Land Company, and of subsequent purchasers of treasury stock. It is particularly alleged that defendant Charles H. Lewis has sold and received pay for a large number of the 191,000 shares, from which the plaintiff has received no benefit, and that he has sold and received pay for a large amount of the treasury stock, and has rendered no account therefor.

The third bill also alleges the purchase of the Sagamore farm and the Sherman farm, mentioned in the first and second bills, with the proceeds of portions of the 191,000 shares of stock previously referred to, and the proceeds of said treasury stock, and that the Sagamore farm and the Sherman farm, in fraud of the plaintiff, were conveyed to the defendant, Walter E. Lewis, and are now held by said Lewis and the defendant Kenneth H. Lewis, purporting to be trustees, in specified proportions, for the defendants Annie F. Lewis, Jessie Lewis, Walter E. Lewis, Leonora L. Jackson, Dexter W. Lewis, Edison Lewis and James H. Jackson and Walter E. and Kenneth H. Lewis, trustees, and also, that these farms are now held by the trustees, in fraud of the plaintiff, and without any consideration paid by the trustees, or any of their grantors, grantees in the mesne conveyances, or by the cestuis que trustent, and with full knowledge of all parties of the rights and equities of the plaintiff, so that the property now equitably belongs to the plaintiff. It is also alleged that The Camden Land Company has assigned to the plaintiff all rights which it had at law or in equity, respecting the matters charged,

and that both companies were under the absolute control of William D. Lewis, and of the defendants, while the acts occurred of which complaint is made. Further it is alleged that the plaintiff has purchased from the true owners portions of the real estate falsely represented to have belonged to the old company, but that it has received no interest in any property from any of the defendants.

The plaintiff alleges that it is entitled to a conveyance of the Sagamore Farm and the Sherman Farm from Walter E. and Kenneth H. Lewis, the trustees, and a release of the interests of the cestuis que trustent, and to an accounting from the defendant Annie F. Lewis as administratrix of the estate of William D. Lewis, and from Charles H. Lewis, Walter E. Lewis, Annie F. Lewis, Jessie Lewis, Emma J. Call and Florence L. Abbott, for all stock held or disposed of by them, or either of them, and makes prayer therefor.

The defendants Annie F. Lewis, Jessie Lewis and Charles H. Lewis, while denying many matters charged, but not necessary now to be specified, deny all allegations of fraud, and also, of any trust for the benefit of the plaintiff or its stockholders. In their answers, they also claim the benefit of a demurrer. The other defendants have not answered. As to this bill it may be observed that while Annie F. Lewis is named among the defendants as administratrix of the estate of William D. Lewis, the death of William D. Lewis is not alleged, and no prayer for relief is made against her in the capacity of administratrix. The bill, then, charges (1) that the two farms mentioned were bought for the plaintiff by Wm. D. Lewis, its president, and were paid for in whole or in part with its funds or with the proceeds of its stock unlawfully issued and sold, and not properly accounted for, and that Walter E. Lewis, Kenneth H. Lewis, Annie F. Lewis, Jessie Lewis, Leonora L. Jackson, Dexter Lewis, Edison Lewis, James M. Jackson and Walter E. Lewis and Kenneth H. Lewis as trustees, have legal or equitable titles to both farms, which they should convey to the plaintiff; (2) that Walter E. Lewis, Annie F. Lewis, Jessie Lewis, Emma J. Call and Florence L. Abbott have unlawfully received stock in the plaintiff corporation, which they should account for to it, and (3) that Charles H. Lewis has unlawfully received and sold the stock of the plaintiff, in part at least, other

than that mentioned in the preceding class, for the proceeds of which he should account to it.

These various allegations, we think, make the bill bad for multifariousness. It is not alleged that the other defendants had any connection with the 99,000 shares of stock received by Walter E. Lewis and others. It is not alleged that any of the other defendants than Charles H. Lewis were in any way interested in the stock sold by him, or connected with the sales by him. It is not alleged that Charles H. Lewis, Emma J. Call and Florence L. Abbott have any connection with the Sagamore and Sherman farms. Here, then, are three different causes of complaint, three prayers for relief, and each in effect against a different group of defendants. One group is to account for the stock received and held, another to account for stock sold, and another to convey land. Nor does the proof show that the situation can be improved by amendment, except by striking out, for the proof shows the same variety of interests and relations. The counsel for the plaintiff urges, as we understand him, that the bill should not be deemed multifarious, because these various complaints grow out of what was virtually a single transaction, namely the fraudulent, unauthorized and void issuing of the stock of the plaintiff at its organization by W. D. Lewis, its president, followed by the unlawful manipulation subsequently of so much of said stock as was treasury stock. We cannot accede to this view. If it should appear that a part of the proceeds of the 99,000 shares spoken of went towards the purchase price of the farms, or if a part of the proceeds of the stock sold by Charles H. Lewis, after being turned into the treasury, went in the same direction, can the plaintiff in one and the same proceeding recover of those who received the 99,000 shares of stock, the value or proceeds thereof, and of Charles H. Lewis the proceeds of stock sold by him, and at the same time enforce against other parties a conveyance of the land on the ground that it was paid for by the proceeds of the same stock? We think not. And all the more this result would follow if the stock was not identical. The complaints made and remedies sought are not only inconsistent but antagonistic. This bill will have to be dismissed.

But a determination of the other two bills involves a consideration

of many of the questions which have been argued with respect to the third bill. There is no doubt that both the Sagamore Farm and the Sherman Farm were paid for in part at least by the proceeds of the sales of stock of the plaintiff, and that the stock sold was in each case stock which was or had been treasury stock, and also stock which had been issued at the outset for the benefit of stockholders in another corporation to pay for property purchased. The plaintiff claims that all of the latter stock was illegally issued, that a portion at least of the former was issued for illegal purposes, and that the proceeds of both classes should be deemed trust funds, which can now be traced into these farms.

In order to have a clearer understanding of the matters in litigation, it is necessary to trace briefly the history of the antecedent corporation, to whose assets, such as they were, and to whose liabilities, the plaintiff has succeeded, though neither the first corporation nor its stockholders, as such, are parties to these bills, nor have they made complaint.

After a painstaking examination of the voluminous record, giving proper weight to the findings of the justice who heard the case below, we think the facts may be summarized substantially as follows. Prior to June, 1894, William D. Lewis, now deceased, and his son, Walter E. Lewis, had acquired some rights and interests in various lots and tracts of land in Camden and Lincolnville, with the idea of disposing of them as sites for summer residences. On June 20, 1894, they organized a corporation called The Camden Land Company, with a view that the corporation should take over their interests in the real estate in exchange for stock. The Camden Land Company (hereafter to be called the old Company) was organized for the express purpose of dealing in real estate. Its capital stock was fixed at $360,000, divided into 120,000 shares of the par value of $3 each. In its organization, William D. Lewis procured the services of William H. Adams, of Boston, and Ralph C. Stephenson, of Kittery, at which latter place the corporation was organized, Lewis and Adams each subscribing for 33 shares, and Stephenson for 34 shares; and they three were elected directors. It is very evident that Adams and Stephenson were in the employ of Lewis, and acting solely by

his direction. It is alleged in one of the bills that they became directors at his solicitation and for his accommodation, and voting as he directed. They were there to represent and act for him, and had no real interest in the corporation or its purposes, otherwise. Although cash appears by the records to have been paid for their shares, under the circumstances we think it should not be found that they paid their own cash. They were what the cases call "nominees" of Lewis, and their stock interests are not to be considered. *Old Dominion Copper Co.* v. *Bigelow*, 188 Mass. 315. At its organization the corporation authorized the directors to purchase such real estate and other property "as they shall be advised are for the best interests of the corporation," and to pay either in cash or the stock of the corporation not exceeding 119,900 shares, which was all of the stock unsubscribed for by the incorporators. On July 2, 1894, the directors (Lewis and Adams being present) voted to buy of the Lewises, all of their rights and interests in certain lots and tracts of land, which were named, and to assume the encumbrance thereon, and to pay them therefor the remaining stock of the company, namely, 119,900 shares. At this time the Lewises had lost their right and title to many of the lots named, and what legal right they had in the other lots was of little or no value. Subsequently, however, during the same year, they succeeded in recovering some interests in the lots forfeited, and conveyed to the company those interests more or less encumbered, but of some value over and above encumbrances, though of far less value than the par value of the 119,900 shares of stock. Of the 119,900 shares to which the Lewises were entitled by the vote, Walter E. Lewis donated back to the company 30,000 shares "for the purposes of development and expenses of the company." So far as the stock voted by the old company for land from the Lewises was issued by the company, it was issued direct to the parties to whom the Lewises sold it. No stock certificate except for the 33 shares subscribed for at the organization was ever issued to either of the Lewises. No certificate was ever issued for the 30,000 shares of treasury stock donated by Walter E. Lewis. It remained in the treasury unissued, except when any was sold, a certificate was issued to the purchaser. Of this 30,000 shares of treasury stock

5,500 shares were sold prior to February, 1896, leaving 24,500 shares unsold. The company at that time had issued certificates for 33,095 shares of other stock, one half directly to purchasers and one half in the name of one S. L. Symonds, and endorsed by him in blank.

In February, 1896, William D. Lewis and others, operating with him, formed the plan of organizing a new company, with a larger capital stock, to be exchanged for the assets of the old company. Their purpose was to get more shares of stock to sell. Accordingly a meeting of the old company was held Feb. 10, 1896. At this meeting, William D. Lewis, S. L. Symonds and Ralph C. Stephenson attended in person. They also held proxies from other stockholders. Symonds was a stockholder, and he had been secretary and treasurer of the old company almost from its organization. At this meeting it was unanimously voted to sell and convey the franchise of the corporation to a new company, to be organized to deal in real estate, with double the capital stock, namely, 240,000 shares, and take in payment 239,970 shares of such stock, provided the new company should assume the debts of the old company. Lewis and Symonds were appointed trustees to receive this new stock of the new company and distribute it among the stockholders of the old company, giving two shares of the new for one of the old.

On the same day and at the same place, Lewis, Symonds and Stephenson, who composed the meeting of the old company and passed the vote above named, organized, in accordance with prior notices, a corporation to deal in real estate and stocks, to be known as Camden Land Company, (hereinafter to be called the new company) with 240,000 shares of stock, at a par value of $3 each. The three incorporators were elected directors, and were authorized to purchase such real estate and other property "as they shall be advised are for the best interests of the corporation," and to issue stock in payment thereof, not exceeding "239,900" shares. The incorporators subscribed for 10 shares each, which, so the records state, were paid for. Lewis was made president, Symonds secretary and treasurer of the new company. The next day, Feb. 11, 1896, the directors (Lewis and Symonds, only, being present) voted "to buy of The Camden Land Company their franchise and all their property, of whatever

name and of whatever nature, and wherever located, including real estate in Camden and Lincolnville, Maine, containing about 850 acres of land bonded and subject to the following claims, which the Camden Land Company hereby assume," (four claims were specified), and pay therefor 239,970 shares of the capital stock of Camden Land Company. At a stockholders' meeting, held May 6, 1896, at which were present in person W. D. Lewis, S. L. Symonds and R. C. Stephenson, and other stockholders were represented by proxy, the acts of the directors under the vote of Feb. 11, above stated, were approved. And further, at a stockholders' meeting held May 7, 1902, there being present in person or by proxy holders of 190,580 shares of stock, it was "unanimously voted that all acts of the directors and officers be hereby ratified and approved."

Symonds, the treasurer of the new company, immediately after the directors' vote above named charged off on the books of the new company all its capital stock, 30 shares to the incorporators, according to their subscriptions, and the remaining 239,970 shares to Lewis and Symonds, trustees for the stockholders of the old company. All the assets and rights of the old company were subsequently transferred to the new company. The old company did possess some real estate which the new company acquired, but it was less in quantity and and value than appeared in the treasurer's report of the old company, or was represented to purchasing stockholders in the new company, and very much less in value than the par of the stock given in exchange.

The plaintiff claims that the votes of Symonds, as stockholder and director in the new company, to exchange the stock of the new company for the assets of the old, were made on the strength of the representations of Lewis, which turned out to be false, in regard to the ownership of the various tracts of land which the old company had voted to buy of the Lewises. But we think that the presiding justice below was well warranted in finding that if the representations of Lewis were made as claimed, and if Symonds believed them to be true, they were not the cause of his vote. That is to say, he did not make the vote on the strength of those representations. Symonds was part and parcel of the new scheme for "restocking" the lands

and property of The Camden Land Company; and we think, to quote the language of the presiding justice, that "he was hand in glove with Lewis, working in concert with him to obtain more stock to sell, and voted as he did for that purpose."

If the foregoing transactions were valid and effective, the new company now had no stock unissued. Lewis, Symonds and Stephenson, being all the stockholders in the new company, and also its directors, had voted, as stockholders, to authorize the directors to purchase real estate and give in payment therefor 239,900 shares of its stock. The directors had voted to buy the assets of the old company for 239,970 shares of stock, 70 shares more than was named in the stockholders' vote; but the directors' vote was afterwards ratified by the stockholders. All the shares had been disposed of by unanimous consent of all the stockholders, 30 shares to them as incorporators, and the remainder to trustees for stockholders of the old company. The stock all belonged to Lewis, Symonds and Stephenson, incorporators, and to Lewis and Symonds, trustees, and was entered on the books accordingly. The new company still has the property conveyed to it by the old company in exchange for this stock. It has never sought to rescind the contract of purchase, and does not now seek to.

But after all of the stock of the new company had been disposed of, so far as book account is concerned, as previously stated, Lewis and Symonds, as trustees, transferred to the treasurer of the new company 49,000 shares of stock, which was two shares for one of the treasury stock remaining in the treasury of the old corporation. This stock, although it had been issued to Lewis and Symonds as trustees, is to be regarded as treasury stock. When this was done the new company had as assets the agreement of the old company to convey its lands and rights, which was afterwards carried out, and had upon its books the 49,000 shares of its own stock thus transferred to it. There were left in the hands of Lewis and Symonds, trustees for the stockholders in the old company, 190,970 shares. Of the 49,000 shares of treasury stock, 35,000 shares have been disposed of and issued, and all have been accounted for to the company in one way or another. Some have been sold by the president and by the general manager at varying prices, $1 a share and

upwards, but have been accounted for to the company, so far as book keeping goes, at $1 a share. The cash proceeds have been used by the company in its business. Some shares have been transferred to the president on account of salary and expenses. Out of the shares remaining after the 49,000 shares of treasury stock were returned to the company, allotments were made by Lewis and Symonds, trustees, to Charles H. Lewis, Walter E. Lewis and others of the Lewis family. Some or all of these shares have since been sold by Charles H. Lewis upon the market. Charles H. Lewis was general manager of the new company, and also made sales for it out of the 49,000 shares of its treasury stock.

By far the greater portion of the proceeds of sales of stock were consumed in expenses of officers and agents, and in paying salaries to the officers and to the general manager, Charles H. Lewis. These salaries, however, were fixed by the votes of the directors. The plaintiff claims that these salaries were unlawfully voted at directors' meetings attended only by William D. Lewis and S. L. Symonds, who, by their interest, were disqualified from voting on the question. The salaries to Lewis and Symonds were voted at such meetings.

As already stated, one ground on which the plaintiff asks that the Sagamore and Sherman farms be declared to be held in trust for its benefit and for a conveyance is that the funds of the plaintiff, or funds derived from the sale of its stock, were used to pay for both of these farms. It is undoubtedly true that a large part of the money paid for these farms came from the sales of stock in the plaintiff company. But with two exceptions to be noticed, all the proceeds of stock which went into these farms arose from the sales of stock originally held in trust by Lewis and Symonds for the benefit of the stockholders of the old company, and outside of the 49,000 shares of treasury stock.

Out of the 49,000 shares of treasury stock, 5500 shares were transferred to W. D. Lewis on account of salary and expenses. 5,000 shares of this Lewis stock were sold by him to Edwin Lord for 5,000 in cash and other considerations, probably of little value, and the other 500 shares were left with Lord to be sold by him for the joint benefit of Lewis and himself. Of the $5,000 received from

Lord, Lewis paid $3,000 towards the purchase of the Sagamore farm, March 28, 1901.

One George A. Bigelow purchased 2,000 shares of the treasury stock at $1.50 a share, for which he gave to W. D. Lewis two notes payable to the plaintiff for $1,500 each. This stock was accounted for by Lewis to the company at $1.00 a share, the company taking, in part at least, other notes, derived from the sale of other stock. W. D. Lewis turned in one of Bigelow's $1,500 notes towards the purhase of the Sherman farm, and it was afterwards paid. The effect of these two payments out of the Lord purchase and the Bigelow purchase we shall consider hereafter.

The plaintiff also claims that the Sagamore and Sherman farms should be conveyed to it, because it says that the farms were bought for it; that W. D. Lewis, in making the original agreements for purchase, was then acting as its officer and agent. It appears that at a meeting of the stockholders held May 10, 1897, Lewis was "authorized and empowered to act for the company in the purchase of real estate." No specific authority or instruction was given to him with regard to any particular parcel of real estate, and so far as appears, neither the corporation nor the directors directed him specifically to make contracts for the Sagamore farm or the Sherman farm. In 1898 W. D. Lewis secured an option, or agreement to sell, on the Sherman farm in the name of his son, William E. Lewis. In 1901 he secured a similar option on the Sagamore farm in the name of W. E. Lewis, trustee, the purpose of the trust not appearing in the writing. We have no doubt that at the beginning of the negotiations and during the greater part of the time after the owners agreed to sell, and until the deeds were given, Lewis intended that these farms should go to the complainant eventually. All the payments, however, were made by him out of his own funds, or at least out of funds which he thought belonged to him. He charged none of his payments to the company. The company never became bound to purchase either farm, or to repay Lewis for his disbursements. Before the deeds were obtained, and at a time when it was exceedingly doubtful whether the Lewises would be able to complete the payments, a new trust was formed. Money was raised from persons who had

had nothing whatever to do with the previous transactions with the company, or its stock, and with it was paid a balance due on the purchase of each farm, and interest. And thereupon the farms, by mesne conveyances, were placed in trust for the benefit of members of the families of W. D. Lewis and Charles H. Lewis, whose money had gone in to make the prior payments, and for the benefit of the persons contributing later to complete the payments. Among these persons were directors of the plaintiff company other than the Lewises, including Symonds, who now seems to complain of the transaction.

Upon a careful study of the evidence, we are unable to find that any enforcible trust is established in favor of the plaintiff, in either farm, by reason of the fact that they were purchased by the president of the company. Whatever may have been his intention, it was not carried into effect. It did not proceed so far as to make it a trust binding upon himself, or which the company was bound to recognize, or which it might enforce. There was no declaration of an express trust in these farms for the benefit of the plaintiff. There were no fiduciary or confidential relations between Lewis and the company with respect to these farms out of which a constructive implied trust might arise from the fact that he made the purchase. He had a right to buy the farms for himself, and afterwards to sell them to the company. His intention to do so did not make them trust property. Even if he had agreed to buy them for the company, but had repudiated the agreement and purchased them in his own name, with his own money, the great weight of authority is to the effect that the agreement would be within the statute of frauds and not enforcible, if not in writing. 15 Am. & Eng. Ency. of Law, p. 1187, and cases cited.

The only remaining question is whether these farms were paid for in whole or in part, with the funds of the plaintiff, and under such circumstances that an implied or resulting trust would arise, or, failing that, whether money of the plaintiff, which was in the hands of William D. Lewis, and which is to be regarded as trust funds, was paid as the consideration, in whole or in part for the purchase of the farms, and if the answer upon the latter hypothesis is in the affirmative, whether the fund can be regarded as so traced into the farms as to make them trust property, or as to make them liable to be charged in equity with the payment of the fund.

To present the issue sharply, it must be said that under the first and second bills, the question is not what liabilities the promoters of the old company are under to that company for secret profits growing out of their sale to the company, or an account of their failure to disclose to existing or future stockholders the truth respecting the title or cost of the lands bought. The old company is not seeking relief. Nor is it a question how far the promoters of the new company are responsible to it for matters growing out of the sale from the old to the new company, or for profits received by them in the sale of the new stock, which was given them for their old stock.

It may be conceded, for it is well settled and true, that promoters of a corporation stand in a fiduciary relation to the corporation, and to its subscribers for stock, and to those who it is expected will afterwards buy stock from the corporation. The promoters owe to them the utmost good faith. And if they undertake to sell their own property to the corporation they are bound to disclose the whole truth respecting it. If they fail to do this, or if they receive secret profits out of the transaction, either in cash or by way of allotments of stock, when there are other stockholders, or it is expected that there will be other holders of new and additional stock, undoubtedly the corporation may elect to avoid the purchase; or it may hold the promoters accountable for the secret profits, if in cash; or may require a return of the stock if unsold; or if sold, an accounting for the profits of its sale. *Hayward* v. *Leeson*, 176 Mass. 310, and cases cited; 3 Thomp. on Corp. p. 2927; *Plaquemines Tropical Fruit Co.* v. *Buck*, 52 N. J. Eq. 230; *Old Dominion Copper Co., etc.* v. *Bigelow*, 188 Mass. 315. But here the plaintiff corporation does not seek to avoid the sale. It retains the property purchased. So far as the Sagamore and Sherman farms are concerned, it does not seek, and cannot seek, an accounting for promoters' profits. For these reasons we do not need to inquire whether the plaintiff might have avoided the sale from the old company, on the ground that its promoters were stockholders in the old company, and therefore that they were buyers and sellers in the same transaction. Nor are we concerned now with the question whether the promoters or directors are liable to those who purchased of them or of the company, for false

representations with respect to the amount or value of the corporate property, or other material matters.

The real question involves only the character and ownership of the funds which went to pay for the Sagamore and Sherman farms. These funds, so far as concerns this case, were derived entirely from the sales of stock in the plaintiff corporation. It appears that all of the stock, excepting the shares subscribed for by the incorporators or promoters, was issued to Lewis and Symonds in trust for the benefit of the old stockholders, to be distributed by them, two shares for one. But there were no old stockholders for 24,500 shares, which was treasury stock of the old company. Lewis and Symonds, accordingly held 191,000 shares of stock in trust for actual stockholders of the old company, and 49,000 shares to represent the equivalent of the treasury stock in the old company. We have already said that we think these 49,000 shares must be regarded as treasury stock. We can see no difference in allowing them on the one hand to remain in the treasury in the first place, or on the other, issuing them to trustees whose duty it would be to immediately cover them back into the treasury. Up to this point we see nothing of which the plaintiff corporation can find fault. The whole course of procedure between the two companies, so far, has simply resulted in the organization of a new company, with the same stockholders, owning the same property, but capitalized at twice the amount. It was in effect a reorganization. Nothing, relating to the exchange, so far, was concealed from the new company or its stockholders. It was understood that they were buying the assets of the old company, whatever they were. When the exchange was effected, they were not wronged and the company was not wronged. The stockholders had just as much as they had before, no more, no less. Lewis and Symonds, the trustees to whom the stock was issued, held it not as trustees for the plaintiff, but as trustees for the old stockholders. The old stockholders were entitled to the stock. They could sell it. No trust attached to it in their hands for the benefit of the new company, nor to proceeds of sales by them. The payments for these two farms, with the exception of a single item in each case, were made out of the proceeds of sales of the 191,000 shares of stock which belonged

to stockholders, and the conclusion at which we have arrived eliminates them from further consideration. We do not wish to be understood as saying that, if the purchase by the new company of the old had been effected upon the strength of false representations by the promoters of the new, or if they had received secret profits out of the transaction, the plaintiff would have been remediless. But we do not think that the representations of Lewis were in any degree a moving consideration for the transfer.

In the case of the Sagamore farm, as we have seen, a $3,000 payment was made out of the proceeds of stock sold by W. D. Lewis to Edwin Lord. This stock had been treasury stock; but sometime prior to the sale to Lord it had been transferred to Lewis as part payment of debts owed to him by the corporation. These debts consisted of salary as president and expenses credited to him on the books of the corporation. The salary was voted at a meeting of the directors, at which only he and Symonds were present, when each was voted a salary. It is contended that such a vote was unauthorized. We think so. Directors have no authority to act for the corporation in matters in which they themselves are interested. They owe their whole duty to the corporation, and they are not to be permitted to act when duty conflicts with interest. They cannot serve themselves and the corporation at the same time. *E. & N. A. Ry. Co.* v. *Poor*, 59 Maine, 277. For the same reason, directors cannot vote salaries to themselves. Nor can they vote a salary to one of their number as president or secretary or treasurer, at a meeting where his presence is necessary to a quorum. And such votes, if passed, are voidable by the corporation, and if money has been paid it may be recovered back. *Kelley* v. *Newburyport St. Ry. Co.*, 141 Mass. 496; *Barnes* v. *Brown*, 80 N. Y. 527; *Gridley* v. *Railroad Co.*, 71 Ill. 200; *McNulta* v. *Corn Belt Bank*, 164 Ill. 427; 56 Am. St. Rep. 203; *Jones* v. *Morrison*, 31 Minn. 140; 21 Am. & Eng. Ency. 877, 899, 910; 10 Cyc. 777, 790, 809; 2 Cook on Stockholders, sect. 657.

In this situation of the accounts, Lewis procured the transfer to himself of 5,500 shares of treasury stock, and charged himself with it at $1 a share. The plaintiff questions the lawfulness of that transfer, even assuming Lewis's account to be valid. It is well set-

tled that an officer cannot apply corporate property in his possession to the payment of a debt due to himself from the corporation, without the authority of the directors, and the corporation may require a return of the property thus appropriated. *Emporium Real Estate etc. Co.* v. *Emrie*, 54 Ill. 345; *Greenville Gas Co.* v. *Reis*, 54 Ohio St. 549; 21 Am. & Eng. Ency. 911; 10 Cyc. 799. No more, we think, can an officer pay himself with treasury stock, without the authority of the directors. While it is true that the president or general manager of a corporation sometimes exercises quite extensive powers in the executive management of its business, he is nevertheless, acting all the time under the express or implied authority of the directors, who are the real managers of the corporation. He has no implied authority to sell treasury stock. Matter of Utica Nat. Brewing Company, 154 N. Y. 268. And in the absence of any vote of the directors (and there is none in this case) authorizing the president of a corporation to have issued to himself stock on account of the corporation's debt to him, we think he has no such authority. Even if he may be authorized to sell stock, no authority to take it in payment of his own account can be implied from this fact. To sell stock, and to apply it on the selling agent's own debt, are two different things. His authority to take the stock of the company in payment of his debt cannot be implied from the fact that he may have the general executive management of the corporation. No doubt a vote of disinterested directors, in a meeting where the interested director's presence is not necessary to a quorum, would be sufficient authority for such action. But in this case there was no such meeting, and there was no such vote. Lewis appears to have acted solely on his own responsibility, and handled the stock as if no one else had any interest in it. It is true that Symonds, a director, knew of the transfer and probably assented to it. But that was not enough. Directors must act as a board. *Peirce* v. *Morse-Oliver Building Co.*, 94 Maine, 406; 10 Cyc. 775, and cases cited; 21 Am. & Eng. Ency. 864. There was no such act in this case. Two of the three directors knew and assented, but one of those two was disqualified to act by his interest. The issue of shares, without authority of the directors, conveys no rights as against the corpora-

tion, in the absence of an estoppel, in favor of one who is not a purchaser of them in good faith and for value. *Ryder* v. *Bushwick R. Co.*, 134 N. Y. 83. Lewis could not well play the role of an innocent purchaser. The stock, when issued to him, in equity was not his. The corporation might require its return. He, therefore, held it in trust for the corporation. And the proceeds of that stock sold by him were impressed with the same trust, and may be followed so long as distinguishable; or Lewis's estate may be held accountable for them. $3,000 of the proceeds are traced into the Sagamore farm.

As to the Sherman farm it appears unmistakably, we think, that on May 1, 1899, W. D. Lewis, president of the plaintiff, sold 2,000 shares of treasury stock to George A. Bigelow, at $1.50 a share, for which Bigelow gave his two notes of $1,500 each, payable to the company, one of which Lewis turned in towards the purchase price of the Sherman farm. Lewis, on account of this transaction, transferred to the company other notes for $2,000, leaving $1,000 unaccounted for, apparently. It seems to have been the practice of both Lewises to account for the stock of the company which they took and sold, at $1.00 per share, regardless of the price actually received. And we think Lewis in this instance undertook to account fully for the 2,000 shares of treasury stock by the notes for $2,000 which he turned in to the company. Although the accounting must be held good for $2,000, we do not think it was sufficient. When an officer of a corporation, on a salary, is employed to sell its treasury stock for the benefit of the corporation, he cannot speculate in it for his own benefit. He cannot, without the consent of the corporation or directors, lawfully obtained, charge it to himself, or account for it at an arbitrary price, and pocket the surplus of proceeds, if any, over and above the arbitrary price at which he charges it. He must truly account to the corporation for the whole price received from purchasers. The money in his hands belongs to the corporation for the whole price received from purchasers. The money in his hands belongs to the corporation, and is therefore trust money. Lewis, then, after accounting for $2,000 of the $3,000 received, still had in his hands $1,000 trust funds belonging to the plaintiff. This was represented by the $1,500 note, or by part of the amount due on the

note of Bigelow, which he held. That note he turned in towards the purchase of the Sherman farm, and it was afterwards paid by Bigelow.

There is some evidence that it was understood at the time by Lewis that this $1,000 did not belong to the company; but we think it did, until properly accounted for. The burden of accounting for it is upon the defendants and the accounting which they attempt is not satisfactory.

But the defendants say that the acts of Lewis as president, and of Lewis and Symonds, as directors, have been ratified by votes of the plaintiff's stockholders, and that the ratification validates all unauthorized acts, that is, all acts done without or in excess of authority. It is unquestioned that a corporation may ratify the unauthorized acts of its officers and directors, if they are within the powers of the corporation, and make them as valid as if antecedent authority had existed for doing them. This may be done by a vote of the stockholders, and is sometimes inferred from long acquiescence. Such a ratification might validate an unauthorized or irregular issue of stock to a president in payment of a salary which had been voted to him at a board meeting when his presence was necessary to a quorum. It might validate an accounting which an officer had made for treasury stock sold by him.

It appears in the case, as already stated, that at a meeting of the stockholders held May 6, 1896, the acts of the directors under the vote of the preceding February 11, were approved. This undoubtedly related to the exchange of its stock for the assets of the old company. This matter we have already disposed of. But the other ratification of May 7, 1902, whereby the stockholders "unanimously voted that all acts of the directors and officers be hereby ratified and approved" is open to consideration. It is urged that this ratification should not be held to effect the rights of the plaintiff in this case for two reasons. First, that the ratification was passed by the votes of stock owned or controlled by Lewis, whose unauthorized acts as director and president it was intended to cure; and secondly, that the ratification was voted in ignorance of facts now discovered, and which are relied on to show that the payments of $3,000 and $1,000 above referred to were made with trust funds. It is claimed that if a director is dis-

qualified from voting a salary to himself, or from paying himself by the issue of stock, he should be for the same reasons disqualified as a stockholder from voting to ratify such acts, and that to hold otherwise would be to say that when a director owns a controlling interest in the stock, the minority stockholders are remediless against his unlawful acts as director. It may be an open question yet, whether a ratification of the unauthorized acts of a director, in his own interest, is effective when voted by stock owned or controlled by him, and whether he is entitled to vote at a stockholders' meeting to ratify a contract made by himself. See *Pender* v. *Lushington*, 6 Ch. D. 70; the case of *Beatty* v. *North Western Transportation Co.* in its several phases, in 6 Ont. Ch. D. 300 (6 Am. & Eng. Corp. Cases, 315); 12 App. Cases, 589; 11 Ont. App. 205 (10 Am. & Eng. Corp. Cases, 263); 12 Sup. Court of Canada, 598, (19 Am. & Eng. Corp. Cases, 171); the vigorous protest of the author in 4 Thompson on Corporations sect. 4461; *Gamble* v. *Queens County Water Co.*, 123 N. Y. 91; *Bjorngaard* v. *Goodhue County Bank*, 49 Minn. 483; *McNulta* v. *Corn Belt Bank*, 164 Ill. 203. There is no doubt that the arm of the court in equity is long enough to reach and undo any such ratification which appears to be fraudulent as against the minority stockholders, and that the court will interfere when such action by the stockholders is so detrimental to the interests of the corporation itself as to lead to the necessary inference that the interests of the majority stockholders lie wholly outside of and in opposition to the interests of the corporation and of the minority of the shareholders, and that their action is a wanton or fraudulent destruction of the rights of such minority. See *Gamble* v. *Water Co.*; *Bjorngaard* v. *Bank*, and on 4 Thomp. Corp. all cited above.

But it is unnecessary to consider this question further here, for it does not appear that the ratification was carried by stock owned or controlled by Lewis. Undoubtedly a great majority of the stock represented at that meeting was friendly to the Lewis interests, and, in the cleavage of sentiment which had begun to appear then among the stockholders, for and against Lewis, took the side of Lewis. But on the question of ratification the vote was unanimous.

The remaining objection to the ratification is, we think, well taken.

It is common legal knowledge that one cannot be said to ratify that which he does not know. *Marcoux* v. *Society St. John Baptist*, 91 Maine, 250; *Whalen* v. *Equitable Accident Co.*, 99 Maine, 231. The burden is on him who relies upon a ratification to show that it was a binding ratification, that is to say, that it was made with a full knowledge of all the material facts. 21 Am. & Eng. Ency. 901; 10 Cyc. 1079. The resolution of ratification was both broad and indefinite. No single act is referred to. There is no pretense that the stockholders outside of the Lewises and Symonds had any knowledge of the transactions now complained of. Nor is knowledge to be presumed from the fact that the transactions appeared in the records and books of the corporation. Means of knowledge is not knowledge in such case. It is not to be expected, and it is not true generally, that the stockholders in meeting assembled, know what is contained in the records of directors' meetings, or in the books of account. *Murray* v. *Nelson Lumber Co.*, 143 Mass. 250; *Pacific Rolling Mill* v. *Dayton etc. Railway Co.*, 5 Fed. Rep. 852; *Allen* v. *American Building and Loan Asso.*, 49 Minn. 544; *First Nat. Bank of Fort Scott* v. *Drake*, 29 Kans. 311; 10 Cyc. 1079, and cases cited. The ratification relied upon cannot, therefore, be sustained.

We have already said that, in the absence of ratification, the $3,000 and $1,000 items are to be deemed trust funds. Can they be followed into the Sagamore and Sherman farms, respectively? We think they can. They certainly have been traced into them. The plaintiff's right does not arise from an express trust, or from a resulting trust, but because the money which went into the farms was itself trust money. If so they are to be charged with the trust. The authorities are numerous that when trust funds of a personal character are changed into real estate, or are invested in real estate, they can be followed, and the rights of the beneficiaries maintained, if the rights of third parties have not intervened. *Cobb* v. *Knight*, 74 Maine, 253; 28 Am. & Eng. Ency. 1110. The rule is that when all of the substituted property is paid for by the trust property, the cestui que trust may elect to take the property. But that rule does not apply in a case like this. The farms were not originally purchased with these trust funds. The payment from the trust fund

in each case was only one of many payments. Equity requires that the plaintiff should get the benefit of its funds, and that they should be a charge respectively upon the two farms; but not as we shall show upon the entire present interests in the farms. We cannot give the relief specifically prayed for, but we can give other relief, and the only relief the case is susceptible of. We cannot order a conveyance of all the interests in the farms, but we may order a sale of the interests affected by the trusts.

Although William D. Lewis procured the contracts for the sales of these farms in the name of his son, W. E. Lewis, we are satisfied that the entire beneficial interest was in the father. Subsequently W. E. Lewis obtained deeds of the farms and gave mortgages for the unpaid parts of the purchase price. But he held in trust. In fact we are unable to distinguish any interest in W. E. Lewis apart from that of his father. It certainly has not been made to appear. While matters were in this condition, doubt arose whether W. E. Lewis would be able to complete the payments, and a new arrangement was made, whereby W. E. Lewis conveyed the farms to one George W. Jackson, and Jackson to W. E. Lewis and Kenneth H. Lewis in trust for certain parties in certain proportions, namely, Annie F. Lewis, 8-64; Jessie Lewis, 8-64; W. E. Lewis, 8-64; Leonora L. Jackson, 7-64; Dexter W. Lewis, 7-64; Edison Lewis, 7-64; Kenneth H. Lewis, 7-64; James W. Jackson, 8-64; W. E. and Kenneth H. Lewis, trustees for S. L. Symonds, 4-64. All these except Jackson and Symonds were the widow and children of William D. Lewis and the children of Charles H. Lewis. So far as this widow and these children (except Kenneth) are concerned, the conveyance of the Sherman farm was voluntary and without consideration. They have no greater or other rights than William D. Lewis would have had. And the same is true of the interest of W. E. Lewis in the Sagamore farm. But J. M. Jackson, S. L. Symonds and Kenneth H. Lewis contributed respectively $1,500, $800 and $700 towards the payments on the farms. This was a part of the new trust arrangement. Their interests are entitled to protection. The trust funds traced into the Sherman farm, therefore, should be a charge only upon the interests, under the trust deed of

that farm to W. E. and Kenneth H. Lewis, of Annie F. Lewis, Jessie Lewis, W. E. Lewis, Lenora L. Jackson, Dexter W. Lewis and Edison Lewis. And the trust funds traced into the Sagamore farm should be a charge, as the first bill is at present constructed, only upon the interest of W. E. Lewis under the trust deed of that farm to Kenneth H. Lewis and himself, for the benefit of themselves and Annie F. Lewis, Jessie Lewis, Lenora L. Jackson, Dexter W. Lewis and Edison Lewis. And these trusts may be enforced by a sale of those interests, but subject to mortgages, if there be any.

It also appears that since the trust arrangement was entered into, J. M. Jackson and Kenneth H. Lewis have paid certain sums for interest and taxes on the farms. Equity requires that they should be reimbursed for so much of such payments as were for the benefit of such interests as are herein charged with the payment of the trust funds, with interest. In the record before us, however, it does not appear in every instance, for which of the two properties the payments were made, and out of which reimbursement should be made.

We have so far limited the right of recovery, as to the Sagamore farm, to the interest of W. E. Lewis. He is the only defendant in the bill touching that farm. None of the other cestuis que trustent have been made parties to that bill. Nor have J. M. Jackson and S. L. Symonds, who are interested in that farm, the same as they are in the Sherman farm. That trust had been created before the bill was filed, but the trust deed was not recorded until afterwards, and probably neither the deed nor its contents were known to the plaintiff when it brought its bill. When the fact was discovered, however, these persons should all have been made parties, as they were in the bill touching the Sherman farm. And the question arises whether they ought not to be made parties even now. This bill was heard below in connection with the other bills to which they were all parties, and the distinction of parties seems to have been lost sight of on all hands. Various admissions were made seemingly as if applicable to all parties. The cases were, in fact, tried as one case. Of course, we cannot render a judgment against persons who are not parties. Ordinarily at this stage of a case, we should not retain a bill for the summoning in of additional parties. But we think, in

view of the circumstances alluded to attending the trial, and because we think that justice to both the plaintiff and this defendant requires it, the same persons should be made parties in the Sagamore bill, as are so made in the Sherman bill. In this way it can be ascertained in one proceeding whether interests of the others in this farm are subject, with W. E. Lewis's interests, to be charged with the payment of this trust fund; and if so, in what proportion, and subject to what reimbursement, so far as J. M. Jackson, S. L. Symonds and Kenneth H. Lewis are concerned. The equities of all the parties can thus be adjusted, on one bill.

In the case of the Sherman farm, the appeal is sustained, and the bill is sustained, and with costs against the parties who have answered. The case will go to a master, (unless the parties agree,) to ascertain for how much J. M. Jackson and Kenneth H. Lewis should be reimbursed for payments made for taxes and interest, on account of this farm, that is, for such payments as were for the benefit of the interests of Annie F. Lewis, Jessie Lewis, W. E. Lewis, Lenora L. Jackson, Dexter W. Lewis and Edison Lewis, namely 45-64, with interest. Upon the coming in of the master's report, a decree will be made below for a sale of the above mentioned interests of Annie F., Jessie, W. E., Dexter W. and Edison Lewis and Lenora L. Jackson, in the Sherman farm, and for the payment out of the proceeds, after the expenses of the sale are paid, to J. M. Jackson and Kenneth H. Lewis of 45-64 of the amounts severally paid by them for interest and taxes, on account of this farm; then the payment to the plaintiff of $1,000, and interest, in lieu of an accounting for use and profits, from May 1, 1899; and then the payment of the balance to the several cestuis que trustent whose interests are sold, according to their respective shares under the trust deed.

In the case of the Sagamore farm the appeal is sustained, and the bill is sustained against W. E. Lewis, with costs. But the bill will be retained without further decree against him, until the other persons interested, who are named above, are made parties to the bill. And after it shall be ascertained whether their respective interests are also to be charged with the payment of the trust fund, the whole case will go to a master for the same purposes as in the Sherman

bill, and the same proceedings will be had and decree passed as are above directed in that bill. In this case the amount to which the plaintiff will be entitled is $3,000 and interest from March 28, 1901.

In the third case, the bill is to be dismissed with one bill of costs.

The cases having been heard together, the costs in each before being taxed must be apportioned by a justice sitting below.

So ordered.

NEILS C. JENSEN

vs.

THOMAS A. L. T. KYER.

Cumberland. Opinion December 29, 1905.

Master and Servant. Servant's Duty. Assumption of Risk. Specific Orders. Assurance of Safety. Master's Negligence. Servant's Contributory Negligence.

Master and servant do not stand upon the same footing. The servant's duty is obedience. He has a right within reasonable limits, to rely upon his master's knowledge, skill and ability and is not bound to set his judgment against the judgment of his superior. Specific orders and assurances of safety, coming from such a source, have a natural tendency to throw him off his guard and lull him into a feeling of security.

In determining the question of contributory negligence of a servant, who is injured while acting in obedience to the specific orders of the master present, and under his assurance of safety, such order and assurance constitute a part of the attendant circumstances to be considered.

Such order and assurance are immaterial, however, unless they are the operating influence which induces the servant to do the act that is the immediate cause of the injury.

To constitute an order it is not necessary that the language used should be of a formally imperative character.

If the danger is so patent and serious that no prudent man would incur it, the servant cannot plead the master's order or assurance of safety as a justification for placing himself in a position of such obvious peril.

Negligence on the part of the master is not one of the ordinary risks which the servant assumes as a part of his contract of employment.

Upon the question of voluntary assumption of risk by the servant, he is chargeable with the full consequences of what he ought to have known in the exercise of ordinary care and prudence, but the specific command of the master and his assurance of safety are to be weighed as a part of the attendant circumstances.

On exceptions by plaintiff. Sustained.

Action on the case to recover damages for personal injuries suffered by the plaintiff and caused by the alleged negligence of the defendant. Plea, the general issue. After the completion of the plaintiff's evidence at the trial, and upon the defendant's motion, the presiding Justice ordered a nonsuit, and thereupon the plaintiff excepted.

The case is stated in the opinion.

Wilbur C. Whelden and Wilford G. Chapman, for plaintiff.

Symonds, Snow, Cook & Hutchinson, for defendant.

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

POWERS, J. Exceptions to the ruling of the presiding justice ordering a nonsuit at the close of the evidence for the plaintiff.

The plaintiff was employed by the defendant to drive a sprinkling cart. He was totally blind in one eye; and the sight of the other was "very poor," so that he could not see to read without using a glass. This the defendant knew. Plaintiff had operated a sprinkler the month before, but was never upon the defendant's sprinkler until the day of the injury. He had driven through the big doors of other barns with different loads, but had never been in the defendant's barn but once or twice and then only on foot. The injury was received about five o'clock of a July afternoon. The defendant was sitting on the seat of the sprinkler with the plaintiff who testifies: "When we came along near the yard I asked him where he wanted me to put that sprinkler; and he says 'In the barn sure.' So I went into the yard and when I came near the barn door I stopped the sprinkler, and then he raised up in the seat, and I thought I was going off too,

and he says: 'Hold on; sit right down there on the sprinkler, and I will tell you when to come in.' And he went off of the sprinkler, and went into the barn, and then he turned around and looked around, and then he says: 'All right; come in.' I was not ready; I turned about to be sure to take the right—to have everything ready. I knew the horses would start quick up the rise. And he says 'Come on now; everything is all right,' and went into the door; so I started, and when I came in the door the upper part of the door struck me right here," jamming the plaintiff between the top of the doorway and the seat of the sprinkler and injuring his spine. One witness stated that when the defendant called to the plaintiff the second time there was "a little anger with it." There was also evidence tending to prove that the barn floor was about three feet above the level of the yard, and that from the barn floor to the bottom of the rise was about ten feet. Just how far from the door the plaintiff stopped his team and the defendant got down does not appear. He says he stopped the sprinkler when he came near the barn door. If he stopped his horses at the foot of the rise sitting upon the seat he would be some twenty feet away. The top of the doorway was from six inches to a foot above the seat of the sprinkler when standing on the level of the barn floor. The question presented by the exceptions is whether upon the undisputed evidence, viewed in the light most favorable to the plaintiff, a verdict for the plaintiff could be sustained.

Was the defendant negligent? It is familiar law that it is the duty of the master to exercise ordinary care in view of all the circumstances to see that the servant shall not be exposed to dangers which can be avoided by the use of such care. *Rhoades* v. *Varney*, 91 Maine, 222; and to use all reasonable precautions for the safety of those in his service. *Buzzell* v. *Laconia Mnfg. Co.*, 48 Maine, 113. When intelligent and impartial men might honestly draw different conclusions from the facts the question of ordinary care is for the jury. *Larrabee* v. *Sewell*, 66 Maine, 376. The court is of the opinion that a jury would be justified in finding that to order the defendant to "hold on" and "sit right down there" upon the seat, for that was where he was sitting at the time he rose up, and to drive this sprinkler through a door through which the defendant knew it had

never been, without making any tests or measurements to see whether it could be done with safety, did not fulfil the measure of duty which the law imposes upon the master. If, as is urged, the defendant did not go into the barn to see if the doorway was of sufficient height to allow the sprinkler to be driven in in safety, that his attention was not directed to the danger and he did not notice it, it was none the less a failure to exercise ordinary care to see that the place into which he ordered the plaintiff to drive was reasonably safe. It is stoutly contended however that the defendant did not order or direct the plaintiff to drive into the barn, but simply when to drive in, and the defendant relies upon the plaintiff's testimony, "He raised up in the seat, and I thought I was going off too, and he says, 'Hold on, sit right down there on the sprinkler and I will tell you when to come in.'" It is a fair inference that this was an order for the plaintiff to remain seated on the sprinkler. Whether the plaintiff's subsequent statement, made after going into the barn and looking around, "All right; come in." "Come on now; everything is all right," the last time with a little anger in his voice, did not amount to an order, was for the jury to determine. Certainly the defendant's construction is not the only inference which intelligent and impartial men might draw from his language and acts. To constitute an order it is never necessary to show that the language used is of a formally imperative character. In *Stephens* v. *H. & St. J. R. Co.*, 96 Mo. 207, a workman, when told to clear the track as a train was coming, said to the foreman that there were two stones on the track, and was told that it was time he was getting them off. It was held that he was justified in considering this an order. In the case at bar whether the defendant ordered the plaintiff to drive into the barn is to be determined from the standpoint of what, under all the circumstances, the plaintiff was justified in considering it.

Was the plaintiff guilty of contributory negligence? It is urged that the accident took place in broad daylight, that the plaintiff was only some twenty feet away from the doorway, that the situation was as apparent to him as to the defendant, that he did not rely upon the defendant's statements but upon his own judgment, that if he failed to use his senses he was guilty of contributory negligence,

and that, if he did use them, he must have seen and appreciated the danger and voluntarily assumed the risk. In considering what conclusion a jury would be justified in reaching upon this question it is necessary to remember that in this case there are present two differentiating circumstances, that the plaintiff was obeying the direct specific orders of the master present, and that he acted under an assurance of safety. "Although the circumstances when abstracted from the fact of the giving of the order may be such as to justify a court in holding that the servant appreciated the danger to which his injury was due, and was negligent in subjecting himself to the danger, such a conclusion is in a large number of instances not warrantable, if the testimony goes to show that the immediate occasion of his being subjected to that danger was his compliance with the order." Labatt Master and Servant, section 439. And the servant's position is strengthened when he acted not only in obedience to orders but under the master's assurance of safety. Idem, section 453. This court has said that under such circumstances the servant's conduct is to be viewed "in the light of reasonable charity." *Drapeau* v. *Paper Co.*, 96 Maine, 300; *Sawyer* v. *Idem*, 90 Maine, 354. In other words, in weighing all the circumstances attending the situation, obedience to the master's specific orders and his assurance of safety must be included. This well recognized doctrine is based upon several considerations; that the master and servant do not stand upon the same footing; that the servant's duty is obedience; that he has a right within reasonable limits to rely upon the master's knowledge, skill and ability, and is not bound to set his judgment against the judgment of his superior, and that orders and assurances of safety, coming from such a source, have a natural tendency to throw him off his guard and lull him into a feeling of security.

Was the danger of obedience to the order as apparent to the plaintiff as to the defendant? He did not have the same means and opportunity for observation. His eyesight was defective. While he says he could see in the doorway and see if anything was standing there yet at the same time he says it "was not so very plain; there was kind of dark." Whether and to what extent this was true

and its bearing upon the question of due care, were facts which a jury could best determine. The defendant had the advantage of viewing the doorway from the seat of the sprinkler and also viewing the sprinkler from the doorway three feet above the level of the yard. Of course the plaintiff cannot recover if he relied upon his own judgment, and the defendant's orders and assurances of safety were not the operating influence which induced him to attempt to drive into the barn while seated upon the sprinkler, because but for these differentiating circumstances it was plainly contributory negligence for him to do so without first taking steps to ascertain whether it could be done with safety, and his defective eyesight would be no excuse. He says he looked and thought it was all right to drive in, that he could drive in without bending over, and that he drove right ahead thinking that he could go through the door all right. If this testimony stood alone it would be conclusive against him. He testified further, however, that he did not exercise his own judgment about whether it was all right. On the whole testimony the court cannot say, as matter of law, that the statements of the defendant were not the operating influence which induced his action.

The plaintiff must not only have relied upon the superior judgment of the master but have had a right to rely upon it. If the danger was so patent and serious that no prudent man would have incurred it, the plaintiff cannot plead the defendant's orders as a justification for placing himself in a position of such obvious peril. Here again the court is not prepared to say, in view of all the circumstances, especially his defective eyesight and the position from which he viewed the doorway, a position retained in obedience to orders, that honest and intelligent men might not differ in their conclusions.

Did the plaintiff know and understand the nature and the extent of the danger to which he was exposed, so that he can be said to have assumed the risk? Driving into this doorway while seated upon the sprinkler, in obedience to the negligent orders of the defendant, was not a risk which was ordinarily incident to his employment, so that the plaintiff must be held in law to have assumed it at the time he made his contract, because negligence on the part of

the defendant can not be presumed to have been within the plaintiff's contemplation as a part of that employment. He did not assume it later unless he knew and fully appreciated the nature and extent of the danger. Mere knowledge that there was danger is not conclusive. *Frye* v. *Gas Co.*, 94 Maine, 17; *Mundle* v. *Mnfg. Co.*, 86 Maine, 400. "When we say that a man appreciates a danger, we mean that he forms a judgment as to the future, and that his judgment is right. But if against this judgment is set the judgment of a superior, one, too, who from the nature of the calling of the two men and of the superior's duty seems likely to make the more accurate forecast, and if to this is added a command to go on with his work and to run the risk, it becomes a complex question of the particular circumstances whether the inferior is not justified as a prudent man in surrendering his own opinion and obeying the command." *McKee* v. *Tourtellotte*, 167 Mass. 69. And this is equally true whether "the probability of the superior's making the more accurate forecast" arises from the nature of his calling, or from his better means of, and opportunity for, observing the situation at the time. If the danger was obvious to a person of ordinary prudence and intelligence then the plaintiff assumed the risk. He is chargeable with the full consequences of what he knew irrespective of orders or assurances of safety. In view however of his imperfect eyesight and the position he occupied twenty feet at least away from the doorway, which was up a rise ten feet in length and three feet in height, the conclusion is not irresistible that he knew and understood the nature and degree of the danger. In determining what he ought to have known in the exercise of ordinary care and prudence, with which facts he is equally chargeable, the command of the master and his assurance of safety are to be weighed as part of the attendant circumstances. "When an act is performed by a servant in obedience to a command from one having authority to give it, and the performance of the act is attended with a degree of danger, yet in such case it is not requisite that such servant shall balance the degree of danger, and decide with absolute certainty whether he must do the act, or refrain from it; and his knowledge of attendant danger will not defeat his right of

recovery, if, in obeying the command, he acted with that degree of prudence that an ordinarily prudent man would have done under the circumstances. "*Anderson Pressed Brick Co.* v. *Sobkowiak*, 148 Ill. 573. In the infinite variety of fact and circumstance presented by negligence cases it is rarely of profit to examine and compare the facts of other cases. The difficulty is in drawing the inference from the facts under the rules of law. When there is more than one inference possible the law leaves it to twelve men, rather than to one, to say what is the correct inference. In *Haley* v. *Case*, 142 Mass. 316, it is said: "When the master undertakes to direct specifically the performance of work in a particular manner, we cannot say, as matter of law, that the servant is not justified in relying to some extent upon the knowledge and carefulness of his employer, and in relaxing somewhat the vigilance which otherwise would be incumbent upon him."

The case at bar is to be distinguished from those cases where the servant was not acting in obedience to the orders of the master and under an assurance of safety; and also from those, where though one or both of these elements were present, the orders were general and the servant was left to do the work in his own way, such as *Wormell* v. *R. R. Co.*, 79 Maine, 405, and *Lodi* v. *Maloney*, 184 Mass. 240.

The case is close, but it is our opinion that it should be submitted to a jury to say what are the correct inferences to be drawn from the uncontradicted evidence. *Mahoney* v. *Dore*, 155 Mass. 513; *Burgess* v. *Ore Co.*, 165 Mass. 71.

Exceptions sustained.

LOMBARD WATER-WHEEL GOVERNOR COMPANY

vs.

GREAT NORTHERN PAPER COMPANY.

GREAT NORTHERN PAPER COMPANY

vs.

LOMBARD WATER-WHEEL GOVERNOR COMPANY.

Cumberland. Opinion January 1, 1906.

Sales. Delivery. Warranties. Independent Agreement. Condition Precedent. Installing Machinery. Error of Judgment. Non-Liability of Principal. Assumption of Risk of Failure.

Under a contract for the sale of personal property the title passes to the purchaser upon delivery by the vendor to a common carrier authorized to receive it.

A stipulation that a competent man is to be furnished by the manufacturer to install machinery sold to a purchaser to be paid for within a certain time is not a condition precedent to a right of action for the purchase price, but a separate and independent agreement.

Where a contract of sale is in writing, a warranty not expressed or implied by the terms that the article is fit for the particular use, cannot be added by implication.

When a known described and defined article is ordered of the manufacturer, although it is stated to be required for a particular use, there is no warranty that it shall answer the purpose intended by the buyer.

When a competent mechanic, while attempting to install machinery to be used in connection with a powerful motor, by error of judgment in an emergency does an act which causes damage to the property of the owner, his principal is not made liable by his act.

In the first action although the automatic governors which were of the usual make manufactured by the plaintiff proved unadapted for regulating the water speed and momentum applied to grinder units in the defendant's plant, but were shown to be identical with those specified in the contracts and recognized as the most accurate water wheel speed regulators of any make, fulfilling the warranties expressed in the contract, it is *held* that

there was no implied warranty that they should be suitable for the purpose intended.

In the second action it is shown that during the manipulation of the governor by the agent of the defendant while attempting to adjust it to the water wheel connected with a grinder unit the wheel case burst and the machinery and mill were damaged, but it is also shown that the action of the governor caused by the hand of the superintendent was not more sudden than its automatic action, that the water column upon which it acted was of extraordinary weight, and also that before the contract was made it was understood by both parties that the success of this kind of governor in connection with grinder units at the plaintiff's mill could be determined only by experiment, *held* that as the plaintiff corporation must have been as familiar as the defendant with all the conditions under which the attempt to adjust the governor was made, it assumed the risk of failure.

On report. Judgment for plaintiff in the first entitled action and for the defendant in the second entitled action.

The first suit was an action of assumpsit on account annexed, based upon a written contract, to recover the balance due and interest thereon for automatic water-wheel governors and other appliances sold and delivered by the plaintiff company to the defendant company. The writ also contained a count for "goods bargained and sold," also a count for "labor and materials," also an "omnibus count" of the common form, also a special count for interest, and also a count founded upon the written contract. Plea, the general issue.

The second suit was an action on the case brought as a cross action for the recovery of damages alleged to have been sustained by the plaintiff company named therein from the alleged insufficiency of the appliances which were the subject of the contract in the first action, and the alleged negligence of the defendant company in attempting to install the same. Plea, the general issue.

Both actions were tried together at the October term, 1903, of the Supreme Judicial Court, Cumberland County. After the evidence upon both sides in these two actions was concluded, it was agreed that both actions should be reported to the Law Court "for that court to pass upon and determine all questions of law and fact involved, including all questions of damages, and to order such judgments in the two cases as the respective rights of the parties may require."

The case appears in the opinion.

Foster & Foster, and Joseph Bennett, for Lombard Water-Wheel Governor Co.

Symonds, Snow, Cook & Hutchinson, Charles F. Woodard, and William L. Quimby, for Great Northern Paper Co.

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

PEABODY, J. The first case under consideration is an action of assumpsit based on a written contract to recover $10,525.25, the alleged balance of the contract price of certain automatic water-wheel governors and other appliances sold and delivered to the defendant, and interest thereon to the date of the writ, $650, making a total of $11,175.25. The second is an action on the case brought as a cross action for the recovery of $25,000, damages alleged to have been sustained by the plaintiff from the insufficiency of the appliances which were the subject of the contract upon which the first action is based, and the negligence of the defendant in attempting to install the same in the plaintiff's mill. The two cases were tried together, as the same circumstances upon which the defense in the first action is founded formed the basis of the cross action, and they come before the law court on report.

The contract upon which the plaintiff company sues is in the form of a written proposal by it, dated at Boston, January 24, A. D. 1901, which was accepted in writing by the defendant company January 29, A. D. 1901.

The contract is as follows:

GREAT NORTHERN PAPER CO.,
194 Washington St., Boston, Mass.

GENTLEMEN:— We submit the following proposal for water-wheel governing apparatus, to be used in connection with the four (4) grinder water-wheel units in your Millinocket plant.

The specifications, guarantees and agreements, under which we will furnish you the above governing apparatus are as follows:

APPARATUS. We will sell you four (4) of our type "B" gov-

ernors, and four (4) of our 23" balanced relief valves, f. o. b. Boston, Mass., for the sum of Seven Thousand Six Hundred Dollars ($7,600.00). We will also furnish you with the connections necessary to go between said water-wheels and said governors, and the necessary connections for said relief valves, at the cost of the same to us.

GUARANTEE. The governors and relief valves furnished you under this proposal shall be of our regular standard make and quality, and any parts which develop inherent mechanical defects within two months from the time when they are put in operation will be replaced by us without charge.

These governors are guaranteed to give a more accurate speed regulation than any other make.

PURCHASE. In consideration of the above guarantee you hereby agree to purchase said governors and relief valves of us at the hereinbefore named price and to pay for the same and the costs of said connections in cash within one month of date of shipping documents. Also to pay for a man to erect and adjust said governors and relief valves at the rate of five dollars ($5.00) per day for his time, with his necessary traveling expenses added thereto in cash, when the work is done.

CONTRACT. This contract will not bind the Lombard Water-Wheel Governor Company until countersigned by its General Manager, and becomes void unless accepted by you within one month from the date first hereinabove written. The acceptance of this proposal by you within said time will constitute it a binding contract on both sides if so countersigned.

Yours very truly,

LOMBARD WATER-WHEEL GOVERNOR CO.,
by Allan V. Garratt, Chief Engineer.

Countersigned,
LOMBARD WATER-WHEEL GOVERNOR CO.,
by Henry A. Clark, General Manager.

We hereby accept the above proposal.

Jan. 29th, 1901.

GREAT NORTHERN PAPER CO.,
Garret Schenck, President.

It appears from the record that the goods were delivered according to the contract f. o. b. Boston, Mass., and were afterwards received by the defendant at its mill in Millinocket, Maine, that the articles were of the kind specified in the contract, that certain other articles expressly ordered by the defendant were also delivered, that the prices charged in the writ for all the goods were as specified in the contract, that the automatic governors referred to therein were of the standard type manufactured and sold by the plaintiff which were known to and had been used by the defendant, and were identical with the articles specified, that the type of governors was recognized as giving the most accurate speed regulation of any make of water-wheel governor in accordance with the guarantee, that bills of lading or railroad receipts were duly sent to the defendant but no payment except $30 on account was made within a month from the date of shipping documents. It further appears that a competent man was furnished by the plaintiff to set up the appliances in accordance with the contract, and that his services at the rate of five dollars per day and expenses amounted to the sum charged therefor in the account annexed. The report shows that the Millinocket plant has, as part of its mechanical construction, a feed pipe or penstock which brings the water from the head of the canal to a water wheel connected with a grinder unit. This feed pipe has a fall of about 110 feet and is about 1100 feet long and about 10 feet in diameter, and the water column in the flume weighs substantially 6,220,800 foot pounds, and when at working speed contains 222,600 foot pounds of momentum energy or 4,119 horse power. A serious accident to the defendant's mill occurred during the work of installing one of the governors to regulate this momentum.

The defendant denies liability on the three grounds following:

1. That it was not to pay for the governors and relief valves absolutely within one month from the date of shipping the same, but only upon the condition precedent that a suitable man to erect and adjust them was furnished by the plaintiff and that he completed his work within that month. This ground of defense cannot be maintained. The contract was one for a sale of certain goods and the title passed upon delivery to the defendant. This delivery was effected in

accordance with the terms of the contract by placing the goods on board the cars in Boston. When a purchaser orders goods to be sent to him and delivered to a person named or to a common carrier authorized to receive them for his use it is a delivery to him and the sale and purchase are completed. *Torrey* v. *Corliss*, 33 Maine, 333; *Wigton* v. *Bowley*, 130 Mass. 252; *White* v. *Harvey*, 85 Maine, 212. A contract for the sale of articles then existing or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not is a contract for the sale of goods. *Goddard* v. *Binney*, 115 Mass. 450; *Mixer* v. *Howarth*, 21 Pick. 205. The sale was unconditional and the undertaking of the plaintiff to furnish a man to adjust the governors was a separate and independent stipulation and not a condition precedent to recover for the price of the goods sold.

2. That it was not liable upon the contract by reason of the negligence of the plaintiff in erecting and adjusting the governors and relief valves. While there is some conflicting testimony tending to show unnecessary delay on the part of Mr. Avery, the man sent by the plaintiff to install the governors, the evidence does not establish the fact of negligence or incompetence on his part.

3. That the contract was not fulfilled by the plaintiff because the automatic governor was not adapted to the purpose for which it was intended, and it claims that the contract contained an implied warranty that the governor apparatus should be suitable for the purposes of the defendant's plant, that it was the meaning of the specification in the plaintiff's proposal that the governors were to be used in connection with the four grinder units for the Millinocket mill, and that it therefore was the duty of the plaintiff to furnish apparatus safe and effective for the purpose and under the conditions for which it was to be used. Leaving for later consideration the question of the suitability of the governors and all questions as to non-contractual obligations of the plaintiff it would be sufficient to say that the existence of this implied warranty as part of the contract is negatived by its explicit terms defining the guaranties of the plaintiff, by the fact that it contains express guaranties which by legal construction exclude all others, and by the fact that the goods sold

were articles such as the vendor in the ordinary course of his business manufactured for the general market. When a contract is in writing, an additional warranty not expressed or implied by its terms, that the article is fit for the particular use cannot be added by implication. *Whitmore et al.* v. *South Boston Iron Co.*, 2 Allen, 52; *Chanter* v. *Hopkins*, 4 M. & W. 399. Where an express warranty is made upon a sale no other will be implied. *Deming* v. *Foster*, 42 N. H. 165; *Dickson* v. *Zizinia et al.*, 70 E. C. L. 602; *De Witt* v. *Berry*, 134 U. S. 306; *International Pavement Co.* v. *Smith etc. Ma. Co.*, 17 Mo. App. 264; *Cosgrove* v. *Bennett*, 32 Minn., 371; *Shepherd* v. *Gilroy et al.*, 46 Iowa, 193; *McGraw et als.* v. *Fletcher*, 35 Mich. 104. Where a known described and defined article is ordered of the manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known described and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. *Chanter* v. *Hopkins*, supra; *Ollivant* v. *Bayley*, 5 Q. B. 288; *Prideaux* v. *Burnett*, 87 E. C. L. 613; *Seitz* v. *Brewer Refrigerating Machine Co.*, 141 U. S. 510. The rule deducible from the cases cited in support of this ground of defense is not applicable to a contract in which there seems to be no ambiguity in reference to the subject matter. Under these views of the case the plaintiff is entitled to recover $10,525.25, the amount specified in the account annexed, with interest from May 30, A. D. 1901.

This leaves for further consideration the two elements of the claim of the Great Northern Paper Company as plaintiff in the cross action, namely, that the injuries to its mill and machinery were due to the unsuitability and insufficiency of the appliances for the purpose for which they were intended, and to the negligence of the agents of the Lombard Water-Wheel Governor Company in their work of erecting and adjusting the governors.

The defendant, the Lombard Water-Wheel Governor Company after delivering the goods described in the contract to the plaintiff, the Great Northern Paper Company, sent Mr. Avery, one of its mechanics, to erect and adjust the governors and relief valves in the plaintiff's mill at Millinocket, and he proceeded to erect one of the

governors. Two attempts were made to adjust it in connection with the machinery which it was intended to control and regulate. During the first trial several accidents happened to the machinery, and particularly one of the grindstones connected with these governors was broken. At the second trial, after repairs had been made on the machinery, the adjustment was attempted by Mr. Lombard at that time superintendent of the Lombard Water-Wheel Governor Company, and during his manipulation and control of the governor in the attempt to adjust it the water wheel case burst coincidently with a sudden closing of the gate by the automatic governor. A great volume of water was released and the machinery and mill were seriously damaged.

The plaintiff insists that the governing apparatus furnished by the defendant was not adapted to the conditions existing at the mill, and that in consequence of its special and technical knowledge of the appliances manufactured by it and the reliance placed upon the judgment of its engineers, it is responsible for the injury caused by the insufficiency and unsuitableness of the governors and the unsuccessful attempts to install them. The absence of any further attempt to install the governors or any instance of their successful use in connection with grinder units, and particularly under the same conditions as those prevailing at the Great Northern Paper mill where the force to be regulated was water power of extraordinary character, makes it difficult to decide with certainty as to the practicability of this apparatus for the purpose required, but the weight of evidence, particularly that in relation to the final accident to the water wheel case, indicates that this automatic governor could be used under such conditions only with great and constant risk, because from its sensitiveness and the changes of pressure on the grinder wheels it was liable to shut and open the gate with great suddenness and subject the flume to a violent strain from the enormous weight of unelastic water. Apparently no safeguard could prevent a recurrence of the accident which befell the wheel case. It seems to have broken from no inherent weakness but solely from the overwhelming pressure suddenly brought to bear upon it. Assuming, however, that the plaintiff in the cross action is correct in attributing the accident to the unsuit-

ableness of the device for the conditions which existed at the mill, the defendant cannot on this account be held liable, because the plaintiff's officers and engineers must have been entirely familiar with the water power at Millinocket and acquainted with the use of this type of governor in connection with other plants owned and operated by the company, and had equal knowledge of the risk of attempting to erect and adjust for that plant this particular speed regulator, and and the plaintiff is therefore presumed to have assumed the risk. It appears also that prior to the making of the contract the president of the Great Northern Paper Company enquired particularly of the agent of the Lombard Water-Wheel Governor Company regarding the use of this appliance in connection with grinder units, at which time it was definitely stated by the agent of the governor company that he could not tell how accurately the water-wheels driving the grinder could be governed, and that he could only guarantee that the governors would handle the wheels quicker than any other make of governor.

The conversation at this time indicates that the plaintiff and defendant both considered that the successful use of these governors in connection with the mill plant was a matter which could be ascertained only by experiment. Under these circumstances it cannot be considered that the Lombard Water-Wheel Governor Company assumed any obligation as to its governor appliances except those specifically stated in the contract. It has been already said that the evidence is not sufficient to charge the injury to the machinery during the first trial of the governor to negligence on the part of Mr. Avery. It is uncertain whether the accident to the grinders was occasioned by some movement of the governor itself or by an injury to the shaft of the water wheel existing before he took charge of the manipulation of this machinery. The greater weight of evidence, however, indicates that the governor had not been connected with the water wheel gates when the grindstone burst, and that Avery was not in the mill at the time.

But it is strongly contended by the plaintiff in this action, that the bursting of the water wheel case at the second attempt to adjust the apparatus was directly occasioned by the act of Mr. Lombard the

agent of the defendant in regulating by hand the movement of the governor and thereby causing the sudden closing of the gate. It appears however from his testimony, that the act referred to was done upon hearing a sound indicating the cracking of the water wheel case, and if so, it was after and not before the accident to the wheel case and did not probably contribute to the injury. Such an act, though it may now seem to have been injudicious, and may have contributed to the final result, if done in an emergency, as it appears to have been, according to his best judgment at the time, would not render his company liable; but it appears from the evidence that no manipulation of the governor could produce a quicker effect than its automatic action. This action cannot therefore be maintained.

In *Lombard Water-Wheel Governor Co.* v. *Great Northern Paper Co.* Judgment for plaintiff.

In *Great Northern Paper Co.* v. *Lombard Water-Wheel Governor Co.* Judgment for defendant.

BION W. BICKFORD *vs.* AETNA INSURANCE COMPANY.

Cumberland. Opinion January 5, 1906.

Fire Insurance Contract. Construction. Renewal of Policy. Frame Building and "Addition."

An insurance contract should, in cases of ambiguity, be construed most favorably to the insured, and the language of the contract, if ambiguous, is to be interpreted in the light of attendant circumstances and the intent of the parties.

Unless otherwise expressed, a renewal of a policy of insurance though a new contract will be construed to be subject to the terms and conditions contained in the original policy.

Personal property, consisting of hay, carriages and sleighs was insured under a policy and described as contained in "the frame building and addition situated on Depot Street, in Gorham, Maine, and occupied as a livery and sale stable." The property lost was sleighs and carriages contained in the building destroyed which was forty-six feet long by thirty-seven feet wide, and connected with the larger main building by a platform twenty-four feet wide and twenty-six feet by the sides of the buildings, and supported by posts and reached by a runway and from which doors opened into each building, and erected at the same time as the buildings and constantly used in connection with them. The building destroyed was used by the insured on its second and third floors for storing carriages and sleighs and for occasional sales, the other part being used for different purposes. There was no other structure to which the term "addition" by adaptation or use could apply; and also when the original policy was issued the agent of the insurance company understood that some of the property intended to be insured was contained in the in the building destroyed. *Held:* that the building destroyed was the "addition" mentioned in the policy.

On report. Judgment for plaintiff.

Assumpsit upon a fire insurance policy of the standard form issued to the plaintiff by the defendant company, to recover for loss of hay, sleighs and carriages by accidental fire. This policy was a renewal of the original policy issued by the defendant company through one of its agents, Col. Henry R. Millett, and this renewed policy was

issued through Col. Millett's successor as agent of the defendant company. Plea, the general issue. Tried at the April term, 1904, of the Supreme Judicial Court, Cumberland County. At the conclusion of the testimony "and in accordance with the written stipulations of the parties" the case was reported "for the determination of the Law Court."

In relation to the "compulsory arbitration" clause contained in the policy, the averments in the plaintiff's writ and declaration are as follows: "And the plaintiff further avers that there is a provision in said policy which is as follows, to wit: 'In case of loss under this policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference unless waived by the parties shall be a condition precedent to any right of action in law or equity to recover for such loss; but no person shall be chosen or act as referee, against the objection of either party, who has acted in a like capacity within four months.'

"And the plaintiff further avers that, pursuant to said provision, he endeavored to have his loss determined by three disinterested men, and for that purpose, on the twenty-fourth day of December, A. D. 1903, submitted to said defendant company the names of three persons, all living in said Gorham, to wit, Harry W. Wilshire, Harry Day and Frank F. Johnson, one of whom said company could choose as one of the referees, and requested said company to submit to him the names of three persons, one of whom he would choose, and the two so chosen to choose the third, and that said defendant company utterly refused so to do and thereby prevented the plaintiff from having his loss or damage determined in accordance with said provision."

The case is stated in the opinion.

William Lyons, for plaintiff.

Robert Treat Whitehouse, for defendant.

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

PEABODY, J. This case was an action of assumpsit brought upon an insurance policy to recover for loss of hay, sleighs and carriages by an accidental fire.

The plea is the general issue and the case is before the law court on report by agreement and upon written stipulations of the parties according to which the sole question submitted is "whether or not the building wholly destroyed which it is admitted contained the carriages and sleighs for which the plaintiff seeks to recover was covered and included by the terms of the description of the policy in question, namely: "the frame building and addition situated on Depot Street in Gorham, Maine, and occupied as a livery and sale stable." If this building is covered by the terms of the description of the policy the plaintiff is entitled to recover for the loss of his sleighs and carriages the sum of $485, and the sum of $60 which is the admitted damage to the hay contained in the livery stable, if not he can recover only for the loss of the hay.

The plaintiff invokes the application of the familiar rule that an insurance contract should be in cases of ambiguity construed most favorably to the insured. *Herrman* v. *Merchants Ins. Co.*, 81 N. Y. 184; *Allen et al.* v. *St. Louis Ins. Co.*, 85 N. Y. 473; *Rann et al. exrs.* v. *The Home Ins. Co.*, 59 N. Y. 387; *Hoffman* v. *Aetna Fire Ins. Co.*, 32 N. Y. 405; 1 May on Ins., (3rd. Ed.) sec. 175. The plaintiff claims that there are three reasons supporting his contention in the case under consideration: first, that the building which was wholly destroyed was in connection with the larger building "used as a livery and sale stable," storing sleighs for sale being a part of the business; second, that it was the "addition" mentioned in the policy; and third, that it was understood by himself and the agent of the company when the first policy and its renewal were issued that the required indemity was in reference to property in this building.

It is necessary to look beyond the policy to ascertain whether in the use made by the plaintiff the building destroyed was a part of

his livery and sale stable. It could be so considered only because its second floor was used by him for storing carriages preparatory to painting, and subsequently for permanent storage as a portion of the main stable was used, and its third floor was used by him for storing sleighs kept for sale, and because occasionally sales of carriages and sleighs were made by him in the building. The evidence shows that at the time of the fire, March 27, 1903, the lower floor of the smaller building was used by other parties as a harness shop and paint shop and one of the rooms of the second floor was reserved by the plaintiff for painting carriages and the third floor wholly used by him for storing sleighs and that he occasionally made sales of these carriages and sleighs in the building.

It may be doubted whether the language "used as livery and sale stable" included with the main building another twenty-six feet distant used in part as a repair shop and in part a paint shop, though also used for the storage of sleighs by the proprietor, and as the place of an occasional sale of his carriages and sleighs.

It is important to examine further the descriptive word "addition" used in the policy to which the occupation of the plaintiff as a livery and sale stable applies as aptly as to the main frame building. The contract of insurance does not cover the buildings themselves but their contents, and so the ownership of the buildings is immaterial except in their identification as those in which the personal property insured is contained. We are to interpret the terms of the contract to determine whether the addition mentioned is "the building wholly destroyed." The buildings containing the property insured by the policy in suit are not different from those existing when the original policy was issued. If the word "addition" had reference to any existing structure it must be either the building in question or a small building attached to the main building not containing or adapted to contain any of the property insured and which was never used for the purposes of a livery and sale stable. This small annex was of such size, structure and character as to be a component part of the main building and had it contained any of the classes of personal property described in the policy it would have been covered even in the absence of the term "addition."

The building in question was forty-six feet long by thirty-seven feet wide connected with the main building which was eighty-six and one-half feet long and fifty-four and one-half feet wide by a platform twenty-four feet wide and twenty-six feet by the sides of the buildings. The platform was supported by posts and was reached by a runway nearest the building destroyed. Doors opened into each building both under the platform and from it. It was built at the same time as the buildings, and has since been constantly used in connection therewith. The only way of access to the second and third stories of the building destroyed and to a part of the second story of the main building was from the platform.

The word "addition" must have been a generality or amplified description employed without any definite application or have been intended by the plaintiff and the agent of the underwriters to be within the contract and to mean the building in question, unless its definition and interpretation in the light of surrounding circumstances defeat such intention. The definitions given in dictionaries afford very little assistance in determining its application to a particular structure. The meaning of the term must be extended or limited by reference to other words of description and by the use and purpose contemplated by the parties to the contract not inconsistent with the language of the policy, and by judicial definitions given in similar cases. Generally a building entirely distinct from a larger will not be covered by a policy insuring a "building and addition." In *Rickerson* v. *German-American Ins. Co.*, 32 N. Y. Supp. 1026, it was held that a policy on "the brick building and additions" where on the front of the lot was a three story brick building on the east side a two story extension and in the rear a five story brick factory building, and there was a space between the rear wall of the extension and the front wall of the rear building of about seven feet filled in by a small frame structure on which boards were nailed to form the front and roof, did not include the rear building as an addition to the front building. It was held in *Peoria Sugar Refining Co.* v. *People's Fire Ins. Co.*, 52 Conn. 581, that within the meaning of an insurance policy giving the insured authority to make additions a new warehouse located forty feet away from the main building and con-

nected with it by a bridge and underground passage used for pipes, is not an addition. In *Cargill* v. *Millers & Manufacturers Mut. Ins. Co.*, 33 Minn. 90, under a policy insuring a steam power elevator building and addition with porches and platforms attached a warehouse two and one-half feet from the elevator and about the same size, fastened to it with strips of board nailed to each building, used for storing grain received into the elevator was held in effect to be a bin of the elevator building and covered by the policy. In *Marsh* v. *Concord Mut. F. Ins. Co.*, 71 N. H. 253, a fire policy on a frame mill building and all additions thereto attached, which building was occupied by the insured as a pail shop, was construed to cover a dry-house twelve feet from the main building between which and the dry-house was a movable bridge, there being no other building beside these except a boiler house two feet from the dry-house. In *Home Mut. Ins. Co.* v. *Rowe*, 71 Wis. 33, an insurance policy covered a "planing-mill building and additions and machinery therein." The engine room from which the motive power of the mill was furnished was situated twenty-two feet from the mill building, connected therewith by a shaft for the transmission of power, and a spout through which shavings were forced to the engine room. A roadway passed between the buildings. It was held that the word addition covered the engine room and engine. *Blake* v. *Exchange Mut. Ins. Co.*, 12 Gray, 265; *Liebenstein* v. *The Baltic Fire Ins. Co.*, 45 Ill. 301; *Robinson* v. *Pennsylvania Ins. Co.*, 87 Maine, 399.

This question is not free from doubt in the light of the authorities cited, but upon the facts which appear in evidence of the use which the insured made of the building destroyed in connection with his livery and sale stable business, and the fact that no other structure by its location or use can be intended by the terms of the policy, under the rule of construction which in cases of doubt favors the insured, we hold that the building destroyed was the addition designated in the contract.

The evidence shows that at the time the original policy was issued, Col. Millett, the agent of the underwriters, understood that some of the property covered by the policy was in the small building, now claimed to be the addition referred to in the policy though this under-

standing was not known to his successor, Mr. Carl, nor did he personally know that any of the classes of property specified in the policy was contained in this building. The interpretation of the contract is aided by the intent of the parties and the plaintiff is entitled to the benefit of the understanding when the first policy was issued in construing the new contract under a renewal. *Day* v. *Dwelling House Ins. Co.*, 81 Maine, 244; *Philbrook* v. *N. E. Fire Ins. Co.*, 37 Maine, 137. Unless otherwise expressed a renewal will be construed to be subject to the terms and conditions contained in the original policy. *Day* v. *Mut. Ben. L. Ins. Co.*, 1 MacArthur (D. C.) 41; *Hartford F. Ins. Co.* v. *Walsh*, 54 Ill. 164; *Witherell* v. *Maine Ins. Co.*, 49 Maine, 200; *Aurora F. & M. Ins. Co.* v. *Kranich*, 36 Mich. 288.

It is claimed by the defendant that the policy in suit could not be understood to cover property in the building consumed, because the rate of insurance on that building established by the New England Insurance Exchange, was higher than upon the main building; but this fact was not known to the insured and could not effect his rights.

Judgment for plaintiff for $545.

LUCY M. MORRISON *vs.* ELLEN M. MORRISON.

York. Opinion January 8, 1906.

Money Had and Received. Mistake. Burden of Proof. Verdict.

In an action of assumpsit for money had and received, to recover money alleged to have been paid by mistake, the burden of proof is on the plaintiff to show that the payment was made by mistake of fact, and under such circumstances as would make its retention by the defendant inconsistent with equity and good conscience.

When evidence is conflicting as to material facts, that offered by the plaintiff tending to show that she allowed the defendant to receive one-half of the proceeds of the sale of her land which was conveyed to the purchaser by their joint deed, she supposing they were equal owners, and that offered by the defendant tending to show that the money was a gift from the plaintiff made with full knowledge that she was the sole owner of the land from which the money was obtained, a verdict for the defendant rendered by the jury under instructions of the court presumably directing their attention to the issues involved and not shown to be unwarranted by the weight of evidence, cannot be set aside.

On motion for new trial by plaintiff. Overruled.

Assumpsit for money had and received to recover money alleged to have been paid under a mistake. Tried at May term, 1904, of the Supreme Judicial Court, York County. Plea, the general issue. Verdict for defendant. Plaintiff then filed a general motion for a new trial.

The case is stated in the opinion.

George F. and Leroy Haley, for plaintiff.

James A. Edgerly and George W. Hanson, for defendant.

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

PEABODY, J. This action is assumpsit for money had and received brought to recover a sum of money alleged to have been paid under a mistake.

The verdict was for the defendant and the case is before the law court on the plaintiff's motion for a new trial.

The plaintiff was the widow of Samuel Morrison, late of Sanford, Maine, who died in 1895. He left by his will, after payment of his debts, funeral charges, and expenses of administration, and a legacy of $50 to his granddaughter, all his estate to his widow and his son, Fred L. Morrison, while they both lived, and the remainder to the survivor, or if his son first died leaving children his share was to vest in them. The son died in 1902 leaving no issue, but a widow, the defendant, to whom by his will he gave his entire estate.

The property which passed to the plaintiff by the will of Samuel Morrison consisted of a farm in Sanford of the value of about $3,000 and farming stock and tools and other personal property; that which passed to the defendant by the will of Fred L. Morrison consisted of a small lot of land in Sanford of the value of about $50 and some personal property, a part of which being farming stock and tools. The plaintiff resided with her son and his family on the homestead farm after her husband's death and she continued to live on the place with the defendant several months after the son's death. It was mutually decided to dispose of the homestead farm and the stock and farming tools on the same, and the lot of land owned by Fred L. Morrison at his death, and the plaintiff and defendant made a conveyance of the property by a deed signed by both to Benjamin C. Jordan for the sum of $4,200. Mr. Jordan paid one-half of the consideration to each of the grantors as requested by them.

The foregoing facts are not in dispute; but there is a material conflict of the testimony which bears upon the precise issues upon which the rights of the parties in this action depend. The plaintiff claims that she is entitled to the money paid by Mr. Jordan to the defendant by her consent, by reason of a mistake in reference to her title under her husband's will to the property conveyed. The nature and cause of the mistake she explains by her testimony and other evidence which she offers. This evidence tends to show that her son had in his possession a copy of the Samuel Morrison will which she had only read casually once or twice, and that after his death the defendant told her that their interests were equal as she had suc-

ceeded to the share of Fred L. Morrison by his will; and that she believed at the time of the conveyance that she was disposing of one-half of the property only, and that the defendant was disposing of the other half in her own right.

Assuming this explanation to be correct and the facts to be as she alleges, the plaintiff claims that she would be entitled in this action which is based upon equitable principles, to recover the money paid to the defendant for two reasons, namely: First, because in her acts she relied upon the representations made by the defendant. The daughter-in-law standing in a relation of confidence toward her could not retain an advantage gained by misrepresentation even if made through mistake of facts of which she had equal means of knowledge with her. *Jordan* v. *Stevens et als.* 51 Maine, 78; *Pickering* v. *Pickering*, 2 Beav. 31; *Moore* v. *Copp*, 119 Cal. 429. Second, because in legal effect, by joining in the deed with the defendant, she conveyed property which belonged to herself but which she supposed belonged to the defendant. *Bingham* v. *Bingham*, 1 Ves. (Sen.) 126; *Lansdown* v. *Lansdown*, Mosely, 364; *Pusey* v. *Desbouvrie*, 3 P. Wms. 315; *Wheeler* v. *Smith*, 9 Howard, 55; *Skillman et ux.* v. *Teeple et als.*, 1 N. J. Eq. 232; *Goff* v. *Gott*, 37 Tenn. 562; *Sheridan* v. *Carpenter*, 61 Maine, 83. The case presented by the plaintiff is distinctly different from those where money was paid voluntarily under circumstances consistent with reason and equity, as in *Norris* v. *Blethen*, 19 Maine, 348; *Norton* v. *Marden*, 15 Maine, 45; *Parker* v. *Lancaster*, 84 Maine, 512. She claims it was not a voluntary payment of money, but an inadvertent conveyance of property which the plaintiff supposed she did not own, but which she supposed was owned and was being conveyed by the other grantor in the deed; that the defendant could not in equity and good conscience receive and retain the proceeds of property which she knew she did not own as it would be not only contrary to justice but good morals.

But the defendant's version of the transaction presents a different case. Her testimony and other evidence introduced tend to show that the plaintiff acted of her own motion with full knowledge of her title to the whole of the homestead farm, and that in directing the division of the proceeds of the conveyance she made a gift to her of

one-half, and that the plaintiff did this from the consideration of their intimacy and of her affection for her son who had, during his life, owned the property equally with her.

The burden of proof rested upon the plaintiff. The jury sustained the defendant's claim that the subject of this suit was a gift to her. It must be assumed that the presiding Justice gave such instructions as were required to direct their attention to the issues involved in the case; whether the plaintiff knew her legal rights under her husband's will when the conveyance was made; and whether in the attendant circumstances under which the money was paid and received there was any element of fraud, misrepresentation or mistake. The verdict is not shown to be unwarranted by the weight of evidence.

Motion overruled.

HERBERT J. BANTON *vs.* OMAR HERRICK.

Penobscot. Opinion January 27, 1906.

Real Action. Recorded Deeds. Title. Directed Verdict. No Exceptions. Adverse Possession. Constructive Disseisin. R. S., c. 106, § 38.

1. As between two titles by recorded deeds of real estate, the older is the better title.
2. When in a real action a verdict is directed for one party as to part of the land demanded in the action and the other party does not except, the verdict as to that part of the land will be assumed to be required by the evidence.
3. When an entry is made upon a specific lot of land (not being a wood lot pertaining to a farm under R. S., chapter 106, section 38) and a part is occupied without any recorded claim of title, a title gained by such occupation is limited to the part actually occupied; but when such entry and occupation are under a recorded deed of the whole lot showing a claim of title by record to the whole lot, a title gained by such occupation extends over the whole lot described in the deed, in the absence of controlling circumstances to the contrary.

4. The above rule of constructive disseisin was in force prior to the enactment of the statute R. S., chapter 106, section 38, and is not limited by statute. It is not limited to farms and wood lots attached to farms.
5. In this case a lot of 110 acres was entered upon and a part occupied under a line of recorded deeds of the whole lot. The occupation of the part was found by the jury to be of sufficient character and duration to constitute a title by disseisin to that part. There were no fences or other boundaries between that part and the rest of the lot. *Held:* that the title acquired by disseisin covered the whole lot.

On exceptions by defendant. Sustained.

Real action brought to recover a parcel of land situate in the town of La Grange, in Penobscot County and described in plaintiff's writ as lot numbered thirty-two (32) north of the Board Eddy road, so called, in that part of La Grange called the Hammond tract, containing one hundred and ten (110) acres and numbered according to the plan and survey of Jedediah Herrick. Formerly this lot was wild land all wooded except a few acres of open meadow land near the middle. This meadow land had been improved by the defendant.

The plea was the general issue with a brief statement "that defendant, his predecessors, and grantors have been in continuous occupation and possession of the premises described in plaintiff's writ and declaration, holding same under claim of title, exclusive of all other rights adversely to the pretended title of the plaintiff for more than twenty years, last past before the commencement of this action."

After the evidence on both sides had been closed, the presiding Justice instructed the jury as follows: "In my view of the case there is no issue of fact to be passed upon by the jury. The plaintiff rests his case without putting in any testimony in rebuttal to all this parol testimony which has been introduced by the defendant. In my view of the case and as to that the plaintiff's counsel agrees, there is sufficient evidence to show that the defendant has acquired title in that part of the demanded premises as is meadow land, by making improvements, by being in occupation and possession for much more than twenty years, and for much more than twenty consecutive years; not that he has every year necessarily cut the grass that in my view is not necessary, if he has occupied that which might be referred to as cultivated land as a person ordinarily does his own land of that same character.

"But now in regard to the wild land upon which it appears that the defendant and his predecessors in title have occasionally cut some lumber and perhaps in one or possibly two instances in recent years, may have cut a little fire-wood; assuming all of this testimony upon the part of the defendant to be absolutely true,—and that is our duty to assume it, because it is not controverted,—assuming that all of these witnesses who have been called by the defendant, have told the exact truth, in my view of the law the evidence is not sufficient to show that thereby the defendant has acquired title to the wild land by disseizure, by adverse possession. Upon that part of the land he has done nothing in the way of benefit or improvement; he has put nothing upon the land, when I say he, I mean he and those under whom he claims all that has been done by him and his predecessors has been to take something off of the land, more or less occasionally and more or less intermittently upon various occasions there have been undoubtedly some lumbering operations when hemlock has been cut and peeled and removed, and the same as to poplar. Assuming all these things have been done including the payment of taxes by the defendant and his predecessors that does not give him title by disseizin or adverse possession to the wild land; something more, in this state and much more is necessary, therefore, it becomes not a question of fact for you to pass upon, but a question of law for me to pass upon, and I therefore have had verdicts prepared which I direct, relieving you of all the responsibility."

In accordance with these instructions a verdict was returned for the plaintiff for so much of the land as is wild land while a verdict was returned for the defendant for so much of the land as is meadow land. Thereupon the defendant excepted.

The case is stated in the opinion.

Taber D. Bailey, for plaintiff.

T. P. Wormwood and H. H. Patten, for defendant.

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

EMERY, J. This is a real action begun in 1902. The land demanded is a lot of 110 acres and is described as "Lot No. 32,

north of the Board Eddy Road in La Grange according to the survey and plan of Jeddediah Herrick." Formerly it was wild land all wooded except a few acres of open meadow land near the middle. The plaintiff showed a record title to the whole lot from the year 1832. The defendant also showed a record title to the whole lot, but only from the year 1868. By the record, therefore, the plaintiff showed the older and hence better title, but the defendant further interposed in defense the claim of title to the whole lot by adverse possession.

The court instructed the jury that upon the evidence the defendant had acquired title to the meadow land part of the lot by occupation of the requisite character and duration, and directed a verdict for the defendant as to the meadow part of the lot. The plaintiff took no exceptions to this ruling, and hence we must consider so much as established in considering the present case.

As to the rest of the lot, the wooded part, there was no evidence that it was separated from the meadow by any fences, ditches or other artificial means, or that there was any definite line of demarcation. It was undisputed that the entry of the defendant and his predecessors in title, and their occupation of such part of the lot as they actually occupied, were under a chain of deeds duly recorded in the proper registry and covering the whole lot, No. 32. There was evidence that the defendant and his predecessors had made roads, cut wood, &c., over the most of it, and had paid taxes on the whole lot, all under claim of title for more than thirty years. There was no evidence that the plaintiff, or any of his predecessors in title, had made any entry, paid any taxes, or exercised any ownership over any part of the lot for more than thirty years. The court ruled that as to this wooded part of the lot the evidence did not make out a title by adverse possession and directed a verdict for the plaintiff for the wooded part. To this ruling the defendant excepted.

Taken by itself, without reference to the occupation of the meadow part, the occupation of the wooded part was not sufficient to warrant a verdict for the defendant; but we think the occupation of the lot cannot be so separated. The entry and occupation of the part were under a duly recorded deed of the whole lot. When an entry is

made upon a lot of land and a part is occupied without any recorded claim of title, a title by adverse possession is limited to the part actually occupied, unless it be part of a farm; (R. S., ch. 106, sec. 38) but when a lot of land is entered upon and part of it occupied under a recorded deed of the whole lot, showing a claim of title by record to the whole lot, the effect of such entry and occupation is not limited to the part actually occupied, but extends over the whole lot in the absence of controlling circumstances to the contrary.

Under our law, the delivery and recording of a deed of conveyance, at least when followed by entry upon the land described in the deed, is the equivalent of the old common law livery of seisin. That livery of seisin extended over the whole parcel enfeoffed. In the same manner the seisin conferred by a deed executed and recorded as required by our statutes extends over the whole parcel conveyed. If actual seisin of any material part under that constructive seisin of the whole parcel is of such character and duration as to ripen into a title by disseisin, that disseisin and title are of the whole parcel. It is to be assumed that the owner by the older record title knew of the entry and of the occupation of part of his land by the stranger and that it was of the character to give title by disseisin. It is also to be assumed that he knew that such entry and occupation were under a seisin conferred by a recorded deed (if such was the fact,) and that he knew of the extent of that claim of seisin. He was chargeable with such notice as the public registry would give. Any record owner seeing any part of his land occupied by another in such manner as would give title by disseisin if sufficiently long continued, is bound to ascertain from the public registry whether such occupation is under a recorded claim of title, and also the extent of that claim. If, knowing all this, he makes no effort to interrupt such occupation or claim until after twenty years he has no cause of complaint that the law protects the occupant in his claim to the whole parcel.

This rule did not originate in the statute, R. S., ch. 106, sec. 38, extending the effect of actual occupation of improved land over uncultivated land or woodland when used as part of a farm. That statute extends the effect of entry and occupation and improvement

by a mere disseisor not having any color of title by record. Without the statute, any title acquired by such disseisor would be limited to the part actually occupied. It would not extend over woodland, etc. With the statute, such disseisor in the open, notorious and exclusive possession of a farm may hold the woodland part of the farm as well as the farm home and fields. The rule as to the effect of entry and occupation of a part of a lot under a recorded deed of the whole does not depend on and is not affected by that statute. It (the rule) is not confined to farms.

The foregoing propositions are established by repeated decisions of this court, and in opinions fully reasoning them out and citing many authorities. A reference to some of them should be sufficient. See *Little* v. *Megquier*, 2 Maine, 176; *Kennebec Purchase* v. *Laboree*, 2 Maine, 275; *Noyes* v. *Dyer*, 25 Maine, 468; *Foxcroft* v. *Barnes*, 29 Maine, 128; *Putnam Free School* v. *Fisher*, 34 Maine, 172; *Brackett* v. *Persons Unknown*, 53 Maine, 228. The case *Walsh* v. *Wheelwright*, 96 Maine, 174, is not in conflict, as in that case no part of the plaintiff's land had been so occupied as to give title by disseisin.

Of course, in a given case there may be facts preventing the operation of the rule cited, as where the record owner or others have also occupied the part sought to be brought under the constructive possession, or where parcels are not contiguous and it is sought to extend the occupation of one constructively over the others, or where the tract is so extensive and of such character and location as to make the rule inapplicable. In this case no such facts appear. The judgment must be that the defendant's exceptions are sustained.

Exceptions sustained.

MICHAEL SERETTO

vs.

ROCKLAND, SOUTH THOMASTON & OWL'S HEAD RAILWAY.

Knox. Opinion January 26, 1906.

Action. Debt. Indebitatus Assumpsit. Damages. Recoupment. Contracts. Substitution. Estoppel. Loss by Idleness of Workmen. Insurance by Contractor.

The general rule is that debt lies wherever indebitatus assumpsit will lie.

While generally used for the recovery of a precise sum due under simple or special contracts, yet the action of debt may be maintained for a quantum meruit or a quantum valebat.

By counting in debt, a plaintiff's right to recover is restricted to the sums alleged to be due by the terms of the contract.

If an action of debt is brought on a quantum meruit or a quantum valebat, it is as available to the defendant to show any facts bearing upon the question of what the work done by the plaintiff was reasonably worth or what the goods sold by the plaintiff were reasonably worth as if the action had been covenant broken or assumpsit.

In determining what sums, if any, are due to a plaintiff, in an action of debt he is limited in his proof to the specifications of his claim, and against these items the defendant has the right to introduce counter proof.

If the failure of a plaintiff contractor to fulfill a contract was not caused by the fault of the defendant and any damages have resulted, they may be offered by way of recoupment to reduce the compensation to which the plaintiff contractor would otherwise be entitled to recover; but if such plaintiff contractor was prevented or excused by the fault of the defendant from performing the contract he would be entitled to recover such sums as had become due at the date of his writ according to his account annexed or otherwise properly specified in his writ.

When it is mutually covenanted that installments to be paid by a defendant to a plaintiff contractor for work done on a railroad shall be determined by an engineer of the defendant designated by name, and the defendant afterwards substitutes another engineer for the one designated and the plaintiff contractor acquiesces in such substitution, the estimate and certification of the work as it progresses made by the substituted engineer is binding upon the parties, and the defendant by whose acts the substitution is made is estopped from denying the authority of the substituted engineer.

When loss to a plaintiff contractor by reason of the enforced idleness of his workmen appears to be established as the result of the defendant's fault and is clearly due within the terms of the contract, recovery therefor can be had.

When by the terms of a written contract a plaintiff contractor is required to maintain insurance against accidents sustained by any persons in connection with the work embraced in the contract, and the contract calls for "extra work" as well as general work, such insurance must be wholly maintained by such plaintiff contractor at his own expense.

The case at bar was an action of debt brought by the plaintiff to recover certain sums alleged to be due him under a written contract under seal for the building of an electric railway and the work under which contract was abandoned by the plaintiff before its completion. *Held:* that the plaintiff is entitled to recover for general work $8166.67; for extra work claimed, less the amount of liability insurance, $5881.87; for loss by idleness of his workmen $1152; for lumber sold defendant $468.24.

On report. Judgment for plaintiff.

Action of debt brought by the plaintiff to recover certain sums alleged to be due him under a written contract under seal for the building of an electric railway, the work under which contract had been abandoned by the plaintiff before its completion. The plaintiff declared in debt by two counts, one based on the items of an account annexed, and the other for goods bargained and sold, money lent, money paid, money received and money due upon an account stated. Under the general count the plaintiff specified the nature of the indebtedness.

At the conclusion of the testimony offered by the plaintiff it was agreed to report the case to the Law Court and that court, "upon so much of the evidence as is legally admissible, to render such judgment as the rights of the parties require."

The case is stated in the opinion.

Reuel Robinson, for plaintiff.

Arthur S. Littlefield, for defendant.

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

PEABODY, J. This action was brought by the plaintiff to recover certain sums alleged to be due him under a written contract for the

building of an electric railway. The case comes before the law court on report.

The work was commenced by the contractor about the middle of April, 1904, and was abandoned by him about the ninth day of July of that year, before it was fully completed. The contract was executed by the parties under seal. The plaintiff declares in debt by two counts, the first being based upon the items of an account thereto annexed amounting to fifteen thousand nine hundred sixty-eight and eight one hundredths dollars ($15,968.08), and the second for like amount for goods bargained and sold, money lent, money paid, money received and money due upon account stated. Under the general count the plaintiff specifies the nature of the defendant's indebtedness to him. By counting in debt the plaintiff's right to recover is restricted to certain sums of money alleged to be due by the terms of the contract, as recovery for damages resulting from a breach of its covenants would require a different form of action.

It is admitted by the plaintiff that the contract was not completed, but he justifies its non-fulfillment by the fault of the defendant. The defendant claims that the plaintiff, without just cause, abandoned the work and did so expressly because it did not yield to the imposition of a condition which was not a part of its obligation; and it alleges, as a further defense to the action, that the plaintiff has not proved performance of such part of the work as entitled him to any instalment of the stipulated compensation.

If the failure of the plaintiff to fulfil the contract was not caused by the fault or default of the defendant and any damages have resulted, they may be offered by way of recoupment to reduce the compensation to which the plaintiff would otherwise be entitled, 9 Cyc. 686, but if he was prevented or is excused by reason of the fault of the defendant from performing the contract, he would be entitled to recover such sums as had become due at the date of the writ according to the account annexed, or specified under the second count in the writ. *Jewett et al.* v. *Weston*, 11 Maine, 346; *Norris* v. *School District*, 12 Maine, 293; *Atkinson* v. *Brown*, 20 Maine, 67; *Andrews* v. *Portland*, 35 Maine, 475.

It is suggested, as a technical defense to this action, that the plain-

tiff has misconceived his remedy, even if there is merit in his claim, that it should have been assumpsit under the common counts, or covenant broken on a count declaring on the special contract. But the plaintiff upon his theory replies that in an action of debt he can recover the definite sums due under the special contract, whether for general work, extra work and materials, so far as the construction of the railroad has progressed, and for loss sustained by him on account of the enforced idleness of his workmen, as provided in the contract. The general rule is that debt lies wherever indebitatus assumpsit will lie. *Larmon* v. *Carpenter*, 70 Ill. St. 549; *Van Deusen* v. *Blum*, 18 Pick. 229; *Veazie* v. *Bangor*, 51 Maine, 509; *Allard* v. *Belfast*, 40 Maine, 369; *McVicker* v. *Beedy*, 31 Maine, 314; *Portland* v. *Atlantic & St. Lawrence R. R.*, 66 Maine, 485; *Norris* v. *School District*, supra. While this action is generally used for the recovery of a precise sum due under simple or special contracts, it may be maintained for a quantum meruit or quantum valebat. *Smith* v. *First Cong., etc.*, 8 Pick. 178; *Nat. Exchange Bank* v. *Abell*, 63 Maine, 346. It would, therefore, be as available to the defendant to show any fact bearing upon the question of what the work done by the plaintiff was reasonably worth as if the action had been covenant broken or assumpsit. And the issue can be tried in this action whether the plaintiff did general work, or did extra work and furnished extra materials, under the terms of the contract, to be ascertained as therein agreed, and whether, upon the facts proved, there were due to the plaintiff other sums of money at the date of the writ. In determining the sums, if any, due to the plaintiff he is limited in his proof to the specification of his claim, and against these items the defendant had the right to introduce counter proof. *Gooding* v. *Morgan*, 37 Maine, 419. The defendant offers no evidence, but relies upon the facts to which the plaintiff is limited by his form of action and the specification of his claim.

By the terms of the contract the plaintiff was to construct 21,920 feet of electric railway main track and 500 feet of second track, in accordance with specifications as to work and material, and extra work was to be done, constituting part of the construction of the railroad to which the provisions of the contract were to apply as fully

as to the general work specified therein. The defendant was to pay for the completed work $17,500 in instalments every thirty days as the work progressed, to the extent of eighty-five per cent. thereof, estimated and certified in writing by the engineer of the railroad, Howard C. Forbes. There are provisional agreements which definitely authorize the engineer to complete the contract if the work is abandoned by the contractor, or unnecessarily or unreasonably delayed, and for adjusting compensation under such conditions; and also providing for indemnifying the contractor for any loss occasioned through the fault of the railway by not being able to deliver materials, or in any other respect failing to carry out its part of the agreement.

The report shows that a bill for extra work, rendered by the contractor, amounting to $1353.02, another for extra work amounting to $1611.02, a bill for regular contract work amounting to $4958.33, estimated and certified by the engineer, were paid. The controversy in this suit relates to the sums alleged to be due subsequently, during the further continuance of the work, from May 21st to about the first of July, 1904, which have not been paid. The first of the unpaid accounts was for extra work, amounting to $2016.80, under date of June 4, 1904, certified by Mr. Bowers, who acted as the engineer of the railroad after the retirement of Mr. Forbes. The second was for extra work, amounting to $2141.47, under date of June 18, 1904, and the third account, dated July 2, 1904, was for extra work, amounting to $1922.59, the two last being certified by Mr. Keene, then acting as the engineer of the railroad. The plaintiff claims also to recover the balance of amount due on general work, under an estimate made by Mr. Keene and reported in writing to the company June 24, 1904, viz. $13,125, less amount paid on account of general work, $4958.33.

The contract between the parties provided, among other things, "Whenever the word 'engineer,' or a pronoun in place of it, is used herein, it shall be and is mutually understood to refer to Howard C. Forbes, 4 State Street, Boston." And it was further provided, "For completing the electric railway as herein specified the sum of Seventeen Thousand Five Hundred Dollars ($17,500,) which shall

be in installments every thirty (30) days as the work progresses to the extent of 85 per cent. (85 per cent.) of the estimates of the work done, prepared and certified in writing by the engineer, the remaining 15% shall be due ten (10) days after the work is completed upon the inspection and acceptance in writing by the engineer." "For all extra work done and extra materials furnished by written order of the engineer, for which no price is set in written order, its actual and reasonable cost to the contractor as certified by the engineer, plus ten per cent. (10 per cent.) of said cost, which sums shall be due in installments of every 14 days as the work progresses, to the full amount of the estimates of the value of work done, prepared and certified in writing by the engineer."

To entitle the plaintiff to recover he must show performance of the contract on his part, or excuse for its non-performance. He is required to prove, in the manner agreed upon, that these items were due when the suit was commenced. It was mutually covenanted that the installments to be paid by the defendant to the plaintiff should be determined by the engineer of the railroad company designated by name. His estimate and certificate would be binding upon both parties, in the absence of fraud, while he continued to act in the capacity of engineer. *Mar. & Pot. R. R. Co.* v. *March*, 114 U. S. 549; *Condon* v. *South Side R. R. Co.*, 14 Gratt. 302; *Howard* v. *All. Val. R. R. Co.*, 69 Pa. St. 489; *McCauley* v. *Kellar et al.*, 130 Pa. St. 53.

It appears that Mr. Forbes commenced to act as engineer in the construction of the railroad with Mr. Bowers as his assistant, that about the middle of May, 1904, he was discharged, and upon his retirement Bowers was specially authorized by the president of the company to act according to his judgment relative to the cuts and fills in the construction of the railroad, and in general was recognized as the chief engineer. The superintendent of the plaintiff was informed by the president of the company that Mr. Bowers had been appointed engineer, and that Mr. Forbes was to certify no more bills. Mr. Bowers left the employment of the defendant company and Mr. Keene, who had been his assistant, was, on June 21, 1904, given general written authority by the president of the company to act as

engineer, and he continued to act in that capacity until the work was suspended. These successors to the original engineer made the estimates and certified thereto as has been stated. Their appointment by the chief officer of the railroad company, the notice given to the plaintiff and his acquiescence in the substitution constituted a waiver by both parties of the conditions of the contract in reference to the estimate and certification of the work as it progressed, and is binding upon them. There was an implied agreement that upon any contingency which prevented the original engineer from continuing to act, a different method should be adopted for determining the instalments which should become due to the plaintiff.

The defendant could not, by removing the engineer, bar the plaintiff's right of recovery. Such a construction would place a premium on wrong doing. *Ricker* v. *Fairbanks*, 40 Maine, 43; *Haynes* v. *Fuller*, 40 Maine, 162; *Emerson* v. *Coggswell*, 16 Maine, 77; *Bank* v. *Curtis*, 24 Maine, 36. There might have been objection on the part of the plaintiff to the successors of the engineer designated in the contract, but it is shown by his acts that he assented to the substitution. But the defendant, by whose acts the substitution was made, is estopped from denying the authority of these engineers.

It is insisted by the defendant that it was a condition precedent to the plaintiff's right of recovery that the estimates and certificates should be made in the manner stated in the contract. This would be true if any definite method or form is required, unless the condition is waived or excuse for its omission is shown. Mc*Namara* v. *Harrison*, 81 Ia. 486; *Michaelis* v. *Wolf*, 136 Ill. 68; 1 Beach on Contracts, secs. 100, 101, 102. The requirement as to the estimates and certificates of the engineer is simply that the contract price for the general work should be due "in instalments every thirty (30) days as the work progresses to the extent of 85 per cent. (85 per cent.) of the estimate of the work done, prepared and certified by the engineer," and the written reports of the engineers of their estimates appear to us sufficiently explicit to comply with the terms of the contract. *McCauley* v. *Kellar et al.*, supra; *Drhew* v. *Altoona*, 121 Pa. St. 40; *Ricker* v. *Fairbanks*, supra. It would appear, therefore, that these items of work and materials are proved in the manner

required by the contract and would be recoverable, unless defeated by the failure of the plaintiff to fulfil his contract without fault on the part of the defendant. The evidence shows that the failure of the defendant to pay the instalments found due by the engineers was the reason why the work was abandoned by the contractor. It is argued that the plaintiff required security for future instalments in addition to the payment of present indebtedness not authorized by the terms of the contract; but we think that immediate payment of what was due was separable from a condition which the defendant might refuse, and, after demand, which the evidence shows was repeatedly made by the plaintiff, he was justified in discontinuing the work. So far as it had progressed he must be regarded as having fulfilled the contract and may recover the instalments of the general work due, together with the fifteen per cent contingently deferred, and the sums due for extra work done and extra materials furnished, determined according to the terms of the contract.

The item of loss to the plaintiff by reason of the enforced idleness of his workmen, appears to be established by the evidence as the result of the defendant's fault, to the amount specified in the plaintiff's claim, and is clearly due within the terms of the contract.

Another item of the plaintiff's claim in controversy is the amount paid for insurance against accidents which is required to be maintained by the contractor at his own expense. It was to cover all work "embraced in this contract." The plaintiff claims that the employer's liability insurance which he is required to maintain applies only to the general work, and that the amount paid for insurance claimed in this action relates only to extra work and is an element of expense constituting a part of the actual cost. But the language of the contract requires that the insurance in connection with the extra work, as well as the general work, shall be maintained at the expense of the contractor. This is the necessary implication from the provision relating to extra work when ordered by the engineer, that "all and singular the provisions of this contract shall apply to said extra work as if the same were specified in the contract." The amount of this item must be disallowed.

Upon these considerations we hold that the plaintiff should recover

the balance due for general work, $8166.47, the aggregate for extra work claimed less the amount of liability insurance, $5881.87, loss by idleness of his workmen, $1152, and lumber sold railroad company, $468.24. Judgment should be entered accordingly.

Judgment for plaintiff for $15,668.58.

CITY OF AUGUSTA *vs.* AUGUSTA WATER DISTRICT.

Kennebec. Opinion February 7, 1906.

Augusta Water District. Public Municipal Corporation. Exemption from Taxation. Special Laws, 1903, c. 334, Special Laws, 1905, c. 4; R. S. 1883, c. 46, § 55. R. S., c. 9, § 6, cl. I; c. 47, § 96.

The Augusta Water District is a public municipal corporation, and by virtue of Revised Statutes, chapter 9, section 6, its property, appropriated to public uses, is exempt from municipal taxation.

On report. Judgment for defendant.

Action of debt to recover taxes assessed against the defendant by the City of Augusta for the municipal years of 1904 and 1905. The facts were agreed upon by the parties and the case reported to the Law Court.

The case is stated in the opinion.

W. H. Fisher, for plaintiff.

Heath & Andrews, for defendant.

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

SAVAGE, J. Action to recover taxes assessed in the years 1904 and 1905.

The Augusta Water District was created a body politic and corporate by chapter 334 of the Private and Special Laws of 1903. It embraced the territory and people within seven of the eight wards in

the city of Augusta. It was created "for the purpose of supplying the inhabitants of said district and of the towns of Chelsea, Vassalborough, China and Manchester, and such municipalities, together with the city of Augusta, with pure water for domestic and municipal purposes." By the original charter and by the supplementary act, chapter 4 of the Private and Special Laws of 1905, it obtained the right of eminent domain for taking land, water and water rights, including the plant of the Augusta Water Company. It also obtained the right to lay its pipes and aqueducts in the public streets. The charter provided that all the affairs of the district should be managed by a board of trustees, composed of three members to be chosen by the municipal officers of the city of Augusta, and to this board of trustees was given the power to ordain and establish necessary by-laws. For the accomplishment of the purposes of its charter, the district was authorized to issue its bonds, which were declared to be a legal obligation of the district, and the district itself was declared to be a quasi municipal corporation, within the meaning of R. S., 1883, ch. 46, sect. 55, which provides that "the property of the inhabitants of counties, towns, cities and other quasi corporations may be taken to pay any debt due from the body politic, of which they are members." The board of trustees was authorized to establish rates for water, to provide revenue to pay running expenses, and for extensions and renewals, to pay the interest on the indebtedness of the district, and to provide for a sinking fund. If any surplus remained, it was to be paid to the city of Augusta. The charter was to take effect only when approved by a majority vote of the legal voters within the district, voting at an election specially called for that purpose.

By proceeding under its right of eminent domain, the defendant has acquired the entire plant, franchises and other property of the Augusta Water Company. It is admitted that all the property described in the assessments was acquired through such eminent domain proceedings, and that the property so assessed was and is used by the defendant in performing its duties under its act of incorporation, and that all of it, when assessed, was necessary for such use.

The sole question presented by the case is whether the defendant's property, so assessed, was legally taxable by the City of Augusta in either of the years 1904 or 1905. The defendant contends that it was not, on the grounds, (1) as to 1904, that the title to the property had not vested in it on April 1, 1904; (2) that, in the absence of statute authority, the property of one public municipal corporation, which it claims itself to be, cannot lawfully be taxed by another; and, (3) that its property is expressly exempted from taxation by R. S., ch. 9, sect. 6, which provides that "the property of any public municipal corporation of this state, appropriated to public uses" is exempt from taxation. In our opinion a consideration of the last contention will dispose of the whole case.

No question is raised but that the statute referred to is constitutional, and we think none can be raised successfully. The only matter of inquiry remaining is whether the defendant is a public municipal corporation within the meaning of the statute. If it is, its property is exempt, of course, from municipal taxation.

It is beyond question that the state, in the exercise of its governmental powers, may create subdivisions of its territory and people, and impose upon the subdivisions the performance of public duties for the good and welfare of the people. Such subdivisions are merely the instrumentalities or agencies appointed by the state to fulfil some part of its own functions, within a limited territory. They are public instrumentalities, or agencies, both because they are doing the state's proper work, and because they are concerned with public uses for the general public benefit. Among the public functions which the state thus assigns to such agencies are commonly those relating to the education of children, the construction and maintenance of ways, and of drains and sewers, the maintenance of good order, the furnishing of protection against fires, and, undoubtedly, the furnishing a supply of pure water for domestic and public purposes. Among the public agencies to which is committed the duty of performing these public functions are cities and town, village corporations, fire districts, water districts, and formerly, in this state, school districts. These territorial subdivisions may be conterminous with city or town limits, or they may embrace more or less than the territory of a city or town.

The character of a subdivision depends not upon the limits of its territory, but upon the nature of its public duties, whether municipal or not. For the term municipal relates not only to a town or city, as a territorial entity, but it also pertains to local self government in general, and in a broader sense to the internal government of a state. Standard Dictionary, Municipal. A town or city is wholly a creature of the state, and wholly subservient to the state, and for that reason is not strictly a municipal corporation, as interpreted by the common law. It is rather a quasi municipal corporation. *Hooper* v. *Emery*, 14 Maine, 375; R. S., ch. 47, sect. 96; *Riddle* v. *Proprietors*, 7 Mass. 169. Nevertheless, a city or town is a municipality, and in this state, and so in all New England at least, it is, in common parlance, and by general understanding, a municipal corporation. 1 Dillon Municipal Corporations, 4th Ed. sect 20. It is a *public* municipal corporation, for being a municipal corporation, it is, ex vi termini, necessarily a public one. It performs public municipal duties.

But if the education of children, the care of roads, the furnishing of fire protection, and of water for domestic and public purposes, are public municipal functions, when performed by cities or towns, it is difficult to see why they should be otherwise, when performed by local subdivisions of territory and people, greater or smaller than a city or town. A body politic and corporate, created for the sole purpose of performing one or more municipal functions, is a quasi municipal corporation, and as we have said, in common interpretation, is deemed a municipal corporation. The phrase "municipal corporation" is now generic, and, we think, it should be held to include municipal corporations proper, and such quasi municipal corporations, as cities, towns, school districts, water, fire and other municipal districts. That it is to be so held has been recognized again and again in this state. In *Camden* v. *Camden Village Corporation*, 77 Maine, 530, it was held that a village corporation or district was one of the means or instrumentalities created and used by the state in the exercise of its governmental functions, and that possessing and exercising those powers of a public character usually pertaining to "*other municipal corporations*," such as cities and

towns, its property appropriated to public uses was not taxable by the town within whose limits, the property was situated. In *Kennebec Water District* v. *Waterville*, 96 Maine, 234, a water district in all essential respects similar to the defendant, was declared to be a quasi municipal corporation. The court said: "It is created not only a body corporate, but also a body politic. Its purposes are purely public. It is invested with the power and charged with the duty of furnishing the territory and the people within its limits a supply of water. Its purposes and duties in this respect are as extensive as could be conferred by the legislature upon a municipality. It is an agency, so far as supplying water is concerned, in municipal government." So in *Mayo* v. *Dover & Foxcroft Village Fire Company*, 96 Maine, 539, the defendant, which was in reality a fire and water district, and which was incorporated and authorized to raise money for fire protection and for a supply of water for fire and other municipal purposes, was denominated a public corporation, also a municipal corporation. And so treating it, its power, under an act of the legislature, to purchase and pay for, by money raised by taxation or otherwise, an existing water works system for the purpose of supplying water for its own municipal wants and for the domestic use of its own inhabitants, was upheld on the ground that the sovereign power of the state may authorize a municipal corporation, as one of the agencies of government, so to do.

And in this connection, it should not be overlooked that the legislature in section 9 of the charter has expressly classed the defendant among the quasi public corporations, like cities and towns, the property of whose inhabitants may be taken to pay the debts of the body politic, as provided in R. S., 1883, ch. 46, sect. 55; R. S., 1903, ch. 47, sect. 96.

Elsewhere, the courts have used the term municipal corporation as applicable to a county, *Tippecanoe County* v. *Lucas*, 93 U. S. 108; an irrigation district, In re Madeira Irr. Dist. 92 Cal. 296; 27 Am. St. Rep. 106; a park district, 51 Ill. 37; a sanitary district, *Wilson* v. *Trustees*, 133 Ill. 443; to commissioners of public ponds, *St. Louis* v. *Shields*, 62 Mo. 247; a park commissioner, 63 Minn. 125, and many others.

We do not think it necessary to discuss the specific clauses in the defendant's charter showing that its purposes and powers were both public and municipal. Construing the charter as a whole, it clearly follows from what we have already said that the defendant district is to be regarded as a public, municipal corporation, and we hold that it is such within the meaning of R. S., ch. 9, sect.6, cl. I, exempting the property of such corporations, when appropriated to public uses, from municipal taxation. The taxes in question were assessed in disregard of that statute, and this action to recover them cannot be maintained.

Judgment for the defendant.

In Equity.

WILLIAM R. ALLAN *vs.* NELSON S. ALLAN et als.

Washington. Opinion February 7, 1906.

Taxation of Costs in Equity Proceedings. Practice Established. Chancery Rules. Statute 1867, c. 89. R. S., c. 79, §§ 11, 12.

I. Usually it rests in the sound discretion of the court whether costs in equity shall be awarded to either or neither party.

2. In the absence of any statutory provision, or rule of court, if costs are awarded, the court will exercise its discretion as to the specific items which may be allowed.

3. There are no terms of court in equity proceedings. On motion of either party a cause in equity is set down for a hearing at such time as the court shall order.

4. In equity, costs for travel and attendance do not depend upon terms of court, but only upon hearings, whether they be held during a term or otherwise.

5. A party to whom taxable costs are awarded is entitled to an allowance of two dollars for each day's attendance at a hearing before a justice, or

a master, and of thirty-three cents for every ten miles travel, to attend such a hearing, not exceeding forty miles, unless he makes affidavit that he actually traveled a greater distance for the purpose of attending such hearing.

In equity. On exceptions by defendants. Sustained.

Exceptions to the ruling of a single justice affirming, on appeal therefrom, a clerk's taxation of costs in an equity proceeding.

The case is fully stated in the opinion.

B. B. Murray, for plaintiff.

C. B. & E. C. Donworth, for defendants.

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

SAVAGE, J. Exceptions to the ruling of a single justice affirming, on appeal, a clerk's taxation of costs in equity. The original bill was filed in the clerk's office May 6, 1901. Subpoena issued returnable at the following August Rules, at which time the defendants appeared. Their answer was filed October 3, 1901. A preliminary injunction was granted, without objection, October 11, 1901, in term time. On March 24, 1902, the plaintiff filed an amendment to his bill, withdrawing the original allegations, and praying for relief upon entirely new and different grounds. The amendment was allowed without objection, at the following April term, upon payment by plaintiff of one bill of costs. The defendants filed their answer to the amended bill, November 5, 1902, and replication was filed at the April term, 1903. At the October term, 1903, an interlocutory decree was entered by consent of parties, sending the cause to a master for an accounting. A hearing was had by the master December 22, 1903, and the master's report was filed at the April term 1905, when objections were filed by the defendants to the acceptance of the report for defects appearing therein, and the cause was thereupon recommitted to the master. The master's amended report was filed June 8, 1905. The cause was finally heard by a single justice, June 9, 1905, and a final decree was filed August 2, 1905, in which it was adjudged that "the plaintiff recover his taxable costs against the defendants." In taxing the costs, the clerk allowed the plaintiff

for travel and attendance, as in actions at law, for thirteen terms of court, that being the whole number of terms of court in that county between the filing of the bill and the date of the final decree. No other allowance for travel and attendance was made. The present controversy relates solely to the costs taxed by the clerk for travel and attendance, as stated above.

There is no general statute regulating the recovery of costs in suits in equity. There are some instances where the statutes provide that costs *shall* be awarded, as for example, in bills for redemption from mortgages, under some conditions, the plaintiff is "entitled to judgment for redemption *and costs*. But usually it rests in the sound discretion of the court whether costs shall be awarded to either or neither party, as equity shall require. *Stilson* v. *Leeman*, 75 Maine, 412. As to the specific items which may be allowed, if costs are awarded, the court will exercise its discretion, in the absence of any statutory provision or rule of court. As was said by the court in answer to the requirement of chapter 89 of the Laws of 1867, that the Justices of the Supreme Judicial Court should "prepare a schedule or tariff of legal taxable costs, as provided by statute":— "There are very many services important and necessary in the administration of justice, and for which those rendering them are justly entitled to compensation, when no fees are established by statute, and where none can well be established in advance . . . In such cases when no fees are established, or 'authorized by statute,' the court claims and exercises the right of supervising charges, if objected to and found unreasonable, and of making suitable deductions." 55 Maine, 595. And to their answer the justices appended a schedule of "Fees in Equity Cases" which were proper to be allowed, but for which there was no statute provision.

From time to time, the court, in its Chancery Rules, has established schedules of fees which may be taxed as costs in equity suits, and which, so far as applicable, are controlling, 72 Maine, at p. 600; 82 Maine, at p. 605.

In the taxation before us the clerk seems to have followed, by analogy, the rule in suits at law, where the allowance for travel and attendance is regulated and measured by the number of terms of

court while the action is pending. There are however no terms of court in equity proceedings, except that process is made returnable to the first day of a term of court, in case the bill is inserted in a writ of attachment, and may be made so returnable when a clerk issues a subpœna as a matter of course. The subpœna may be made by the clerk, returnable at a rule day, or it may be made returnable on any day in or out of term, by order of court R. S., chap. 79, sect. 12. Rule days, monthly in each county, are established by the court "for the proper despatch of equity business, when and where all processes shall be returnable, unless otherwise ordered by the court, or directed by statute." Chancery Rule III. But now, by statute, as formerly by rule of court, (72 Maine, p. 584,) the court is always open in each county for equity proceedings, except upon days in which, by law, no court is held. R. S., chap. 79, sect. 11. It is open every juridical day, rule days and term time included. When ripe for hearing on interlocutory or on final issues, a cause is set down on motion of either party, for a hearing, at such time as the court shall order. For convenience merely, in many counties, equity causes are usually heard in term time. In other counties they are rarely so heard. As a matter of practice, in some counties, at least, the equity causes are not carried upon the term docket. They are not called as a part of the continued docket. They are not, in any event, a part of the term's work, except as they may be set down for hearing by the court, for its own convenience, or the accommodation of parties, or where issues are presented for the determination of the jury. It follows that costs for travel and attendance do not depend upon terms of court, but upon hearings. This conclusion is not inconsistent with the decision in *Stilson* v. *Leeman*, supra, where it is held that "travel and attendance should be taxed as in actions at law *when the case is heard or made up at a regular term of court.*" In that case too an item for attendance before a single justice, not in term time, was disallowed, for the reason that the party finally awarded costs did not prevail at that hearing, the implication being that if he had prevailed he would have been allowed for that attendance.

The only rule in chancery which touches an allowance for travel

or attendance, provides that "upon exceptions to a bill or answer travel and attendance shall be taxed as follows: — for every ten miles' travel of a party to attend a hearing before one of the justices, or before a master, thirty-three cents; but no more than forty miles' travel shall be taxed in any case, unless the party shall make an affidavit that he actually traveled a greater distance for the purpose of attending such hearing; for each day's attendance at a hearing before a justice, or before a master, two dollars shall be taxed." 72 Maine, at p. 601; 82 Maine, 605. This rule is limited and relates only to the allowance for travel and attendance at hearings on exceptions to a bill or answer, even though the hearing may be before a master. For such exceptions may be referred to a master. Whitehouse Eq. Prac. sect. 464.

The practice in taxation by clerks in this state has not been uniform; but in one case only, *Stilson* v. *Leeman*, has the question of allowance for travel and attendance been presented for the determination of this court. In that case travel and attendance were taxed as in actions at law, for the reason, as it seems, that the case was heard or made up in term time. But we think the better practice, and one which we now approve, is to follow the rule established for fees at hearings on exceptions to bill or answer. The situations are entirely analogous. And by applying this rule, there will follow a single uniform practice covering costs at hearings of all kinds.

The plaintiff is entitled to no costs until after his amendment to his original bill was filed. He then started with a new bill. The case shows that the plaintiff should recover for attendance at five hearings, at two dollars each, — namely, when the cause was sent to a master, when the cause was heard by the master, when the objections to the master's report were heard, when the parties were heard by the master upon the recommittal of his report, and when the cause was finally heard by a single justice. We allow the third item, not because the plaintiff prevailed in that instance, which he did not, but because the difficulty seems to have arisen through inherent defects in the report itself.

The plaintiff is also entitled to recover for travel to these hearings,

but as the number of miles traveled is not shown in the case, we are unable to determine the amount.

Exceptions sustained. Appeal sustained. Clerk's taxation to be modified by him in accordance with this opinion.

STATE OF MAINE *vs.* ARDENIS SHUMAN.

Knox. Opinion February 12, 1906.

Criminal Pleading. Embezzlement. Indictment. Duplicity. Town Treasurer Using Town's Money for Private Purposes. R. S., c. 121, § 8.

An indictment against a town treasurer, charging that he did steal, take and carry away the money of the town which was in his possession by virtue of his office, because, as also charged, he had unlawfully embezzled and fraudulently converted the same to his own use, is not bad for duplicity.

Nor is such an indictment bad, because it is not alleged that the treasurer's term of office has expired, nor that a demand has been made upon him and that he neglects and refuses to account.

A town treasurer has no right to use the town's money for any purpose of his own whatever. If he does so use it knowingly it is a fraudulent conversion, for which he becomes indictable at once.

On exceptions by defendant. Overruled.

Indictment against the defendant, Ardenis Shuman, as treasurer of the town of Union, for the crime of embezzlement. To this indictment the defendant demurred, with leave to plead over. The demurrer was overruled, and the defendant excepted.

The indictment is as follows:

"STATE OF MAINE.

"KNOX ss.—At the Supreme Judicial Court, begun and holden at Rockland, within and for the County of Knox, on the first Tuesday of January, in the year of our Lord one thousand nine hundred and five.

The Grand Jurors for said State upon their oath present, that Ardenis Shuman of Union, in the County of Knox and State of

Maine, at Union aforesaid, in the County of Knox aforesaid, on the twenty-fifth day of April, A. D. 1904, said Ardenis Shuman then and there being a public officer, to wit, the town treasurer of the town of Union aforesaid, did by virtue of his said office, and whilst he was employed in said office, have, receive, and have in his possession and under his control, certain money to a large amount, to wit, to the amount of one thousand three hundred and seventy-nine dollars and fifteen cents, and of the value of one thousand three hundred and seventy-nine dollars and fifteen cents, of the property of the inhabitants of the town of Union aforesaid, and then and there the money aforesaid did unlawfully embezzle and frandulently convert to his own use; and that the said Ardenis Shuman in manner and form aforesaid, the aforesaid money of the property of the inhabitants of the town of Union aforesaid, feloniously did steal, take and carry away; against the peace of the State and contrary to the form of the Statute in such case made and provided.

A true bill.

E. R. BOWLER, Foreman.

PHILIP HOWARD,
Attorney for the State for said County."

Philip Howard, County Attorney, for the state.

L. M. Staples, for defendant.

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

SAVAGE, J. Demurrer to indictment charging the defendant, as town treasurer, with embezzlement. The presiding justice below overruled the demurrer, and the defendant excepted.

The defendant contends that the indictment is bad for duplicity,—that embezzlement and larceny are two distinct offenses and must be set out in separate counts. The point is not well taken. Only one offense is charged. Embezzlement or fraudulent conversion of funds by a public officer is declared by statute, R. S., ch. 121, sect. 8, to be larceny. It is not so at common law for the reason that the taking is not felonious. *State* v. *Stevenson*, 91 Maine, 107. In this indictment under the statute, it is charged that the defendant did

steal, take and carry away the money of the town which was in his possession by virtue of his office, because, as is alleged, he had unlawfully embezzled and fraudulently converted the same to his own use. The acts charged constitute statutory larceny,—one offense.

The defendant claims further that it appears that the defendant was still town treasurer when indicted, and that as a matter of law, a public officer can not be indicted during his term of office, for embezzlement, because during the term he has the legal possession and custody of the funds. It is urged that the indictment must state not only that the term of office has ended, but also that a demand has been made upon the officer and that he neglects and refuses to account. This point is not tenable. In the first place if it were otherwise tenable, it is not alleged that the defendant was in office when indicted. It is alleged that he was town treasurer April 25, 1904. Non constat, that he continued to be treasurer until January, 1905, when he was indicted.

But the defendant errs respecting the extent of his criminal responsibility for his acts. He errs, in argument at least, in regard to his rights in the town's money. It is the town's money and not his own. He has no right to use it for any purpose of his own whatsoever. If he does so use it knowingly, it is a conversion, fraudulent as to the town, for which he becomes indictable at once, as he would be for any other indictable offense. He becomes ipso facto criminally responsible, without demand or refusal to account. The law gives a town treasurer the custody of the town's money to keep, and to pay out under proper authority for town purposes, but not to use for himself, in any way whatever. His responsibility is not measured or acquitted by his ability to pay over the balance due at the end of his term, upon demand or otherwise, but it depends upon his use or misuse of the money during the term, or later. Here it is alleged that the defendant "did unlawfully embezzle and fraudulently convert" the town's money to his own use, on a day named during his term. That was sufficient, in that respect.

No other objections have been raised.

Exceptions overruled. Defendant has leave to plead over as per stipulation.

STATE OF MAINE, BY WILLIAM M. PENNELL, Libellant,

vs.

INTOXICATING LIQUORS AND VESSELS.

CITY OF PORTLAND, Claimant and Appellant.

Cumberland. Opinion February 16, 1906.

Intoxicating Liquors. Search and Seizure. City Agency. Unlawful Sale. Marked and Unmarked Vessels. Statute 1851, c. 211, §§ 1, 11. Statute 1853, c. 48, § 8. Statute 1855, c. 166. Statute 1858, c. 33, § 28. Statute 1870, c. 125. Statute 1885, c. 539, § 8. Statute 1887, c. 140, § 9. Statute 1893, c. 253. R. S., c. 29, §§ 32, 34, 47, 48, 49, 51.

1. Intoxicating liquors properly purchased for a city or town liquor agency, and in the possession of a duly appointed and qualified liquor agent, which have been taken by virtue of a search and seizure process, and libelled, if not intended for sale in violation of law, are not forfeitable, although the casks and vessels containing them are not marked in accordance with the provisions of R. S., ch. 29, sect. 34.
2. Such liquors, if contained in casks and vessels at all times conspicuously marked with the names of the municipality owning them, and of its agent, are not subject to seizure and forfeiture, even though intended for sale in this state in violation of law. Such liquors in vessels so marked are "protected" from seizure and forfeiture, by force of the statute. R. S., ch. 29, sect. 34.
3. But such liquors, if intended for sale in violation of law, and if the casks and vessels containing them are not at all times conspicuously marked as provided in the section before referred to, are subject to seizure and forfeiture, the same as any other intoxicating liquors intended for unlawful sale.

State v. *Intoxicating Liquors*, 68 Maine, 187, overruled in part.

On report. Case to stand for trial.

Search and seizure process. On the ninth day of August, A. D. 1905, one of the deputy sheriffs of Cumberland County made complaint before the Municipal Court for the city of Portland in accordance with the provisions of section 49 of chapter 29, R. S., that he had reason to believe that Charles C. Douglass, who was the then duly appointed and qualified liquor agent of the city of Portland

under section 26 of said chapter, had in his possession certain intoxicating liquors which he intended to sell in violation of law. A warrant was issued by said court in due form and a large amount of intoxicating liquors were seized upon said warrant.

Said liquors were duly libelled by Wm. M. Pennell, sheriff of said county, in accordance with the provisions of chapter 29, sections 50 and 51, and one of the municipal officers of the city of Portland duly appeared and filed a claim for said liquors in behalf of said city.

Hearing was waived in the Municipal Court and the libel taken by appeal to the Superior Court for Cumberland County. By agreement of counsel, and by direction of the presiding Justice of that court, the case was reported to the Law Court on the following agreed statement:

"This is a search and seizure process upon which certain intoxicating liquors were seized at the City Liquor Agency in Portland. The liquors in question and the vessels containing them were purchased by the Municipal officers of said city of Portland of the State liquor Commissioner from his stock at his place of business for sale under section 26 of chapter 29 of the Revised Statutes of Maine. The said liquors were pure and unadulterated and not factitious, when said liquors and vessels were in the possession and custody of Charles C. Douglass the appointed and qualified agent of said city of Portland for the sale of said liquors, who prior to said seizure had given bond as the law directs and had no interest in said liquors or in the profits of the sale thereof.

"The state will offer evidence that the said liquors were unlawfully kept and deposited with the intent to sell the same in this state in violation of law; and claims that upon proof of that fact the liquors should be adjudged forfeited even though all the casks and vessels containing them were marked in full compliance with section 34 of chapter 29, R. S.

"The state will also offer evidence that the casks and vessels containing the liquor were not marked as required by said section 34 of chapter 29, R. S.; and claims that upon proof of that fact the liquors should be adjudged forfeited even though they were not kept and deposited with intent to sell them in this state in violation of law.

"The claimant contends that the liquors are not forfeitable in this proceeding if the casks and vessels containing them were marked as required by said section 34, even though they were kept and deposited with the intent to sell the same in this state in violation of law.

"The claimant further contends that the liquors are not forfeitable in this proceeding if not kept and deposited for unlawful sale in this state, even though the casks and vessels containing them were not marked as required by section 34.

"By agreement of counsel the case is reported to the Law Court upon the foregoing statement. If the Law Court shall sustain both of the claimant's contentions, the libel is to be dismissed and the liquors returned to the claimant; if the Law Court does not sustain either or both of the claimant's contentions, case to stand for trial as to the facts involved in the contention or contentions so not sustained."

The case also appears in the opinion.

William C. Eaton, County Attorney, for the state.

Scott Wilson, for City of Portland.

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

SAVAGE, J. Claim of the city of Portland for intoxicating liquors seized upon a search and seizure process issued under the provisions of R. S., ch. 29, sect. 49. The liquors were properly libelled by the officer who seized them. They had been purchased by the municipal officers of Portland, of the state liquor commissioner, as provided by statute. They were pure and unadulterated and not factitious, and when seized were in the possession of the duly appointed and qualified liquor agent of the city, for the sale of liquors, who had no interest in the liquors or in the profits of the sale thereof.

The questions presented by the report are whether such liquors so situated are subject to seizure and forfeiture under R. S., ch. 29, sect. 49, and the following sections, if they are kept and deposited with intent to sell the same in this state in violation of law, even

though the casks and vessels containing them are marked in full compliance with section 34 of the same chapter, and whether, if not so marked, they are subject to seizure and forfeiture when not intended for unlawful sale. The claimant contends that they are not so seizable and forfeitable in any event, under any contingencies, and we will first consider that contention. The conclusion, of course, must be reached by a consideration of all of the relevant provisions of the statute prohibiting generally the sales of intoxicating liquors, which is R. S., ch. 29.

Section 47 declares that "no person shall deposit or have in his possession intoxicating liquors with intent to sell the same in the state in violation of law, or with intent that the same shall be so sold by any person, or to aid or assist any person in such sale." In section 48, it is provided that intoxicating liquors kept and deposited in the state, intended for unlawful sale in the state, and the vessels in which they are contained, are contraband and forfeited to the county in which they are so kept at the time when they are seized." Section 49 provides for the issuing of a search and seizure warrant upon the sworn complaint of a person competent to be a witness in civil suits, that "he believes that intoxicating liquors are unlawfully kept and deposited" in a place in the state described, by a person named, if known, "and that the same are intended for sale within the state in violation of law." If liquor is seized upon such a warrant, the subsequent procedure is twofold. The party keeping or depositing the liquors with unlawful intent is subject to punishment. The liquors themselves are libelled in rem, and may be adjudged forfeited under section 51. Section 49 contains the only provisions, relevant to this discussion, which authorize the issuing of a search and seizure process, and forfeiture follows only when liquors have been seized upon a warrant issued on a complaint such as is described therein. It necessarily follows, then, that intoxicating liquors are subject to forfeiture only when intended, at the time of seizure, for sale "in violation of law."

To determine what sales are "in violation of law" we turn to section 40, which provides that "no person shall at any time, by himself, his clerk, servant or agent, directly or indirectly, sell any intoxi-

cating liquors, of whatever origin, except as hereinbefore provided." The phrase "hereinbefore provided" relates back to section 26, which provides that the selectmen of any town, and the mayor and aldermen of any city, "may appoint some suitable person, agent of said town or city . . . to sell "intoxicating liquor purchased by them according to law, to be used for medicinal, mechanical and manufacturing purposes, and no other." All sales of intoxicating liquor in this state, therefore, except those made by a duly appointed and qualified town or city agent, are "in violation of law." But sales by such an agent may also be in violation of law. His authority is not unlimited. On the contrary, it is very narrowly restricted. He can sell only within the town of his appointment, and then liquors to be used only for medicinal, mechanical and manufacturing purposes. He cannot lawfully sell to a minor, without the written direction of his parent, master or guardian, nor to an Indian, soldier, drunkard, intoxicated person, an insane person or spendthrift, if known to him to be such, nor to an intemperate person after the prescribed notice. He cannot lawfully sell liquors which have been decreed to be forfeited, or which are found to be impure, or which are adulterated or factitious, or which have not been legally purchased. He cannot lawfully sell if interested in the liquor or the profits of sale. If he exceeds his authority in any of these respects, he becomes liable to punishment. *State* v. *Fairfield*, 37 Maine, 517. He may be prosecuted as a common seller, notwithstanding his appointment as agent. *State* v. *Keen*, 34 Maine, 500; *State* v. *Putnam*, 38 Maine, 296. And there seems to be no escape from the conclusion that if such an agent has in his keeping and possession intoxicating liquors intended to be sold contrary to any of the above described limitations and restrictions, it is intended to be sold "in violation of law," and so comes within the language of section 49 relating to search and seizure process.

But notwithstanding this the learned counsel for the claimant earnestly contends that it never was the intention of the legislature to subject intoxicating liquors, purchased by municipal authority, and in the possession of lawfully appointed agents for sale, to seizure and forfeiture, and that it is inherently improbable that the legisla-

ture would seek to enforce such a drastic remedy against towns, which are merely subdivisions of the state, for governmental purposes, when neither they, nor perhaps their municipal officers are in fault, and when the purposes of the law can be secured by the punishment of the offending agent. It is urged that the history of prohibitory liquor law legislation shows the absence of such an intention, and that a contrary construction would lead to absurd results. There would be, we think, much force in the doctrine of inherent improbability, in the absence of any express language in the statute tending to show that seizures of town or city agency liquors under some contingencies, at least, were within the contemplation of the legislature.

In his argument drawn from history, the counsel calls our attention to the earliest statute of this character. Laws of 1851, ch. 211. That act provided for the appointment of town liquor agents, whose authority was limited to sales of liquors "to be used for medicinal and mechanical purposes, and no other." There was no other express restriction. All others were prohibited from selling intoxicating liquors. By section 11 of the act, search and seizure process was to issue on the sworn complaint "that spirituous or intoxicating liquors are kept or deposited and intended for sale" by a person "not authorized to sell the same in said city or town under the provisions of this act." The only reference in the act to the seizure of agency liquors is found in section 12, where it is provided that in case the keeper or possessor of liquors seized is unknown to the officer seizing them, they shall not be condemned until they have been advertised, so that "if such liquors are actually the property of any city or town in the state, and were so at the time of the seizure, purchased for sale by the agent of said city or town, for medicinal or mechanical purposes only . . . . they may not be destroyed," but may be delivered to the city or town agent. It will be noticed that the provision for search and seizure related to liquors "intended for sale by a person not authorized to sell the same," and not as in the present statute, to all liquors "intended for sale in this state in violation of law." So that in any event the process did not lie against liquors in the possession of agents and

intended for sale by them, either lawfully or unlawfully. And the latter provision referred to in that statute was to protect the property of towns which had been seized unwittingly, without knowledge of the town's ownership, and it was to be returned if not intended for sale for other than medicinal and mechanical purposes.

In the laws of 1853, ch. 48, which was amendatory of and additional to the Act of 1851, the search and seizure provisions in section 1 were limited to liquors kept or deposited by a person "not authorized by law to sell the same, . . . and intended for sale in violation of law." But section 8, besides expressing many additional restrictions upon the authority of agents to sell, provides that "no such liquors owned by any city, town or plantation, or kept by any agent of any city, town or plantation, as is provided by the act to which this is additional . . . . shall be protected against seizure and forfeiture, under the provisions of this and of said act, by reason of such ownership," unless all the casks and vessels are marked, and so forth. We shall discuss the provisions relating to marking casks and vessels, and their effect, later. Just now we are pointing out that the words of the act of 1853 indicate that under some conditions, at least, there might be, by virtue of the statute, seizure and forfeiture of agency liquors. Construing section 1 and section 8 together, we think the meaning is evident. Under the language of section 1, agency liquors were protected because, in terms, the process lay only against liquors not kept or deposited by an authorized agent, but by section 8 that protection was removed, and they were therefore made liable to seizure and forfeiture, in case the casks and vessels were not marked. In such case, the limitation in section 1 did not apply. Moreover, the word "such" in the phrase "no such liquors owned by any city . . . shall be protected" seems clearly to refer to liquors which had been seized upon search and seizure process, and concerning which proceedings were to be had for forfeiture, in accordance with the immediately preceding sections. Again in the same section, it is provided that adulterated or factitious liquors shall not be protected from seizure and forfeiture by reason of being kept for sale by such agents." We are therefore of opinion that notwithstanding the limitation referred to in section

1, these provisions indicate that the legislature contemplated that in certain instances, at least, agency liquors might properly be seized and forfeited. The same provisions appear in the Laws of 1855, ch. 166, which was a substitute for the Laws of 1851 and 1853. Though subsequently repealed in 1856, the provisions found in section 8 of the Laws of 1853, by reenactment in 1858 and since, are found in substantially the same form in present section 34.

In the Laws of 1858, ch. 33, the previous agency statutes were reenacted in substantially the same form in which they exist now. Indeed, the language of most of the provisions followed that in the former statute. The search and seizure provisions were however changed so as to be applicable in terms to all liquor "intended for sale within this state in violation of law," the limitation as to authorized agents being omitted. The language is broad enough to reach liquors intended to be sold by the agent himself in violation of law. Old section 8 of the Laws of 1853, relating to protection of agency liquors, or the want of it, reappears as section 28, following as before the search and seizure and forfeiture sections. Its relative situation in the statute is significant. No doubt the interpretation which should have been given to it then ought to be given to it now, though in the revisions of 1883 and 1903 it has been transposed to that part of the statute which relates more particularly to city and town agencies.

The counsel however urges that the construction we have so far placed upon the statute leads to an absurdity, in that the statute of 1858, the language of which in the search and seizure section for the first time made all liquors seizable and forfeitable, if they were intended for sale in violation of law, whether kept by agents or not, also provided in section 18 that all liquors and vessels seized and declared forfeited should be delivered by order of court to the mayor and aldermen of the city, or the selectmen of the town, to which they were forfeited, and that such portions as were found upon examination to be fit to be sold for medicinal, mechanical or manufacturing purposes should be turned over by them to their liquor agent to be sold, in accordance with the act. In other words, liquor seized from a town or its agents, if forfeited, was ordered back to the town, and,

if suitable, returned to the agent. Such was undoubtedly the effect of the Law of 1858, and it so continued until the Laws of 1870, ch. 125, when it was provided that liquors forfeited should be destroyed by spilling on the ground, and town agents were subjected to a penalty if they sold forfeited liquors. In 1885, the Law of 1858 in this respect was restored. Laws of 1885, ch. 359, sect. 8. But in 1887, the Law of 1870, requiring a destruction of forfeited liquors, was reenacted. Laws of 1887, ch. 140, sect. 9. And that continued to be the law until chap. 253 of the Laws of 1893, which required that all forfeited liquors containing more than twenty per cent of alcohol should be turned over to the sheriff to be sold for the benefit of the county, and that all others should be destroyed. But notwithstanding these changes from time to time in the method of disposing of forfeited liquors, we think they worked no change in the construction of section 28, of the Law of 1858, which has remained unchanged to the present time. If agency liquors were forfeitable under the Law of 1858, they are forfeitable now. If they were not forfeitable then, they are not now. Section 28, as we have seen, was borrowed almost verbatim from the Law of 1853. But the Law of 1853 also provided for a destruction of the liquors, and not for a return of them to the municipal officers, as in the Law of 1858. It is undoubtedly true sometimes that when an existing statute is amended, or a former statute reenacted with changes in some particulars, the effect of the amendment upon other parts of the statute is not well considered. In such cases it is the duty of the court to declare, as well as it can, the legislative intent shown in the whole statute as amended, or, in other words, to declare to what extent the legislature intended the existing law to be affected by the amendment. It has been seen that the Law of 1853 contemplated that agency liquors might be seized and forfeited in certain contingencies. We cannot avoid the conclusion that the legislature, in reenacting the same law, in the same language, in 1858, intended the same result, although another disposition of forfeited liquors was provided for. We cannot hold otherwise without doing violence to the language of section 28 in the Law of 1858.

And it may fairly be said, in this connection, that this construction

of the law of 1858 does not lead to such an utter absurdity as is contended. At least one of the contingencies when agency liquors were not protected from seizure and forfeiture was when they were adulterated and factitious, and known by the agent to be such. While the law of 1858 required the delivery of forfeited liquors to the municipal authorities, only such as were found fit for medicinal, mechanical or manufacturing purposes were to be turned over to the agent for sale. The rest were to be destroyed. And in any event, by the seizure of such liquors, and the necessity of making claim therefor, the attention of the authorities would be sharply called to the conduct or misconduct of their agents which made the liquors subject to seizure. Upon a consideration of the whole statute, we are satisfied that agency liquors were then, and are now, seizable and forfeitable, under certain contingencies. It was so held in *Androscoggin R. R. Co.* v. *Richards*, 41 Maine, 233, a case arising under the law of 1853, and it was necessarily so held, although the question was not much discussed, in *State* v. *Intoxicating Liquors*, city of Belfast claimant, 68 Maine, 187, a case which arose under the law as it was enacted in 1858, and reenacted in the revision of 1871.

But we think it is only under certain contingencies that agency liquors are subject to seizure and forfeiture. While it is true that, in general terms, the statute provides that all liquors intended for sale in violation of law may be seized and forfeited, the present section 34 (section 28 in the law of 1858) declares that no such liquors owned by a city or town, or kept by an agent thereof, as provided by law, are protected against seizure and forfeiture, by reason of such ownership, "unless all casks and vessels in which they are contained are at all times conspicuously marked with the name of such municipality and of its agent," also, that "they shall not be protected from seizure and forfeiture by reason of being kept for sale by such agents, if they have knowledge that the same are adulterated or factitious." The only reasonable inference to be drawn from this language is, we think, that under some contingencies they are protected. Otherwise the words "are protected" and "shall not be protected" have no significance. In one case no

liquors are protected by reason of municipal ownership, unless marked. In the other they are not protected by reason of being kept for sale by agents, if they are known to be adulterated or factitious. It seems to us that the implication is clear,— e converso,— that if the casks and vessels containing them are properly marked, the liquors are protected from seizure and forfeiture, even though intended for sale in violation of law, except that adulterated and factitious liquors are not protected in any event. The last qualification, however, has no bearing in this case, as it is admitted that the liquors seized were pure and unadulterated and not factitious.

The effect of this construction of the statute, and which was, as we think, among its obvious purposes, is not only that it tends to prevent the making of false claims that liquors seized belong to a town, when in fact they do not, but also that the municipal authorities who alone are authorized to purchase liquors for sale by agents, may protect the property of their towns in this respect against the results of the misconduct of their agents, by seeing to it that the casks and vessels are properly marked. This they can well do. And in this way agency liquors may be at all times kept separate and distinct from others. It is not to be presumed that the legislature anticipated that the municipalities themselves might intend the liquors to be sold unlawfully, though their agents might so intend. And for that reason it is reasonable that the municipal authorities should be permitted to protect the liquors from seizure by marking the casks and vessels containing them, while the agents are punishable for their own misconduct. On the other hand, if the municipal authorities fail to do this, and if the casks and vessels containing them are not properly marked, the liquors are not protected by reason of the ownership of the city or town.

But such liquors are not rendered subject to seizure and forfeiture simply for want of proper marking. Liquors are only so subject when intended for sale in violation of law. There is no statute specifically requiring the casks and vessels to be marked. Hence we think selling liquors contained in unmarked casks and vessels is not of itself in violation of law. The provision respecting the effect of marking casks and vessels is for the protection of the town against

seizure and forfeiture. Although the casks and vessels are not marked, still the liquors are not forfeitable, if it appears that they were not kept for unlawful sale. Sect. 51. The case of *State* v. *Int. Liquors*, Belfast claimant, 68 Maine, 187, is relied upon as authority to the contrary. So far as the question of marking the vessels is concerned, that case is not to be distinguished from the one at bar. But in that case, the question was disposed of in a single sentence, without any discussion, and the point does not appear to have been fully considered. We are of opinion that the conclusion of the court to the effect that agency liquors are seizable and forfeitable merely because the vessels containing them are not properly marked is not sustainable in reason, and that the Belfast case referred to must be regarded as overruled to that extent.

We conclude then, (1) that the liquors in this case, if found not to be intended for sale in violation of law, are not forfeitable, even if the casks and vessels containing them were not marked in accordance with the statute; (2) that if they were intended for sale in this state in violation of law, but were contained in casks and vessels properly marked, they were not forfeitable, and (3) that if they were intended for sale in this state in violation of law, and the casks and vessels in which they were contained were not marked according to the statute, they are forfeitable.

It is proper to add that the equitable remedy against misconducted agencies, provided in section 32, is to be regarded as additional to the other statutory proceedings, and is not a substitute for any of them. Since that remedy was created, all the other statutory provisions have been reenacted without change.

In accordance with the stipulation, the case is to

Stand for trial.

DAVID E. PARSONS

vs.

WATERVILLE & OAKLAND STREET RAILWAY.

Kennebec. Opinion February 20, 1906.

Street Railway. Change of Location by Railroad Commissioners. Failure of Clerk to Give Notice of Change. Operation for Purposes Other than Street Traffic. Use of Street by Street Railroad. Public Servitude. R. S., c. 53, §§ 16, 20.

The determination of the railroad commissioners in regard to the change of location of a street railroad is final. The omission of the clerk of the railroad commissioners, within five days after the filing of the certificate of their decision, to give notice of such determination to all parties of record, does not deprive the railroad corporation of its right to construct and operate its road, or make that a public nuisance which would otherwise be a lawful use of the street.

The operation of a street railroad for other purposes than street traffic, before the railroad commissioners have granted a certificate of its safety for public travel, is not forbidden by R. S., chapter 53, section 20.

The use of a street by a street railroad, is a public servitude imposing no additional burden upon the abutter. The damages paid, when the street was built, were for all time and for all public uses fairly contemplated at the time the land was taken.

Such inconveniences as are inseparable from the use by the public of a public way, cannot be made the foundation of an action for damages.

On exceptions by plaintiff. Overruled.

Action on the case to recover damages alleged to have been sustained by the construction and operation of the defendant's street railway on Church street in Oakland. The plaintiff was a regular practising physician in said Oakland and whose residence and place of business was on said Church street. At nisi prius the plaintiff moved to amend his declaration and his amendment was allowed. The defendant then demurred to the amended declaration, and the presiding Justice pro forma sustained the demurrer, to which ruling the plaintiff excepted.

The case is fully stated in the opinion.

George W. Field, for plaintiff.

Charles F. Johnson, for defendant.

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

POWERS, J. This is an action to recover damages claimed to have been sustained by the construction and operation of the defendant's street railway on Church street in Oakland. The case comes here on exceptions to sustaining a demurrer to the plaintiff's amended declaration.

The writ sets out that the defendant constructed its street railway track along the easterly side of Church street in Oakland; that over said track between July 4, 1903, and the date of the writ, July 6, 1905, it very frequently ran its cars, thereby creating a great noise and disturbance; that the plaintiff's residence and place of business was on the easterly side of said Church street and that there was no access to the premises from said street except by crossing said track, and no access to them elsewhere that was convenient or adequate for the plaintiff. It is further averred that the plaintiff was a regular practising physician, that in making necessary calls upon his patients he was required to cross defendant's track from his premises more frequently than would otherwise have been necessary for persons engaged in other callings and pursuits, that he was greatly hindered, delayed and interfered with in such crossings by the location of said track and the passing of said cars; that persons desiring to come to his premises for the purpose of consulting him professionally were greatly hindered and by reason of the location of the defendant's track have desisted and refrained from coming. The amendment states that the defendant's track was originally located in the center of Church street, that at a hearing for relocation at the easterly side the plaintiff appeared before the railroad commissioners and opposed such relocation, that no notice of their determination was sent by the clerk of said railroad commissioners to the plaintiff or his counsel as required by law; that the defendant run its cars from July 4 to

Sept. 2, 1903, without any certificate from the railroad commissioners, and finally that by the location of the track and the running of the cars the plaintiff's property, as a place of business for a practising physician, has been greatly decreased in value.

The determination of the railroad commissioners was final upon the question of a change of location. R. S., chapter 53, section 16. No right of the plaintiff was affected by the clerk's alleged failure to give him notice of the decision within five days after the certificate was filed. It was a mere ministerial act on the part of the clerk which the defendant could not control and for which it was not responsible. His omission could not deprive the defendant of its right to construct and operate its road, or make that a public nuisance which would otherwise be a lawful public use of the street.

The averment that the defendant from July 4 to Sept. 2, 1903, ran its cars without any certificates from the the railroad commissioners as provided by R. S., chapter 53, section 20, is not sufficient to bring such running of its cars within the inhibition of that section. It is the operation of a railroad for street traffic, without a certificate of its safety for public travel, that is prohibited. The running of cars may be for construction or other purposes entirely distinct from street traffic and public travel.

The declaration therefore contains nothing which shows that the defendant's track was not legally located, constructed and operated and its use of the street a lawful and proper one. It is settled that the use of a street by a street railroad is a public servitude imposing no additional burden upon the abutter. The damages paid, when the street was built, were for all time and for all public uses fairly contemplated at the time the land was taken. *Briggs* v. *Horse R. R. Co.*, 79 Maine, 363. *Taylor* v. *Street Ry.*, 91 Maine, 193. Elc. R. R. Co., Appellants, 96 Maine, 110.

That the plaintiff was hindered, delayed and inconvenienced and people desiring to consult him professionally were kept away, because of having to cross the defendant's track, would not give him a right of action against the defendant for a lawful use of the public way. The defendant had the same right to run its cars along its track that the plaintiff had to drive his horse upon the street. There is no sug-

gestion in the declaration that the defendant did not exercise its right with a due regard for the rights of the plaintiff. So long as two bodies cannot occupy the same point in space at the same time, it will continue at times to be an inconvenience, hindrance or delay to one, having occasion to use a public way, that any other object or person, car, wagon, man or beast should be permitted upon it. It is however a public way for the use of all having occasion to use it in a manner authorized by law. Such inconveniences are inseparable from its use by the public as a public way, and cannot be made the foundation of an action for damages.

Exceptions overruled.

HARRIS LENFEST *vs.* JASON ROBBINS.

Knox. Opinion February 20, 1906.

Exceptions. Evidence. Punitive Damages Claimed. What May be Shown in Defense.

To sustain exceptions they must contain within themselves sufficient to show that the excepting party was aggrieved.

When the purpose for which a question is asked on cross-examination is specifically stated at the trial, and it is not admissible for that purpose exceptions to its exclusion will not be sustained, notwithstanding it may have been admissible for another purpose not stated at the time.

When impeaching conduct of a witness is drawn out upon cross-examination, which is indicative of a deep-seated hostility and bias on his part against one of the parties, it is error to exclude all explanation of such conduct upon re-direct examination.

In an action for trespass to the person, when damages for the indignity or punitive damages are claimed, the provocation, conduct and acts of the parties, which give character and color to the transaction and are clearly and really a part of it, may be shown, though not transpiring at the precise moment of the assault.

Shaw v. *Prentiss*, 56 Maine, 427, approved.

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

Trespass for a personal assault alleged to have been committed by the defendant upon the plaintiff. Plea, the general issue with a brief statement that whatever the defendant did "he did in self defense." Verdict for plaintiff for $205.00. Defendant filed a general motion to have the verdict set aside, and also excepted to certain rulings made by the presiding Justice during the trial.

The case is stated in the opinion.

L. M. Staples, for plaintiff.

M. A. Johnson, for defendant.

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

POWERS, J. Trespass for personal assault. The plaintiff alleged that he had "suffered great agony of mind and humiliation to his feelings and had been held up to public ridicule by being struck." Defendant claimed at the trial that he had a right to show all the facts clearly and fairly connected with the assault; that he was not confined to the immediate moment of the assault, but should be permitted to show all the facts bearing upon the provocation, motives and conduct of both parties. The evidence is made part of the exceptions.

Upon cross examination the plaintiff was asked:

Q. You were convicted in this court, were you not, Mr. Lenfest?

A. I don't know. I was sent up to the high court.

Q. You had a trial in this court, did you not?

A. I guess so.

Q. I was county attorney, was I not?

A. I think likely.

Q. And weren't you found guilty by the jury at that time?

A. I don't know.

Q. The case that you were arrested on was a case for harrassing and annoying Frank Pullen, was it not?

A. I don't know.

Q. The defendant in this case was a witness in that one against you, was he not?

A. Who?

Q. Jason Robbins?

A. He stuck his nose into it. He didn't know no more about it than a child unborn.

Q. You have been ugly with him ever since, haven't you Mr. Lenfest?

A. No sir.

Q. Haven't you annoyed and harrassed Jason Robbins ever since that time down to this?

(Objected to. Excluded. Exceptions noted.)

The exceptions, including the printed case, do not show when the trial referred to took place. The assault was on June 11, 1904. The case at bar was tried at the September term, 1905. For aught that appears the whole period covered by the question was subsequent to the assault. The conduct of the plaintiff, after the assault, could not be admissible upon the question of damages for the indignity or upon that of punitive damages. It seems to have been assumed by counsel and the presiding justice in the colloquy that followed the exclusion of the question, that the inquiry related to a time prior to the assault. Such assumption however is not sufficient. To sustain exceptions they must contain within themselves sufficient to show that the excepting party was aggrieved.

The question was proper for the purpose of showing hostility and affecting the plaintiff's credibility as a witness. Its admissibility however was not placed upon that ground. In answer to a question from the court counsel stated that "the purpose of the present inquiry was to show the character of the man, that he had been annoying up to that time, and to show the object of his stopping Mr. Robbins at this particular time." We will consider these grounds in their order: 1. The plaintiff's character was not in issue. 2. As we have seen, it nowhere appears to what time the question related, and if to a time subsequent to the assault it had no tendency to prove that he had been annoying the defendant before that. Moreover, to state that the purpose of asking the plaintiff if he had

been harrassing and annoying the defendant, was to show that he had been annoying him, did not show upon what rule or principle the admissibility of the question was claimed. 3. There had been no evidence introduced that the plaintiff stopped the defendant and the question had no tendency to elicit any. On the contrary the defendant testified that he stopped his team himself, alighted from it, and first addressed the plaintiff. On no one of the grounds claimed at the trial does the case show the question to have been admissible. If it had been stated that it was for the purpose for showing bias, so as to direct the attention of the presiding justice to that principle of evidence, it would doubtless have been admitted. The defendant is confined upon exceptions to the grounds expressly stated at the trial or contained in his exceptions. *McKown* v. *Powers*, 86 Maine, 291. The case at bar is not one of an exception on general grounds to the exclusion of the question on cross-examination. Here the purposes of the question were specifically stated, both at the trial and in the exceptions, and the defendant is confined to them.

Exception is taken to the charge of the presiding justice. The jury was instructed that the conduct of the parties at the time of the assault, "not at some former time but at that time as a provocation, and as tending to lead to the result may be taken into account, upon the question of punitive damages and damages to injured sensibilities." In this state it is settled in *Shaw* v. *Prentiss*, 56 Maine, 427, that when damages for the indignity or punitive damages are claimed, in an action for trespass to the person, the provocation, conduct and acts of the parties, which give character and color to the transaction and are clearly and really a part of it, may be shown, though not transpiring at the precise moment of the assault. The doctrine is there repudiated that only acts or words of provocation done or uttered at the moment, or immediately connected in time with the infliction of the injury, can be given in evidence in mitigation of such damages. "Time is not the essence of the principle, but fairly established direct connection, as cause and effect."

The rule given at the trial would have been too narrow a one if there were in the case any evidence which would bring it within the principle of *Prentiss* v. *Shaw*. All such evidence was however

rigorously excluded at the trial. The only exclusions of testimony referred to in the bill of exceptions or to which exceptions were taken at the trial, were two. One of these we have already discussed, and the other remains to be considered.

On re-direct examination the defendant was asked:

Q. You were asked if you had spoken to Mr. Lenfest during the last two years. I will ask the question, why didn't you speak to him? (Objected to.)

MR. JOHNSON: I think I have a right to show whether it was his fault or Mr. Lenfest's fault?

The COURT: That raises another issue. It is sufficient that they were on bad terms. That is the main point on either side.

MR. JOHNSON: I think I have a right to show it wasn't on my client's side.

The COURT: I will exclude it.

Standing unexplained, the conduct of the defendant might indicate a long standing hostility on his part at the time of the assault. It matters not who was in fault. The first ground stated as the purpose of the question is not tenable. To show who was in fault would be in effect to concede the hostility and justify it. The second ground stated however, rests on a solid foundation. The defendant had the right to show that the "bad terms," hostility, was not on his side. He had a right to explain the circumstance, and show that his failure to speak to the plaintiff did not indicate a deep-seated hostility, such as would be likely to lead him to assault him or to influence his testimony and affect his credibility at the trial. Wigmore Ev. section 952, *Brooks* v. *Acton*, 117 Mass. 204. In *Williams* v. *Gilman*, 71 Maine, 21, it was held that a party could not upon cross examination introduce testimony of collateral facts and then object to an explanation of them. The fact that the defendant had not spoken to the plaintiff, for two years before the assault, was drawn out by the plaintiff. Its natural effect was to impeach his credibility and raise an inference of long continued hostility which might discredit his account of what took place at the time of the assault. He was entitled to give such explanation as he

could. In *State* v. *Reed*, 62 Maine, 129, a witness was permitted to testify what was his reason for giving contradictory testimony at a former trial, and it is there said that "to refuse an opportunity to explain would be in effect to condemn a party without a hearing." A party has as much right to explain his impeaching conduct as a witness has to explain his contradictory statements. The right is given in order that the jury may have the facts necessary to form a correct judgment as to the motive and credibility of the witness.

Exceptions sustained.

MATTAWAMKEAG LOG DRIVING COMPANY

vs.

GEORGE L. BYRON.

Penobscot. Opinion February 21, 1906.

Driving Logs by Chartered Company. Uniting Drives. First and Second Drives. Assessments for Tolls and Driving. Authority of Directors to make Assessments. Private and Special Laws, 1853, c. 90. Private and Special Laws, 1899, c. 51, § 3.

The practice of having two or more drives in order to insure greater expedition in driving to their place of destination all logs both late and early must be deemed a reasonable one.

The difference in the rates of assessment for first and second drives is the obvious result of experience with respect to the actual cost of driving them.

Ordinarily, a first drive will be the least expensive because it will have the most favorable pitch of water and the labor and expense of driving will ordinarily increase as the water subsides below a favorable driving pitch.

The case at bar shows that the assessment in question was made in entire accordance with the provisions of the plaintiff's charter and therefore is binding upon the defendant irrespective of the question of first and second drives.

The particular question submitted is whether the defendant's logs were driven in the first or second Mattawamkeag drive. And upon this proposition it is *held* that as there were two drives from Jellerson boom to Scatterack boom the second one cannot be deemed to have lost its identity, for the purposes of the assessment authorized by the provisions of the plaintiff's charter, simply because by reason of high water, it had to be driven along with the logs constituting the first drive.

The directors of the plaintiff company who are authorized by the plaintiff's charter to make the assessment "in anticipation of the actual cost and expense of driving" cannot predict with certainty in any year that the logs will not be turned out of Scatterack boom on account of high water. They are therefore compelled to make the assessments upon their knowledge of the drives that leave Jellerson boom, and for this purpose they are reasonably justified in assuming that the logs first driven from Jellerson boom constitute the first drive and those that are next driven must constitute the second drive. This would seem to be the only practical and available criterion by which they can distinguish the logs coming in the first drive from those coming in the second drive, for the purpose of making their assessment "in anticipation of the actual cost and expense of driving."

On report. Judgment for plaintiff.

Assumpsit on account annexed to recover assessments and tolls made by the plaintiff company on the defendant's logs for driving the same in the spring of 1900, from Jellerson boom, so called, on the Mattawamkeag River to their places of destination.

The main contention was whether or not the defendant's logs were driven in the first Mattawamkeag drive, so called, or in the second Mattawamkeag drive, so called. In the year 1900, the assessments for driving logs in the first drive, together with the tolls thereon, amounted to 42 cents per thousand feet boom scale, while the assessment and tolls for logs in the second Mattawamkeag drive of that year amounted to 47 cents per thousand feet boom scale.

The case was reported to the Law Court on an agreed statement of facts.

The case fully appears in the opinion.

Appleton & Chaplin, for plaintiff.

Louis C. Stearns, for defendant.

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

WHITEHOUSE, J. This is an action to recover assessments and tolls made by the plaintiff company on defendant's logs for driving them in the spring of 1900 from Jellerson boom, so-called, on the Mattawamkeag River to their places of destination. The case is reported to this court on an agreed statement of facts.

By the act incorporating plaintiff company (chapter 90 Private & Special Laws of 1853) and by acts amendatory thereto the company is required to drive logs," which *from time to time* may come into the Jellerson and Oxbow booms to the Penobscot boom (section 3, chapter 51, P. and S. Laws 1899) at as early a period as practicable."

The corporate limits of the company extended from Jellerson boom, so-called, in the town of Haynesville on the Mattawamkeag River to the junction of that river with the Penobscot River.

There are three booms on the Mattawamkeag River within their corporate limits, Jellerson boom, Oxbow boom, situated below in Drew Plantation, and Scatterack boom, which is the lowest boom on Mattawamkeag River, about 30 miles below Jellerson boom, and is located near the junction of that river with the Penobscot River.

According to the method of driving the logs on the Mattawamkeag River that has prevailed with the plaintiff company for many years when a sufficient quantity of logs had been collected in Jellerson boom the drive was started. The company or its contractor ordered the boom to be opened and the logs were driven down the Mattawamkeag into Scatterack boom, and thence down the Penobscot River to their places of destination at or above Penobscot boom. This was known as the first drive.

As soon as the first drive had left Jellerson boom the boom was closed to collect the whole or a part of the remaining logs to be driven as the case might be, and when a sufficient number had collected in the boom a second drive was started and driven down in the same manner as the first. Generally all the logs to be driven were driven in the first or second drive but sometimes a third drive was also made.

In 1900 the first drive was started from Jellerson boom and driven to Scatterack as before described. The contractors were then notified not to cut away Scatterack owing to the high water in the Penobscot River, which made it impossible for the Katahdin Pulp and Paper Company to sort the logs at Lincoln.

Then the crew were ordered back to Jellerson boom where they had to wait three or four days for the defendant's logs, which were cut on Beaver Brook fourteen miles above Jellerson boom, and also logs belonging to other parties. After these had all reached Jellerson boom the second drive was started, and defendant's logs together with all the logs belonging to other parties were driven down the river to Scatterack.

When the second drive started from Jellerson boom the first drive was then in Scatterack and had not been turned out on account of the high water as before stated, and the second drive containing defendant's logs arrived in Scatterack before the first drive had been turned out. After the high water had sufficiently subsided, all the logs in Scatterack boom, both those that were driven in the first drive and those that were driven afterward in the second drive, which included the defendant's logs, were turned out together and driven in a body to their places of destination.

In the year 1900 and for many years previous thereto the plaintiff company had assessed the logs for tolls and driving expenses in the different drives separately. In 1900 its assessments for driving the logs in the first drive, together with the tolls thereon, amounted to 42 cents per thousand feet boom scale, while the assessments and tolls for logs in second Mattawamkeag drive of that year amounted to 47 cents per thousand feet boom scale.

The defendant paid the driving assessments and tolls on all his logs at the rate of 42 cents per thousand feet boom scale, claiming that his logs were in the first drive. The company claims that his logs were in the second drive, and that he should pay assessments and tolls amounting to 47 cents per thousand feet boom scale, and this action is brought to recover the difference between the two assessments.

The plaintiff company is required by the mandatory provisions of

its charter to drive all logs in Mattawamkeag River which from time to time come into Jellerson and Oxbow booms. A proper discharge of this imperative duty necessarily involves a division of the logs into two or more drives; and this practice appears to have been uniform and of such long standing prior to 1900 that it must be presumed to have been known to the defendant as well as other operators. In 1900 the first drive which did not comprise the defendant's logs seasonably started from Jellerson boom and reached Scatterack. But by an amendment to the charter enacted the year before (sec. 3, chapter 51, P. & S. Laws of 1899) it was provided that "logs which from time to time may come into Scatterack boom shall not be turned out until the waters in the Mattawamkeag and Penobscot Rivers is at a pitch suitable for sorting out and separating logs of different owners at their several places of destination on said rivers."

When the first drive reached Scatterack the water in Penobscot River was so high that it was impossible to sort the logs at Lincoln and in obedience to this statute orders were promptly "given not to cut away Scatterack." Thereupon a crew was sent back to Jellerson boom to bring down all logs that might come in there belonging to the defendant and other parties. When after several days these had all arrived a second drive comprising the defendant's logs was also driven to the Scatterack Boom where the first drive was still detained on account of the high water. In due time after the water had subsided to a pitch suitable for sorting logs at Lincoln, all the logs in Scatterack Boom including both the first and second drives were turned out together and driven in a body to their place of destination.

The defendant does not and could not reasonably complain that he was subjected to any inconvenience or loss because the first drive was overtaken by the second at Scatterack and the two drives were then united and driven down together. Indeed it is manifest that he received a benefit instead of an injury from the prompt action of the management in thus bringing down his late logs to the boom at the same time as the earlier ones of other parties. But he contends that inasmuch as the first and second drives were mingled and the identity of the second drive comprising his logs was lost after they were turned out of Scatterack boom, he is not liable to pay the

assessment made upon logs of the second drive but can only be required to pay at the rate assessed upon the first drive.

It is the opinion of the court that this contention is without merit. The practice of having two or more drives in order to insure greater expedition in driving to their place of destination all logs both late and early must be deemed a reasonable one. The difference in the rates of assessment for the first and second drives is the obvious result of experience with respect to the actual cost of driving them. Ordinarily, the first drive will be the least expensive because it will have the most favorable pitch of water and the labor and expense of driving will ordinarily increase as the water subsides below a favorable driving pitch.

Section 4 of the original charter of 1853 reads as follows: "Said directors are hereby authorized to make the assessment contemplated in the last preceding section in anticipation of the actual cost and expenses of driving, and in any sum not exceeding, for each thousand feet, board measure, the sum of seventy-five cents, and so in proportion to the distance which any logs or other timber is to be or may be driven between said forks and the places of destination, to be determined by said directors. And if, after said logs or other timber shall have been driven as aforesaid, and all expenses actually ascertained, it shall be found that said assessment shall be more than sufficient to pay said expenses and the sum which shall be assessed as is hereinafter provided for a contingent fund, then the balance so remaining shall be refunded to the said owner or owners in proportion to the said sum to them respectively assessed."

It might properly be observed in the first place that there is nothing in the agreed statement of facts tending to show that the assessment in question was not made in entire accordance with these provisions of the charter and therefore binding upon the defendant irrespective of the question of first and second drives. But the particular question submitted and argued is whether the defendant's logs were driven in the first or second Mattawamkeag drive, and upon this proposition our conclusion is that as there were two drives from Jellerson to Scatterack the second one cannot be deemed to have lost its indentity, for the purposes of the assessment authorized by

the above provision of the charter, simply because, by reason of high water, it had to be driven along with the logs constituting the first drive. The directors of the company who are authorized by the charter to make the assessment "in anticipation of the actual cost and expense of driving" cannot predict with certainty in any year that the logs will not be turned out of Scatterack boom on account of high water. They are therefore compelled to make the assessments upon their knowledge of the drives that leave Jellerson boom, and for this purpose they are reasonably justified in assuming that the logs first driven from Jellerson boom constitute the first drive and those that are next driven must constitute the second drive. This would seem to be the only practical and available criterion by which they can distinguish the logs coming in the first drive from those coming in the second drive, for the purpose of making their assessment "in anticipation of the actual cost and expense of driving."

The entry must accordingly be

Judgment for the plaintiff for $37 and interest from the date of the writ.

In Equity.

BATH SAVINGS INSTITUTION

vs.

SANFORD L. FOGG, Executor, et al.

Sagadahoc. Opinion February 21, 1906.

Savings Bank Deposit. Interpleader. Title to Deposit. Gift. Delivery. Trust.

The Bath Savings Institution filed a bill of interpleader asking that the defendant Sanford L. Fogg as Executor of the will of Jane Cruikshank, on the one side, and the defendant Elizabeth Hilliard, a sister of the deceased testate, on the other side, be required to interplead respecting the ownership of a deposit of $1019.33 standing on the books of the bank with the following entries, to wit:

"Payable to either,

16982 BATH SAVINGS INSTITUTION, DR.

To Elizabeth Hilliard, Ballycassiddy, Ireland, County of Fermanagh, or Jane Cruikshank, Bath."

Held: that all the attributes of an absolute gift in presenti are wanting. Although by the terms of the deposit the fund was made payable to either of the sisters, it was not in fact subject to the disposal of Mrs. Hilliard, for the reason that Mrs. Cruikshank retained possession of the deposit book without which withdrawals could not be made. There was no delivery of either the deposit itself or of the evidence of the deposit.

It is manifest from the terms of the deposit, the accompanying declarations and inquiries of Mrs. Cruikshank and her subsequent conduct that she never had any intention of relinquishing all present and future dominion and control over this fund. Her express wish at the time was to have the deposits made upon terms and conditions that would operate as a transfer of the fund at her decease. The evidence discloses no intention on her part to divest herself of the legal title before that time. There was not a perfected gift in her lifetime.

Jane Cruikshank, the deceased testate, never made any declaration of trust of any kind in favor of her sister, with respect to the deposits in the Bath Savings Institution, either at the time of making any of the deposits, or at any subsequent time. Notwithstanding the repeated suggestion of the treasurer of the bank that if the depositor wished to make sure that her

sister would receive the fund at her decease it would be advisable to give her notice of the deposit and deliver the book to her or to some person for her, the evidence fails to show that notice of this deposit was ever communicated to Mrs. Hilliard before the decease of the depositor, and affirmatively shows that the deposit book was never sent to Mrs. Hilliard but was kept in the possession of Mrs. Cruikshank or under her control until the time of her decease.

From all the facts and circumstances relating to this deposit, it is further *Held:* that Mrs. Cruikshank's intention was that this gift to her sister should not take effect until after her death, that she withheld from her all knowledge of this special deposit and omitted to forward to her the deposit book solely by reason of an unwillingness on her part to relinquish her control of the fund during her lifetime; that she never intended to create any trust to take effect before her death, and hence that there was no perfected gift of either the legal or the equitable title to the money in question deposited in the Bath Savings Institution and that the fund accordingly belongs to the estate of the testatrix Jane Cruikshank.

In equity. On report. Decree according to opinion.

Bill of interpleader brought by the Bath Savings Institution against the defendants to determine the ownership of a deposit of $1019.33 in that bank which deposit had been made by Jane Cruikshank, the deceased testate of the defendant Fogg who as executor of the last will and testament of the deceased claimed the deposit. Elizabeth Hilliard, a sister of the deceased, also claimed the deposit.

In the court of the first instance, it was decreed "that the defendants named in said bill interplead with each other as therein prayed for, that the plaintiff bank be freed from all demands of said defendants arising out of the controversy therein stated, upon paying over to the party or parties hereafter found by this court to be entitled thereto, the amount in its hands and possession represented by the depositor's book in this suit; that said defendants and each of them be and hereby are enjoined and restrained from instituting any suits, or proceeding against said plaintiff to recover said fund or any part thereof during the pendency of this bill in equity." It was then "agreed by and between the parties defendant, that the answers which they have already filed may be taken as the pleadings in the case, and the cause set down for hearing on the bill, answers and proofs, and that the said Elizabeth Hilliard be regarded as plaintiff in the continuation of the suit."

After the evidence had been taken out, it was agreed that the case should be reported to the Law Court, and that "upon so much of the testimony as is legally admissible the Law Court is to render such judgment as law and the evidence require."

The case is stated in the opinion.

George E. Hughes, for Bath Savings Institution.

Frank E. Southard, for Sanford L. Fogg, Executor.

Charles W. Larrabee, for Elizabeth Hilliard.

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

WHITEHOUSE, J. This is a bill of interpleader filed by the Bath Savings Institution asking that the defendant Sanford L. Fogg as executor of the will of Jane Cruikshank on the one side and the defendant Elizabeth Hilliard on the other side be required to interplead respecting the ownership of a deposit of $1019.33 standing on the books of the bank with the following entries, to wit:

Payable to either,

16982 Bath Savings Institution, Dr.

To Elizabeth Hilliard, Ballycassiddy, Ireland, County of Fermanagh, or Jane Cruikshank, Bath."

It appears from the allegations in the plaintiff's bill that at the decease of Jane Cruikshank on the third day of May, 1902, this deposit was still in the care and custody of the plaintiff bank and the deposit book therefor was then outstanding; that the defendant Fogg as executor claims that this deposit belonged to Jane Cruikshank in her own right at the time of her decease and became a part of her estate; that the respondent Elizabeth Hilliard claims that the deposit belongs wholly to her and forms no part of the estate of Jane Cruikshank, that the plaintiff is wholly indifferent as between these claimants and is in doubt as to the person or persons to whom the deposit rightfully belongs but holds the same in trust for the proper and legal owner or owners thereof.

Thereupon the contending parties filed their respective answers, the executor Fogg claiming the deposit as a part of the estate in

accordance with the representations in the plaintiff's bill and the defendant Hilliard claiming that the deposit was made for her benefit and became her property at the decease of Jane Cruikshank.

The essential conditions upon which the equitable remedy of interpleader depends having thus been satisfactorily established, the plaintiff's bill was properly sustained and a decree of interpleader duly entered. By agreement the answers filed were to be taken as the pleadings of the contending parties and the case set down for hearing on bill, answers and proofs, "the said Elizabeth Hilliard to be regarded as plaintiff in the continuation of the suit." Upon these pleadings which duly presented the issue between the contending parties the evidence was heard by the presiding justice and reported for the consideration of this court. The parties are now entitled to a decision upon the merits of the controversy between Elizabeth Hilliard and the executor of the estate of Jane Cruikshank upon so much of the evidence as shall be deemed legally admissible. *Savings Bank* v. *Fogg*, 83 Maine, 374; *Savings Bank* v. *Small*, 90 Maine, 546.

It appears from the statement of the account on the bank book in question, that the deposits were made as follows: Dec. 30, 1896, $200; Nov. 21, 1901, $400; Dec. 6, 1901, $300; March 28, 1902, $100. Jane Cruikshank made all of these deposits in person including the last one made about five weeks before she died, and on every occasion she presented the bank book. During the period covered by these deposits she also made seven withdrawals comprising all of the dividends declared prior to her death.

At the time of her death Mrs. Cruikshank was residing in Bath and was 82 years of age. Elizabeth Hilliard was her sister a year or two younger and had always resided in Ireland. Both of them were feeble and blind for a year or more before the death of Mrs. Cruikshank.

It appears from the testimony of Mr. Palmer, the treasurer of the Bath bank, that when Mrs. Cruikshank made the first deposit in December, 1896, she stated to him that she "wished to open an account in her own name and her sister's name, so that either one could draw it, or in case one should die the other would have the

money." Mr. Palmer further testified as follows: "Several times when she was in there she asked me particularly if there would be any trouble if she died about her sister drawing the money. I told her in order to make it perfectly safe I considered that it was proper for her to notify her sister during her lifetime that she had such an account and to place the book in somebody's else possession, whom she could trust who would forward such book to Mrs. Hilliard at her decease." It does not appear, however, that Mrs. Hilliard was ever informed of the deposit in her favor during the lifetime of Mrs. Cruikshank, and it is in evidence that the deposit book remained in her possession until her last sickness when a friendly neighbor took into his custody for safe keeping for a few days, this and one other bank book, two wills and $85 in money. It does not appear that they were taken by her request or that they were to be kept by him for Elizabeth Hilliard, and on the arrival of her nephew John Hetherington, these articles were all returned to Mrs. Cruikshank's house, and remained there until her decease. It further appears that on the thirteenth day of March, 1902, seven weeks before her death, Mrs. Cruikshank made a will in which she bequeathed to her sister Elizabeth Hilliard, the sum of $700, with a special direction that in case of a deficiency of assets, this bequest with one other of $150, should be paid in preference to any other legacies. It is also in testimony from the nephew Hetherington, that Mrs. Cruikshank made a deposit of $800 in a Lynn Savings bank in November, 1901, in her own name "in trust for Elizabeth Hilliard." But the evidence wholly fails to show any connection whatever between this Lynn deposit of 1901 with the Bath deposits in question which commenced five years before and the case is silent as to the final disposition of the Lynn deposit, if it ever existed.

It is not in controversy that the money in question deposited in the Bath Savings bank belonged to Jane Cruikshank at the time of the several deposits mentioned and continued to be her property during the remainder of her life and became a part of her estate at her decease, unless the terms of the deposit, considered in connection with the depositor's declarations and all the circumstances attending the transaction, can be deemed sufficient to show a perfected gift of

the legal or equitable interest in the fund to her sister Elizabeth Hilliard.

It is not claimed in behalf of Mrs. Hilliard, and in view of the foregoing statement of facts it could not reasonably be contended, that the transaction could become effectual as a perfected gift in the lifetime of Mrs. Cruikshank. All of the attributes of an absolute gift in presenti are obviously wanting. Although by the terms of the deposit the fund was made payable to either of the sisters, it was not in fact subject to the disposal of Mrs. Hilliard, for the reason that Mrs. Cruikshank retained possession of the deposit book, without which withdrawals could not be made. There was no delivery of either the deposit itself or of the evidence of the deposit.

Again it is manifest from the terms of the deposit, the accompanying declarations and inquiries of Mrs. Cruikshank and her subsequent conduct, that she never had any intention of relinquishing all present and future dominion and control over this fund. Her express wish at the time was to have the deposits made upon terms and conditions that would operate as a transfer of the fund at her decease. The evidence discloses no intention on her part to divest herself of the legal title before that time. There was not a perfected gift in her lifetime.

But it is insisted that if the transaction did not constitute a gift of the legal title, it was still adequate to create a voluntary trust which had the effect to transfer to Mrs. Hilliard the equitable interest in the fund. It is claimed that Mrs. Cruikshank constituted herself a trustee of this fund for the benefit of Mrs. Hilliard, and that this trust ceased at the death of the former and the legal title then passed to the beneficiary.

The general principle underlying the doctrine of voluntary trusts, and the criterion by which to distinguish an executed trust from an absolute gift as well as from an ineffectual attempt to make a testamentary disposition of property, are thus explained by Mr. Pomeroy in his Equity Jurisprudence.

"A perfect or completed trust is valid and enforceable, although purely voluntary. A voluntary trust which is still executory, incom-

plete, imperfect, or promissory, will neither be enforced nor aided. In order to render the voluntary trust valid and effectual, the party creating it either by direct transfer or by declaration, must have done everything which, according to the nature of the property comprised in it, was necessary to be done in order to transfer the property and render the transaction binding upon him. A person holding property, real or personal, and intending to make a voluntary disposition thereof for the benefit of another, may do so in either one of three modes: (1) He may make a simple conveyance or assignment of it directly to the donee, so as to vest in the latter whatever interest and title the donor has without the intervention of any trust. (2) He may make a transfer of it to a third person upon trusts declared in favor of the donee. (3) He may retain the title, and declare himself a trustee, for the donee, and thus clothe the donee with the beneficial estate. In either of these modes, if the transaction is imperfect and executory, equity will not aid nor enforce it; and if the intention of the party is to adopt one of the methods, a court of equity will not resort to either of the other methods for the purpose of carrying it into effect. Whenever the party intends to make a transfer directly to the donee, he must do all that is necessary, according to the nature of the property, to pass and vest the title, by valid conveyance in case of real property, and by valid assignment in case of personal property, and generally accompanied by an actual delivery of chattels and things in action where the donor is the legal owner. Where the donor shows an intention to adopt this first method, and thus to vest the property directly in the donee, and the act of donation is simply an assignment of any form, but is imperfect so that it does not pass the title, a court of equity will not treat it as a declaration of trust constituting the donor himself a trustee for the donee; an imperfect voluntary assignment will not be regarded in equity as an agreement to assign for the purpose of raising a trust. If the donor adopts the second or third mode, he need not use any technical words, or language in express terms creating or declaring a trust, but he must employ language which shows unequivocally an intention on his part to create a trust in a third person or to declare a trust in himself. It is not essential, however,

that the donor should part with the possession in the cases where he thus creates or declares a trust." 2 Pom. Eq. Sec. 997.

These principles have been carefully reviewed and numerous cases in which they have been involved have been critically distinguished in the recent decisions of this court. *Savings Institution* v. *Hathorn*, 88 Maine, 122; *Savings Bank* v. *Merriam*, 88 Maine, 146; *Savings Institution* v. *Titcomb, Ex'r*, 96 Maine, 62.

In *Savings Bank* v. *Merriam*, 88 Maine, supra, the questions related to the ownership of two deposits of $950 each made in that bank upon the following terms: "Norway Savings Bank in account with Esther S. Reed and Harry Q. Millett or their survivor in joint tenancy." The terms of the second deposit were indentical with those of the first, substituting the name of Myra J. Millett for Harry Q. Millett. Mrs. Reed retained possession of the deposit books and they were found among her private papers at her decease. The beneficiaries had no knowledge of these deposits until after the death of Mrs. Reed. It was held that inasmuch as she never made any declaration of trust, and never by any unequivocal act or expression showed any intention to create one, the transaction must be deemed an ineffectual attempt to make a testamentary disposition of these funds, and not an executed voluntary trust.

In *Noyes et al. Ex'r.* v. *Institution for Savings*, 164 Mass. 583, the account in the deposit book was headed "Annie M. Pike and Mary L. Hewitt, payable to either or survivor." In this case it also appeared that the book was never in the possession of the claimant, Mary L. Hewitt, and that she had no knowledge of the deposit until after the death of the testatrix. No extrinsic evidence appears to have been introduced, and it was held that the deposit remained the property of the original depositor Annie M. Pike.

In the case at bar Jane Cruikshank never made any declaration of trust of any kind in favor of her sister, with respect to the deposits in the Bath Savings Bank, either at the time of making any of the deposits, or at any subsequent time. Notwithstanding the repeated suggestion of the treasurer of the bank that if the depositor wished to make sure that her sister would receive the fund at her decease it would be advisable to give her notice of the deposit and deliver the

book to her or to some person for her, the evidence fails to show that notice of this deposit was ever communicated to Mrs. Hilliard before the decease of the depositor, and affirmatively shows that the deposit book was never sent to Mrs. Hilliard but was kept in the possession of Mrs. Cruikshank or under her control until the time of her decease. It is not indispensable, it is true, that the beneficiary should have notice of the creation of a trust. A complete and valid trust with respect to personal property may undoubtedly be created by an unequivocal declaration of the owner either written or oral, that he holds the property in trust for a specified purpose, without notice to the beneficiary. Neither was it indispensable to the creation of a trust in this case that the deposit book should be delivered to the beneficiary. Indeed the surrender of all dominion and control over the property might have been entirely inconsistent with the purposes of the trust. Even the power of revocation may be perfectly consistent with the creation of a valid trust. *Stone* v. *Hackett*, 12 Gray, 232. Where the owner of property constitutes himself trustee to hold it for the benefit of another, the control of it may properly remain in him who has the legal title.

But the omission of a depositor to give notice to the beneficiary may under some circumstances have great significance as evidence tending to show that there was no intention to create a valid trust, while on the other hand, proof that such notice was given may have a controlling effect in establishing the existence of the trust. So also the retention of the deposit book by the depositor may under some circumstances clearly appear to be in pursuance of a proper execution of the purposes of the trust, and under different circumstances may as clearly appear to be for the depositor's own purpose and benefit.

It appears from the testimony of Mrs. Cruikshank's nephew in the case at bar as above stated that in November, 1901, five years after opening the account at the Bath Savings Bank she made a deposit of $800 in the Lynn Savings Bank with an express declaration of trust in favor of Mrs. Hilliard. Yet she made no request to have the terms of the Bath deposit changed, so that like those of the Lynn deposit, they would unmistakably import a trust for

her sister, but on the 23rd of March made a will bequeathing the sum of $700 to the same sister.

From all the facts and circumstances relating to this deposit the conclusion is irresistible that Mrs. Cruikshank's intention was that this gift to her sister should not take effect until after her death; that she withheld from her all knowledge of this special deposit and omitted to forward to her the deposit book solely by reason of an unwillingness on her part to relinquish her control of the fund during her lifetime; that she never intended to create any trust to take effect before her death, and hence that there was no perfected gift of either the legal or the equitable title to the money in question deposited in the Bath Savings Bank and that the fund accordingly belongs to the estate of the testatrix Jane Cruikshank.

The taxable costs of each of the parties may be paid out of the estate.

Decree accordingly.

In Equity.

OAKLAND WOOLEN COMPANY et al.

vs.

UNION GAS AND ELECTRIC COMPANY et al.

Kennebec. Opinion February 22, 1906.

Waters and Water Courses. Equity Jurisdiction. Grant of Water Power. Rights of Grantor and Grantee. Rights of Riparian Owners. Construction of Grant of Water Power. Prescriptive Rights. Reasonable Detention of Water. Dam Owners. Upper and Lower Dams.

1. A court in equity has jurisdiction to determine the respective rights of the owners of water power developed by a dam.
2. When the owner of a dam and water privilege grants a part of the water power thereby developed, the right of the grantee is superior, to the extent of the grant, to that of the grantor. Thereafter the grantor has no right to interfere with the grant, or to diminish the quantity of water which has been granted. Nor have those holding under the grantor any such right. The rights of the owner of the dam are thereafter subject to the grant.
3. But if the grantee is not using, or has no wish or preparation to use the water, the grantor or those holding under him may use the whole or allow it to flow down stream.
4. All grants of water power are subject to the rights of riparian proprietors below to have the natural flow of the stream transmitted to them, after reasonable use or detention.
5. A grant of the right to take water from a flume or dam "for carrying on every branch of the tannery business" is not a grant of an indefinite quantity of water, but only of such quantity as would develop the power necessary to carry on every branch of the tanning business, either as it existed at the time of the conveyance, or was then contemplated by the parties. And their conduct afterwards, the use by one and the acquiescence by the other, would furnish satisfactory evidence of what was in contemplation by them.
6. When a grant is made by a dam owner, of the right to draw water from a flume or dam for the purpose of creating the power required for specified purposes, and the grant is silent as to the head of water to be maintained,

and there is no evidence of explanatory conditions affecting the grant, it should be held that a definite head was intended, and that it was the head customarily and ordinarily used at the time of the grant. The grantee becomes entitled to water at that head, sufficient to produce the power required.

7. When the amount of water in an ancient grant was measured by the power required at its date, and there now remains no evidence of the power then required, the continued, unvarying use by the grantee for a long period of time, acquiesced in by those in the line of title of the grantors, will furnish very satisfactory evidence of the extent of the original grant, both as to head and quantity.

8. A grant by the owner of a dam of the right to use 500 square inches of water, for the purpose of creating power, as a substitute for a prior grant, in which the head was not mentioned, carried by implication the right to draw the water from the dam, at the head at which water was ordinarily taken under the prior grant.

9. A grant of a lot "together with one divided third part of the mill dam across said stream, with the right to take and use one third part of the water therein running after deducting the right of water to grind bark and full hides" formerly granted, was not also subject to a deduction of water used by a grist mill, on the ground that the grist mill lot was excepted from the conveyance.

10. In cases of doubt, the practical construction given by the parties is sometimes of great consequence in ascertaining the intentions which should be attributed to them by the language used or omitted in their grants. But such interpretation is never admissible to throw down language which is definite and certain, nor when it would be in violation of settled rules of construction.

11. Unless a use of water for power is in excess of right, and is continuous for twenty years, and is adverse, and is shown to have occasioned actionable injury, no prescriptive right arises. No such prescription is shown in this case.

12. The reasonableness of the detention of running water by dams by the riparian proprietor above to the injury of the riparian proprietors below depends much upon the nature and size of the stream as well as the use to which it is subservient. A use of water followed by detention which would be reasonable in a pond that would fill in a night time might not be reasonable in a case where it would take weeks or months to fill the pond. The owner of the dam controlling the water must not only see existing conditions, but he must foresee probable consequences. He must not, either by use or sluicing, lower the water in the dam, so that in order to perform his duty to those below, and give them the natural flow at all times, he must deprive the grantees on his own dam of the water to which they are entitled. He must keep up the head so that they can exercise their rights, and, then, the surplus of water, either natural or accumulated, which they are not entitled to, or do not use, he may use or turn down stream.

13. Where upper proprietors had the right, under grants from the owner of a dam, to use water for operating a grist mill and a woolen mill, they had the right to use the grants in the usual manner, returning the water to the stream without unnecessary loss or detention, although a riparian proprietor below, which was also the owner of the dam, was a public service corporation, charged with the performance of public duties.

14. Under a grant of the use of water, unlimited as to the number of hours' use the grantee may use the water as many hours in the day as he pleases.

15. Under the grants and upon the evidence in this case, *Held:* that the plaintiff, Oakland Woolen Company, is entitled to the use of 500 square inches of water, or water which would pass through an orifice having a superficial area of 500 square inches, under the grants of the tannery privilege; and under the grants of the wood shop privilege, to the use of six square feet of water, or nine square feet when the water runs over the dam, but not exceeding the quantity granted in 1849, which was one third of the water running in the stream, subject to the right of the tannery privilege, both of these uses being under the usual heads at the times of the grants. The plaintiff, Oakland Water Company, is entitled to the privilege to draw water for the grist mill, subject to the tannery grant of 1879, but limited to the use of no greater quantity of water for the tannery privilege than was required by the grant of 1823. The measure of right under the grist mill grant of 1836 is considered to be the present ordinary use of the grist mill, with the present wheels, under the usual working head of water as it was usually kept before this controversy arose. All the grants are unlimited as to the number of hours they may be used in the day.

16. For their damages the plaintiffs will be remitted to their remedy at law. *Gray v. Water Power Company*, 85 Maine, 526, distinguished.

In equity. On report. Case remanded for further proceedings in accordance with the opinion.

Bill in equity praying for a determination of the respective rights of the owners of a water power developed by the Coombs Mills dam on the Messalonskee stream in Oakland, Kennebec county, and for an injunction. Heard at the October term, 1904, of the Supreme Judicial Court, Kennebec county. At the conclusion of the evidence the case by agreement was reported to the Law Court, "such decree to be entered therein as the law and the evidence require."

The case appears in the opinion.

Wm. T. Haines and Harvey D. Eaton, for plaintiffs.

Charles F. Johnson and G. K. Boutelle, for defendants.

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

SAVAGE, J. Bill in equity praying for a determination of the respective rights of the owners of water power developed by the Coombs Mills dam on the Messalonskee stream in Oakland, and for an injunction. Messalonskee stream is the outlet of Snow pond, a pond with an area of about four and one half square miles. Prior to 1823, Jonathan Coombs owned the land on both sides of the stream and erected a dam across it, at a distance from the foot of the pond proper of nearly a quarter of a mile. A dam of substantially the same height as the original one has ever since been maintained and still stands at the same point. The dam ponds the water back on the entire surface of Snow pond, so that when the water is drawn below the top of the dam, it takes sometimes weeks and sometimes months for the pond to fill again.

In 1823 Jonathan Coombs conveyed to William S. Stanley a lot of land below the dam above mentioned, bounded by the Messalonskee stream on one side, "together with the privilege of taking water from the flume of the grist mill if it does not injure the speed of the grist mill; but if it does then to be taken from the dam sufficient for carrying on every branch of the tanning business; but for no other purposes or machinery whatever." For convenience, we will call this the tannery privilege. In 1879 the owners of the dam conveyed to one Parker, then owning the above mentioned lot and the tannery privilege, "the right and privilege to use for any and all purposes five hundred inches of water that the said Parker now has the right to take or draw from the upper stone dam," which was the Coombs Mills dam, . . . "for the purpose of carrying on the tannery business; provided that he, the said Parker, and his heirs and assigns, shall hereafter contribute his or their share or proportion with others in keeping said dam in repair in proportion to the quantity of water he or they use, meaning and intending to convey to said Parker the right to use five hundred inches of water for all purposes, while he has heretofore had the right to use said water for one particular purpose only." In 1902, the Oakland

Woolen Company, one of the plaintiffs, succeeded in title to the land and water rights which had belonged to Parker.

In the meantime, in 1836, the parties then owning the dam had conveyed to one Thomas land on the same side of the Messalonskee stream as the tannery privilege, but nearer the dam, "with the privilege to draw water for a grist mill from the dam or canal on conditions that the said Thomas shall build and maintain a part of a dam and canal in proportion to the water that may be wanted for the said grist mill." It appears that upon this lot a grist mill was standing, with a flume connected with the dam, at the time Coombs conveyed the tannery privilege in 1823. In 1898 this land and privilege was conveyed to the Oakland Water Company, the other plaintiff. This privilege is called the grist mill privilege. The Union Gas and Electric Company in its answer denies that the Oakland Water Company acquired title to the grist mill lot and privilege. Of this we will speak hereafter, simply saying now that the foregoing statement is correct, according to the terms of the deed.

In 1849, the parties then owning the dam conveyed to David Coombs a lot of land on the Messalonskee stream, being all the land between the tannery lot and the grist mill lot, "together with one undivided third part of the mill dam across said stream with the right to take and use one third part of the water therein running after deducting the right of water to grind bark and full hides for the tannery originally sold to William S. Stanley." This we call the wood shop privilege. In 1854 the parties who owned this lot and privilege conveyed the lot to one Butterfield, "with the right to draw six square feet of water from the canal now on the above described premises, and nine feet when there is a surplus water running over the dam; said Butterfield to keep said canal in good repair." Since that time the lot has been the subject of many conveyances, none of which mentions the dam specifically, but every one of which contains in the habendum clause the words, "with all the privileges and appurtenances thereunto belonging," or "with all the privileges and appurtenances thereof." Whenever the water right is specifically mentioned in the later deeds, it is described as it was in the deed to Butterfield in 1854. By the last of these

conveyances, this lot and privilege was conveyed to the Oakland Water Company in 1898, at the same time and by the same deed the grist mill lot and privilege was conveyed to it. In 1902, the wood shop lot and privilege were leased by the Oakland Water Company to the Oakland Woolen Company for the term of ninety-nine years. So that so far as the present determination of rights is concerned, the Oakland Woolen Company may be regarded as the owner of both the tannery lot and privilege and the wood shop lot and privilege. By the terms of the lease, the lessee agreed to furnish power from the wheel on the leased premises for running the lessor's pump, and has since connected a line of shafting from the wheel to the lessor's pumping station for that purpose, and the same is now in use.

Since its purchase in 1902, the Oakland Woolen Company has expended a large amount of money in erecting a woolen mill on the tannery and wood shop lots, and in equipping the same with machinery. It has, as it claims, further developed the water power upon those privileges by installing new and improved and more economic water wheels. And it is now carrying on there the business of woolen manufacturing.

The defendant corporation, the Union Gas and Electric Company, is the only one of the defendants whose rights we shall need to consider, as the defendant Spaulding's only rights, except as riparian proprietor below, he holds under and by virtue of a contract with the other defendant. And by the term defendant hereafter we shall refer only to the corporation.

The defendant is the owner by mesne conveyances from Jonathan Coombs of all the dam and water rights at the Coombs Mills dam which have not been conveyed to others by the deeds above referred to. It owns a shop or mill at the south end of the dam, equipped to be run by water power from the dam. It also owns a shop called the Batchelder chair shop, run by water power from the opposite end of the dam, above the grist mill privilege. It also owns and controls the outlets of a chain of ponds above Snow pond, so as to be able to utilize the water therein for storage or reservoir purposes. There are in the Messalonskee stream below the Coombs Mills dam several developed water privileges, and at Waterville, six or seven miles dis-

tant, the defendant owns and operates an electric light and power station. Taken as a whole, it seems to be a case at present where there is more enterprise than water.

While for many years, with the uses for water power which then existed, the proprietors at the dam in question, and on the stream below, enjoyed their privileges without serious trouble or complaint, and perhaps without any careful determination of their respective rights, in very recent years, by new development of uses, and as well by a development of new uses for water power, particularly, so far as concerns this case, by the plaintiff, the Oakland Woolen Company at its mill, and by the defendant at its power station in Waterville, the parties have come into very sharp collision as to their rights. And to adjust those rights they have properly come into a court of equity. *Warren* v. *Westbrook Mfg. Co.*, 88 Maine, 58.

The plaintiffs claim that the dam in question is a power dam, as distinguished from a reservoir dam, that it was erected and has always been maintained to create power for the use of the various mills connected with it, and that lately the defendant has used it as a reservoir dam, and, by drawing off the water within it by a sluice and otherwise, so that it might flow down and be used for the more convenient operation of its power plant below, has at times lowered the head of water at the dam more than it had any legal right to lower it, and so low in fact as to destroy its efficiency for the creation of power upon the plaintiffs' wheels. And it is alleged that by this conduct the Oakland Woolen Company has lost the use of the water power belonging to it, and has been put to great expense in supplying itself with power otherwise, and it is claimed that damages therefor should be recovered in this proceeding.

On the other hand the defendant claims that the lowering of the head of water and the other conditions complained of in 1903, prior to the bringing of this bill, were due to the unusual drouth of that year, and to the Oakland Woolen Company's use of water in excess of its rights, and not to the sluicing of water by it, and that afterwards it sluiced water through the dam only to let down the natural flow of the stream, together with the stored waters which had been accumulated in the reservoir ponds above. It says further that in

1904, it did not sluice any water until after the woolen company had ceased to use its wheels for manufacturing purposes. This, however, was after the bringing of this bill.

It is evident that the plaintiffs' rights, whatever they are, are superior to those of the defendant, as owner in the dam and the land with which the dam is connected. The several rights of the plaintiff were carved out by the owners, one after another, from the more extensive rights which they owned, and only the remainder has come down to the defendant. Jonathan Coombs owned the whole. He sold the tannery privilege. His grantee thereby acquired the first right to the extent of that grant. The successors in title of Jonathan Coombs granted the other privileges, thereby in each instance diminishing the right of the grantors. And thereafter neither the grantors, nor those holding under them, had any right to interfere with these grants, nor to diminish the quantity of water which had been granted. *Stickney* v. *Munroe,* 44 Maine, 195. The defendant's rights as dam owner are subject to those grants. It cannot use or sluice water in diminution of the grants, if the grantees wish and are prepared to use it. But if the grantees are not using, or have no wish or preparation to use the water, the grantor or those holding under him may use the whole or allow it to flow down stream. *Warren* v. *Westbrook Mfg. Co.* 88 Maine, 58; *Pratt* v. *Lamson,* 2 Allen, 275. Flowing water is not subject to ownership. Grantees of water rights have merely the right to use it as it flows. They must use it then or not at all. All the rights, however, both of grantors and grantees, are subject to the rights of riparian proprietors below to have the natural flow of the stream transmitted to them, after reasonable use or detention.

1. The deed of the tannery privilege in 1823 conveyed the right of taking water from the flume of the gristmill then standing, or from the dam in a certain contingency not important here, "for carrying on every branch of the tanning business," but for no other purpose. Although this grant was modified and limited in 1879, it is important, considering one phase of the case, to construe this original grant. It does not appear that a tannery was then standing on the lot conveyed by the deed of 1823, but it is evident that one was standing,

or was contemplated. The use of the water was expressly limited, but the amount of water was not limited in terms, though we think it was by implication. It was such a quantity of water as would develop the power necessary to carry on every branch of the tanning business, either as it existed at the time of the conveyance, or was then contemplated by the parties. And their conduct afterwards, the use by one and the acquiescence of the other, would furnish "swift evidence" of what was in contemplation by them. *Butler* v. *Huse*, 63 Maine, 447. Such we think was the intention of the parties, which, so far as expressed in the deed, and construed in the light of existing conditions, must control. The grantor was the owner of a saw mill run by water power from the same dam. As was said in *Covel* v. *Hart*, 56 Maine, 518, "it is evident that it is either a grant of all the water which may thereafter be found necessary to carry on the business of tanning in the yard, however extended and whatever new or additional machinery or vats or other works may be introduced and used, even if they should require all the water of the stream; or it must be limited to the quantity necessary to carry on the business of tanning as it had been carried on and was carried on at the time of the giving the deed." And the court added "it would be remarkable, if he (the grantor) had granted a right to an indefinite quantity of water which might be so exercised as to destroy the value of his mill and privilege." *Davis* v. *Muncey*, 38 Maine, 90; *Blake* v. *Madigan*, 65 Maine, 522.

Although the defendant here in argument says it does not resist a decree the effect of which will be to keep the water in the dam up to a "workable head," it does contend that as a matter of strict construction of this and the other deeds, it is not obliged to maintain the water up to the crest of the dam, as claimed by the plaintiffs, or to any other particular head. The deed itself was silent as to head. But it does not follow that for that reason the grantor left himself at liberty to lower the head to suit his own interests or pleasure. The use of the water was granted for the purpose of creating power. To create power a head is essential. The water was to be taken from the dam, or from a flume in which naturally the water would stand at the same level as in the dam. The purpose of the dam was to

create a head. The grantor having granted the tannery lot, with the right to draw water from the dam to be used for power purposes on the lot, could have no right to draw off or use the water and so lessen the head to the detriment of the grant he had made. *Stickney* v. *Munroe*, 44 Maine, 195; *Jordan* v. *Mayo*, 41 Maine, 552. It does not seem to us consistent with the purposes of the grant that the head was to be changeable or variable according to the will of the grantor. The grant of water for power by the owner of the dam implies that the water is to be kept at such head as is necessary for the enjoyment of the grant. *Rackley* v. *Sprague*, 17 Maine, 281. "The good sense of the doctrine on this subject is that under the grant of a thing, whatever is parcel of it, or of the essence of it, or necessary to its beneficial use and enjoyment, or in common intendment is included in it, passes to the grantee." Story, J., in *Whitney* v. *Olney*, 3 Mason, 280. In this case, however, it does not mean necessarily that the water is to be kept as high as the crest of the dam, for that may not be necessary. As we have seen, the amount of power to be developed was fixed as of the time of the grant. That power could be produced with more water under less head, or with less water under more head. It rarely or never happens that the head is constant. The use itself of the water tends to change the head. Nevertheless we think the parties must have had some definite intention as to the head, and in the absence of qualifying limits in the grant, or of explanatory conditions at the time, we think it should be held that the head intended was the head customarily and ordinarily used at the time of the grant. When this is known, it is not difficult to ascertain the quantity of water under this head which will produce the power required. Now since there is no evidence of the amount of water granted as measured by the power required in 1823, as there is now neither witness nor record of that fact, the continued, unvarying use by the grantees, especially for a long period of time, acquiesced in by those in the line of title of the grantors, will furnish very satisfactory evidence of the extent of the original grant, both as to head and quantity.

But in 1879, the predecessors in title of the defendant granted to the plaintiff's predecessor in title, Parker, the right to use for any

and all purposes five hundred inches of water that the said Parker now has the right to take or draw from the upper or stone dam . . . for the purpose of carrying on the tanning business." No land was granted, although the grantors owned one third of the dam in common and undivided. Merely an incorporeal hereditament was granted, — the right to draw water. But we think that the grant must be construed in the light of conditions created by the previous grants. The grant was manifestly intended as a substitute for the previous grants of water, which it modified. It is a grant of the water which the "said Parker now has the right to take." But all restrictions on the use are removed, and the quantity is fixed at five hundred inches. The parties agree that this means five hundred square inches, or water which would pass through an orifice with a superficial area of five hundred square inches. Whether this quantity is greater or less than the original grant does not appear. At any rate, these figures measure the quantity of water to which the woolen company is now entitled by virtue of the grant of the tannery privilege. And though no part of the dam was granted, nor was the right to draw from the dam or flume expressly granted, there is no doubt but that right passed as appurtenant to the principal grant,— the right as then ordinarily used. *Whitney* v. *Olney*, supra.

Here again the parties are at issue concerning the head at which the woolen company is entitled to take its water. Since the area of the section of water as it passes from the dam or flume to the grantee is fixed, the head becomes all the more important. The defendant invokes the case of *Gray* v. *Water Power Company*, 85 Maine, 526. In that case there had been granted "the right of drawing as much water . . through my dam as will vent off through a gate or opening that is equal to ten inches square, . . . and to carry the water across my land situated between the dam and said Berry's (the grantees) shop by canal or otherwise, . . . or said Berry may at his election take the water out through the main dam and carry it down the brook, nearly to the bridge, by a flume or otherwise, and there erect a building twenty feet square for the convenience of his water wheel, . . . meaning to convey to said Berry the right of using as much water out of the pond as would pass through a

hole ten inches square after conveying it to a convenient place to erect a water wheel." Nothing was said about a head. The grantee made through the dam an opening of one hundred square inches, the lower part of which was three feet above the bottom of the dam. And the water thus drawn from the dam was conducted by a *canal dug* by Berry to his wheel, which was set on about the same level as the bottom of the dam thus obtaining three feet head after it left the dam. It was held that the act of the successor in title to the grantor in drawing down the water in the dam nearly to the top of the opening of the dam, thereby diminishing the usual head of water in the pond was not an infringement upon the right granted.

It will be observed that the grant was of an incorporeal right, and of only an easement in the land for the purpose of conducting the water to a contemplated wheel. It was not the grant of a millsite, with water rights granted expressly or appurtenant. It was not a grant in substitution of existing water rights, or to be construed in connection with such rights. It was merely the grant of the right to draw so much water. The court said that the decision of the case depended upon the intention of the parties to the grant, (meaning of course the intention as expressed) "taken in connection with their situation and the subject matter of their transaction at the time." In ascertaining that intention the court noticed that the quantity of water was small; that the part of the dam from which the water was to be taken was not specified, there being an option of two different places; that no mention was made of any head whatever; that the size of the opening only was given; that "neither the dimensions of the mill to be built, nor the kind, extent or purpose of the machinery to be attached thereto and operated by this small quantity of water carried several rods from the dam in a *canal,* is hinted at;" and that nothing was said about Berry's sharing the expense of keeping the dam in repair. All such matters, of course, are proper for consideration when the language of the grant is indefinite. But the court expressly recognized the rule that the grant of a principal thing carries all things necessary to the use and enjoyment of the thing granted which the grantor has the power to convey, and, therefore, that the grant of mills carries by implica-

tion the use of the head of water necessary to their enjoyment owned by the grantor, citing *Blake* v. *Clark*, 6 Maine, 436; *Rackley* v. *Sprague*, 17 Maine, 281; and *Wyman* v. *Farrar*, 35 Maine, 70. And the court also cited with approval the case of *Canal Co.* v. *Hill*, 15 Wall, 49, where it was held that, although no head of water was mentioned in a lease of "so much water as would pass through an aperture of two hundred square inches to be used solely for propelling the machinery of a paper mill and appurtenant works," it was to be presumed that the parties contracted in reference to such a head as depended upon the usual depth or height of water in the canal. This last case was distinguished by the court from the case then decided on the ground that in the former case the use to which the water was to be appropriated was specified in the lease.

We think the case now at bar is to be distinguished from the case of *Gray* v. *Water Power Co.*, supra. Here the grant was made with reference to a water power then in actual use by the grantee, modifying and limiting it, to supply a mill and machinery then actually existing, and it was to be in substitution of a grant under which the grantee, as we have seen, was entitled to have such a head maintained as was necessary to the enjoyment of the grant. Provision was made for paying a proportionate part of the expenses of repairs on the dam. The production of power by the water granted was the object of the grant. Since the ventage area was limited, to lower the head would tend to impair and might destroy the utility of the grant itself. To imply that the grantor reserved such a right would, we think, be in violation of the manifest intention of the parties. We think rather that it should be held, in the language of *Canal Co.* v. *Hill*, supra, that the parties contracted with reference to such a head as depended upon the usual depth or height of water in the dam.

2. The next in order is the grant of the grist mill lot in 1836, "with the privilege to draw water for a grist mill." This grant is subject to the tannery grant in 1823, and likewise we think to the substituted grant in 1879. But as it does not appear whether the grant of 1879 calls for a larger quantity of water than that of 1823, it should be added that the grist mill grant is subject to the use

of no greater quantity of water for the tannery privilege than was required by the original grant.

We understand the defendant to claim that the plaintiff water company which now owns the grist mill and leases it to tenants at will is not authorized by its charter to engage in the grist mill business and draw water for it, and therefore that the right so far as the plaintiffs are concerned has lapsed. We do not think so. We think the case shows that this privilege was purchased by the water company in connection with the adjoining lot on which it proposed to use water power for pumping purposes, and that in one respect at least its proper corporate operations would be facilitated by acquiring the ownership of the grist mill property. Its use of this property should be regarded as incidental and not unlawful, and not subject to successful attack by the defendant.

As was true in the case of the tannery privilege, so here, the amount of water granted was indefinite in terms. To ascertain that amount reference must be had, as in the other case, to the conditions existing, or contemplated at the time of the grant. And in the absence of evidence specifically bearing upon that time, the conduct of the parties during all the years,—the use and the acquiescence,—must be resorted to. So far as we can judge from the case before us that use has not been materially changed, and the present ordinary use, with the present wheels, under the usual working head of water as it was usually kept before this controversy arose, must afford the measure of right under the grist mill grant. As that water power has always been used and is now being used for grist mill purposes, it is unnecessary to inquire now whether the use of that privilege is limited to grist mill purposes.

3. And next and last is the grant, in 1849, of what is called the wood shop lot "together with one undivided third part of the mill dam across said stream, with the right to take and use one third part of the water therein running after deducting the right of water to grind bark and full hides for the tannery originally sold (in 1823) to William S. Stanley." In this grant the quantity of water granted was expressly defined as one third of the water running in the stream. So far the language is controlling. But it is in terms subject to

the rights of the tannery privilege, meaning, of course, those rights as they existed in 1849. It is not subject to any greater rights, if any such were created as against the grantor, by the grant of 1879. But since the plaintiffs own both of these rights, and both are superior to the defendant's rights, it is unnecessary to consider this feature further. Following the rule already stated, the grant of one third of the dam, with the right to use one third of the water, implied that the usual head of water was to be maintained.

But the defendant contends that this grant was subject also to the deduction of the water used by the grist mill; that the grantee was entitled to the use of only one third of what water was left after satisfying both the tannery and grist mill grants. It appears by the 1849 deed, that after stating a grant of land with prescribed boundaries, and of the water privilege, subject to the tannery privilege, in the language we have quoted, the grantor used the following language:—"Excepting and reserving out of the last described parcel of land, Kimball & Mathews' store lot, Samuel Kimball's house lot, Alfred Winslow's tannery lot, and John Mathew's and S. H. Bailey's grist mill lot." The "tannery lot" and "grist mill lot" are the ones now in question. The defendant's claim is that construing the language of the exception more strongly against the grantor, it should be held that by excepting the grist mill lot from the conveyance the water privilege appurtenant to it was also excepted, and was thereby made an exception to be deducted from the water granted. We are not persuaded that this construction is allowable. It is evident that the excepted parcels were within the boundaries of the larger parcel first described. The tannery lot and the grist mill lot, we know, had previously been conveyed, and were not then owned by the grantor. It may have been so with the other excepted lots. At any rate, it is obvious that the purpose of the exception was to take entirely out of the grant in every respect the excepted parcels of land, so that the effect would be the same as if the granted land had first been so described as to exclude the excepted parcels, without any reference to them. The grantor particularly described the right of water granted as subject to the tannery right, and no

other. There is nothing in the deed from which any other deduction can be implied.

It appears that in the later conveyances of the woodshop lot and privilege, the interest in the dam which was conveyed by the deed of 1849 has been omitted, and the water right has been described as the right "to draw six square feet of water from the canal now on the above described premises, and nine feet when there is a surplus water running over the dam." How this change of description came about does not appear. But it is not claimed that as against the defendant, these later grants enlarged the original right. They might lessen it. It is diminished so far as ownership in the dam itself is concerned. The present grantee is entitled to six square feet of water, and nine square feet when the water is running over the dam, but not in any event in excess of one third of the water in the stream, after deducting the tannery right. And appurtenant to this, as we think the case shows, is the right to take this water from the canal, as it has been taken, for many years at least. *Rackley* v. *Sprague*, supra; *Baker* v. *Bessey*, 73 Maine, 479.

The defendant contends that the results reached by us do not represent the intentions of the parties to the grants as shown by their conduct, by the practical construction put upon the grants by them. It is true that in cases of doubt, the practical construction given by the parties is sometimes of great consequence in ascertaining the intentions which should be attributed to them by the language used or omitted in their grants. But such interpretation is never admissible to throw down language which is definite and certain, nor when it would be in violation of settled rules of construction. The conditions upon which the defendant relies relate chiefly to the relative quantities of water which have heretofore been used by the respective parties, and not very much as to the head which has been maintained. The proportionate parts of the expense of repairing the dam, as borne by the several parties, is also relied upon. It is said that for a long period of years, those in the defendant's rights have used much more, and those in the plaintiffs' rights have used much less water than they would be entitled to under the construction we have placed upon the grants. Of course such long continued use, in the absence of any

terms defining the rights from which the measure of water can be calculated, would be important, and might be controlling. But while usage is admissible to explain what is doubtful, it cannot be permitted to contradict what is plain. *Cummings* v. *Blanchard*, 67 N. H. 268. And unless the use has developed into a prescriptive right, it cannot be employed to defeat rights which are definitely granted and are capable of calculation. Here the tannery right is fixed as to area of ventage. The element left uncertain is the head which the deed implied, and that is susceptible of proof. The extent of the grist mill right is easily ascertainable. And the woodshop right can be calculated, when the flow of the stream is ascertained, and the tannery right, as it was in 1879, deducted.

Whatever the actual relative use of the water may have been, it is sufficient to say, without analyzing the evidence, that there is no evidence showing that any prescriptive right on the part of the users has been acquired. Until 1902 there seems to have been little or no trouble or complaint. As already said, any party had a right to use any or all of the stream which other parties did not require. The exercise of such a right, however long continued, does not give rise to a prescription. Unless such use of water is in excess of right, unless it is continuous for twenty years, unless it is adverse, and unless it is shown to have occasioned actionable injury, no prescription arises. *Crosby* v. *Bessey*, 49 Maine, 539. "Where a proprietor of land upon the shore appropriates and applies to his individual use so much of the passing water as he is enabled to do, even if it be the whole of it, by means of obstructions erected upon and within the limits of his own estate, and the proprietor of the land on the opposite shore neither uses nor seeks to use, nor makes any provision nor has any occasion for the use of any part of the stream or proportion of the water to which he is entitled, there is nothing adverse in the action of the former." *Pratt* v. *Lamson*, 2 All. 280. So as to any disproportionate use. In this case there is no evidence that any of the parties, except in rare instances, used any of the water that any other party at the time wanted to use.

In this case, for determining the rights of the parties, since they are all subject to the rights of riparian proprietors below, it will be

proper to say a word additional upon the right of detention of water, as applied to the conditions which exist. The defendant controls the dam. The dam not only holds the flowing water in a stream, but ponds it back over the area of a large pond over four square miles in area. If the water in the dam is permitted to get below the proper head, it is evident, as it is indeed admitted, a long time may elapse before the pond fills and the head is restored. The case is therefore different from the usual one of a pond in a river, which quickly fills after being lowered,—the filling by night, as is often the case, supplying the exhaustion occasioned by the use the day before. "Reasonable use is the touchstone for determining the rights of the respective parties." *Lancey* v. *Clifford*, 54 Maine, 487. "The reasonableness of the detention of running water by dams by the riparian proprietor above to the injury of the riparian proprietor below, depends much upon the nature and size of the stream as well as the use to which it is subservient." *Davis* v. *Getchell*, 50 Maine, 602. A use of water, followed by detention which would be reasonable in a pond that would fill in a night time, would not be reasonable in a case where it would take weeks or months to fill the pond. The owner of the dam controlling the water must not only see existing conditions, but he must foresee probable consequences. He must not either by use or sluicing, lower the water in the dam, so that in order to perform his duty to those below, and give them the natural flow at all times, he must deprive the grantees on his own dam of the water to which they are entitled. He must keep up the head so that they can exercise their rights and then the surplus of water, either natural or accumulated, which they are not entitled to, or do not use, he may use or turn down stream.

Nor is the situation materially changed by the fact that the defendant is a public service corporation, and charged with the performance of public duties, and that those duties can be more conveniently performed by having the flow of water in the stream kept constant. While it is true that the reasonableness of a use must be determined in the light of all other existing rights in the stream, and the upper right must not be unreasonably used to the prejudice of a lower right, yet it is also true that the plaintiffs have a right to use their

grants for operating a grist mill and a woolen mill, and for pumping water, and to use them in the usual manner, returning the water to the stream without unnecessary loss or detention. The proprietors below must take the water as it comes, after such a use, even if the flow is less constant and less valuable than it would otherwise be.

A question is raised as to the number of hours in a day the plaintiffs are entitled to use their grants. The answer is found, we think, in *Carleton Mills Co.* v. *Silver*, 82 Maine, 215, where this court held that the grantees under a grant similar to these had the right to run their factory by the water power granted as many hours a day as they considered proper.

The bill prays for an injunction. As the case has come up on report, this court is authorized to determine all issues raised by the bill and answer. We have determined the construction to be placed upon the grants under which the plaintiffs hold. But we think the case is not yet ripe for further decision. And although ordinarily we should proceed to a decision upon such evidence as the parties have thought fit to offer, we are the more willing to depart from that practice in this instance, not only because there is a lack of essential evidence, but more particularly because it is obvious that the parties can now, after construction, direct their proof to the pivotal points of the controversy. And we think it is just that they be permitted to do so.

The first question to be settled relates to the head of water. We have held that the grants called for the maintenance of a head at the usual height at the time the grants were made. That may have been at the crest of the dam, and at some times in the season it may have been lower. It is not denied that the present wheels of the plaintiffs, which they claim use no more water than they are entitled to use, can be run efficiently with the water at least one foot lower than the crest. Whether the dam was usually kept full, or was usually drawn down somewhat in the dryer seasons of the year, so as to use the supply in the pond, does not appear. It should be made to appear. Again, before the plaintiffs can obtain an injunction, it must satisfactorily appear that the lowering of the water in the pond was not due to their own use of water in excess of their rights. If both

parties have exceeded their rights substantially, we think an injunction ought not to be awarded to one against the other; and that having learned their rights, it will be presumed that they will not hereafter overstep them. The plaintiffs have not yet shown that in the use of the water under the tannery and wood shop grants they have clearly acted within their rights. Under the one they are entitled to the use of five hundred square inches, under the other to six square feet, or nine square feet when the water runs over the dam, but not exceeding the quantity granted in 1849, both under the usual head at the time of the grants. These are fixed amounts and are susceptible of measurement. There is no satisfactory evidence offered by the plaintiff as to the amounts used by the present wheels. Their capacity for use of water was not determined, so it appears, with reference to the amount of water conveyed by the grants, but with reference to the capacity of the wheels which were there before. That is not sufficient. Though the defendant has offered evidence touching the draft of the plaintiffs' wheels, still it is not shown whether that is, or not, in excess of the plaintiffs' limited rights. Before a definitive decree can well be framed, even for the partition of the water, all these facts should be ascertained, and it will be for the interest of all parties that the rights of the plaintiffs should be expressed in cubic feet per second.

The cause will therefore be remanded below, and there will be referred to a master who will, upon the present evidence and such other evidence as the parties may present, ascertain and report, in cubic feet per second, the quantity of water the plaintiffs are entitled to use under each of their grants, and under what head, as determined by him in accordance with the opinion. He will also ascertain and report in cubic feet per second, the quantity of water which the plaintiff woolen company's present wheels use under the ascertained head.

Upon the coming in of the master's report, a single justice will determine the questions of injunction and costs, and enter a final decree in accordance with the opinion.

As to damages, the court is of the opinion that the plaintiffs should be remitted to their remedy at law, where the parties may exercise their right to a trial by jury. We do not deny the jurisdiction of

a court in equity in appropriate cases to award damages as incidental to an equitable remedy, in order that full justice may be done, or in place of an equitable remedy prayed for, when the specific remedy has become impracticable or would be futile. 1 Pomeroy Eq. Jur. 3rd Ed. sect. 237. It is sufficient to say here that there is not only a want of essential evidence, as already pointed out, as to how much of the plaintiffs' injuries were due to the defendant's acts, but from the character of the evidence of damage offered there is no way of distinguishing between damages sustained before the bill was brought, and those sustained afterwards.

Case remanded for further proceedings in accordance with the opinion.

IVERS & POND PIANO COMPANY *vs.* HATTIE E. ALLEN.

Washington. Opinion February 27, 1906.

Trover. Conversion. Conditional Sale. Chattel Mortgage. Recorded and Unrecorded Chattel Mortgages. R. S., c. 114, § 5.

The defendant gave a mortgage of a piano to the plaintiff who did not record his mortgage. Afterwards she gave another mortgage to one M. who recorded it.

Held: that this was an illegal and unauthorized exercise of dominion over the piano, inconsistent with and detrimental to the rights of the plaintiff, and was a conversion of it by the defendant, without any manual transfer of the property.

On exceptions by plaintiff. Sustained.

Trover brought to recover the value of a piano belonging to the plaintiff and alleged to have been converted by the defendant to her use. Plea, not guilty.

The piano was delivered to the defendant in July, 1904, and at the time a lease and agreement was executed between them which

retained the property in the piano in the plaintiff until fully paid for, but which was never recorded.

The defendant paid under the lease as agreed up to February, 1905, when the property was destroyed by fire, there being then still due on the lease $225.

A demand was made on the defendant by plaintiff in June, 1905.

On Dec. 28th, 1904, the defendant mortgaged the piano together with some other property to William G. Means. His mortgage was recorded, but he never took possession of the property.

The value of the piano at the time the defendant mortgaged it to Means was $250.

In the court of the first instance, on the foregoing facts, a nonsuit was ordered, and thereupon the plaintiff excepted. It was also agreed that if the nonsuit was incorrectly ordered that the plaintiff should have judgment for $250 and costs.

The lease executed by the parties runs as follows:

"BOSTON, MASS., July 7th, 1904.

"I have hired of Ivers & Pond Piano Company a Piano-Forte, Style 231 of said Company's make, Number 32663, valued at three hundred dollars ($300) I agree to pay for the use of same, Ten Dollars cash, the same being rent hereof to August 7th, 1904; and Eight Dollars thereafter, as long as I hire it, a monthly rent of Eight Dollars, payable monthly, in advance, and at the same rate for fractions of a month, with interest at six per cent per annum on unpaid balances of said valuation, at said Company's Warerooms, 114 Boylston Street, Boston.

"Said instrument shall not be removed (except on account of danger from the elements) from my premises at Machias, Maine, without written consent of said Company, and unless I buy it, shall be returned to said Company in as good order as when received by me, ordinary wear excepted.

"If I fail to perform any of these agreements said Company may, without notice or demand, take and remove said instrument, wherever it may be, and thereupon my right to hold or use it shall

cease, without prejudice to said Company's rights on account of any preceding breach hereof.

Signed in Duplicate, HATTIE E. ALLEN, Lessee.
Post Office address, Machias, Maine.

"If said lessee does as agreed above, till payments of rent amount to valuation and interest above named, said piano shall then become her property.

Signed in Duplicate,
IVERS & POND PIANO COMPANY, Lessor,
By I. H. CRABTREE."

W. R. Pattangall, for plaintiff.

H. H. Gray and A. D. McFaul, for defendant.

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

POWERS, J. Trover for a piano. In July, 1904, the plaintiff delivered the piano to the defendant, who at that time executed and delivered to the plaintiff a lease or agreement in regard to the same, reciting that she had paid ten dollars for rent until August 7, 1904, and was to pay eight dollars a month for the use of the same, as long as she hired the piano, until $300 and interest on unpaid balances of that sum was paid, and that, if she fulfilled her agreements till the payments of rent amounted to $300 and interest, the piano should become her property. This instrument was never recorded. The defendant paid as agreed up to February, 1905, when the piano was destroyed by fire. On December 28, 1904, the defendant mortgaged the piano to one Means, who recorded his mortgage but never took possession of the property. The presiding justice ordered a nonsuit and the plaintiff excepted. By agreement of the parties, if the nonsuit was incorrectly ordered, the plaintiff is to have judgment for $250.

The so called lease was in substance a conditional sale, not valid, except between the original parties, without record. R. S., chapter 114, section 5. The plaintiff's mortgage of the piano, not simply of

her interest in it, conveyed a good title to Means. Before that mortgage and its record the plaintiff had the full title to the property, subject to the defendant's equity of redemption. After that the plaintiff had simply the right to redeem from the Means mortgage. The fact that the plaintiff saw fit to trust to the defendant's honor instead of recording its lease, gave her no right to sell or dispose of the piano in any way that would injuriously affect its rights. As against the defendant its claim was valid, and her mortgage of the property was an illegal and unauthorized exercise of dominion over it, inconsistent with and detrimental to the rights of the plaintiff. It requires neither citation nor argument to show that such an act, carrying with it such consequences, was a conversion of the property, without any manual transfer or removal of it. Indeed we know of no accepted definition of a conversion which would exclude the facts of this case. It is sometimes said, that a mere paper sale of a chattel without transfer of possession does not constitute a conversion. That is true, where the rights of the owner to possession, and his legal interest in and title to the chattel, remain unaffected and unimpaired by the sale. Not so here, where the legal effect of the defendant's unlawful act deprived the plaintiff of its property and its right to possession thereof.

This case is not to be confounded with cases against a mortgagor, who has sold only his interest in the mortgaged property, as in *White* v. *Phelps*, 12 N. H. 382, or with cases against a vendee of the mortgagor, as in *Dean* v. *Cushman*, 95 Maine, 454, who obtains by his purchase a right of possession against all the world except the mortgagee.

Exceptions sustained.
Judgment for the plaintiff for $250.

In Equity.

GEORGE D. HAMANT *vs.* FRANK N. CREAMER.

Lincoln. Opinion February 27, 1906.

Real Estate. Execution Sale. Not Invalidated, When. Unauthorized Fees of Officer. Errors of Clerk Issuing Execution. Final Process Amendable. Power of Court, Suo Motu, to Order Amendments. Amendments Treated as Made, When. R. S., 1883, c. 82, § 142. R. S. c. 78, § 32.

An execution sale of the whole of a parcel of real estate conveys all the right, title and interest, of every nature, that the debtor has, and is not invalidated by the fact that he owns only an undivided interest in the land.

Such sale is not avoided by the fact that the officer making it taxed, and caused to be satisfied by the sale, fees not authorized by law.

When through an error of the clerk an execution commanded the officer to collect interest from the time of judgment, instead of from thirty days thereafter, the time fixed for payment in the decree, it will not be avoided, and the proceedings based upon it invalidated, if there is sufficient in the execution, taken in connection with other facts, to identify it with the judgment offered in evidence to support it.

Final as well as mesne process may be amended in the furtherance of justice, when no rights of innocent third parties have intervened except those which will be protected by the amendment.

The court suo motu may order such amendments to be made; and in collateral proceedings where such amendments are allowable, they will be treated as actually made.

Prescott v. *Prescott*, 62 Maine, 428, criticised and doubted.

In equity. On appeal by defendant. Decree below affirmed with additional costs.

Bill in equity, inserted in a writ of attachment, brought to remove a cloud upon the plaintiff's title to certain land in Waldoboro. Omitting the formal parts, the plaintiff's bill is as follows:

First. That he the said complainant is in possession of the following described real estate, situate in said Waldoboro and bounded northerly by land of the heirs of the late Ossie Creamer, and land

occupied by Frank A. Miller, easterly and southerly by the Medomak River, westerly by land of heirs of Lewis F. Heavener, containing forty-five acres, more or less, said complainant owning two undivided thirds of said property, by title defeasible only by redemption of the sale referred to below, and acquiring his title by virtue of a sheriff's deed of said property, executed and delivered to him by W. R. Walter, a deputy sheriff of John B. Rafter, sheriff of Lincoln County, said sheriff's deed being so executed and delivered to the complainant pursuant to the execution sale of said property on an execution which issued from our Supreme Judicial Court on a judgment recovered Nov. 3rd, 1903, by Etta M. Creamer *vs.* Alvin Creamer, said sheriff's sale occurring Jan. 18, 1904, being the date of said deed, under a seizure made Dec. 14, 1903.

Second. That at and prior to the time of the conveyances herein referred to the said Alvin Creamer now deceased, was the owner in fee simple of the complainant's said two-thirds of said property, the other third being owned by said Etta M. Creamer.

Third. That on the seventh day of December, A. D. 1903, the said Alvin Creamer, being deeply involved in debt, by reason of the recovery against him of said judgment in favor of said Etta, the same being a specific sum of $404.00, in lieu of alimony, and in addition to her dower equivalent, and being apprehensive of said seizure and sale, which were made shortly thereafter as above stated, and being desirous to defeat the intended levy of his said homestead, which comprised the bulk of all his estate, did make a certain transfer and conveyance of all his right, title and interest in and to said real estate to Frank N. Creamer, the defendant, all of which appears by a certain quitclaim deed, bearing said date of December seventh, A. D. 1903, and recorded in Lincoln County Registry of Deeds Book, 311, page 294, an attested copy of such record to be here in court produced. Said conveyance was received for record Dec. 8, 1903.

Fourth. That said transfer and conveyance of said property was made by said Alvin Creamer for the special purpose of evading the legal effect of said seizure and sale and with the intention of preventing said real estate coming into the hands and possession and

ownership of said judgment creditor or of any purchaser acting at her instance. And so the complainant avers that said transfer to the defendant was a fraudulent conveyance, and its object to hinder, defraud and delay the creditors of said Alvin.

Fifth. That said Frank N. Creamer, at the time of taking and receiving said transfer and conveyance to him, had full knowledge and sufficient notice of all the facts hereinbefore set forth and cooperated with said Alvin in his intent and purpose as above set forth. And the complainant avers that said conveyance was received by said Frank, as it was given by said Alvin, to defeat the purpose of said levy, and to hinder, delay and defraud the creditors of said Alvin. And the complainant further says that there was no consideration for said conveyance.

Sixth. That the complainant brings this bill in his own behalf and that of the said Etta M. Creamer, at whose special instance and request he bid in said property, and whom he represents or to whose rights he succeeds.

Wherefore the complainant prays:

That the said transfer and conveyance of said Alvin to the defendant be declared by the court to be void. That the defendant be prohibited from exercising any control over said property:

That the defendant be ordered and decreed to make, execute and deliver to the complainant a sufficient conveyance of said property, to the end that the cloud upon the title of the complainant of said property be removed, that the complainant may hold said property to his own use and for the benefit of whom it may concern.

And that the complainant may have such other and further relief as the nature of the case may require.

The defendant's answer, omitting formal parts, is as follows:

1. That said Hamant is not in possession of the premises described in paragraph one of his bill, except as tenant in common with the defendant, the said plaintiff either owning the one undivided third part thereof, or acting as agent or representative of Etta M. Creamer named in said paragraph.

The defendant does not know in which of said capacities the plaintiff so occupies, and therefore will require the plaintiff to prove the

same. The defendant further denies that the plaintiff has any right, title or interest whatever in and to the two undivided thirds to which he claims title by virtue of the alleged sale on execution in favor of Etta M. Creamer against Alvin Creamer and by sheriff's deed as set forth in said paragraph one.

2. That Alvin Creamer, on December 7, 1903, was the owner in fee simple of two undivided thirds of the premises described in paragraph one and thereafter on the same day for a valuable consideration conveyed the same to the defendant, which the defendant now holds; that on Jan. 18, 1904, the time of the alleged conveyance by deputy sheriff W. R. Walter the title to said two thirds was not in said Alvin Creamer, but was in the defendant.

3. The defendant admits that Alvin Creamer on Dec. 7, 1903, conveyed his two thirds of said premises to him, but denies the fraudulent acts, intent, designs and purposes as alleged in paragraph three of plaintiff's bill.

4. The defendant denies each and all allegations in paragraph four of plaintiff's bill.

5. The defendant denies each and all the allegations in paragraph five of the plaintiff's bill.

6. The defendant is not informed as to allegations in paragraph six of plaintiff's bill, and therefore denies the same and will require the plaintiff to prove the same, if true.

Wherefore the defendant prays that the plaintiff's bill may be dismissed with costs.

At the hearing on bill, answer and proofs, the Justice of the first instance, after making a finding of facts, which is sufficiently stated in the opinion, issued the following decree:

"Ordered, adjudged and decreed that the bill be sustained; and that the conveyance from Alvin Creamer to the defendant of two third parts in common and undivided of the premises described in the bill was fraudulent and void as against Etta M. Creamer, in whose favor the execution was issued which was levied upon said premises, and cannot be set up to defeat the title of the complainant acquired at a sheriff's sale on January 18, 1904; and that the complainant has good title to two third parts of said premises.

"Said defendant is perpetually enjoined from asserting any title to said premises under said deed from Alvin Creamer, or from in any manner doing any act prejudicial to the title thereto of this complainant.

"And it is further ordered that the defendant make, execute and deliver to complainant within thirty days from entry of this decree, a good and sufficient release and discharge of all his right, title and interest in said two third parts of said premises.

"And that complainant have and recover of the defendant the cost of this suit, for which execution is to issue."

Thereupon the defendant appealed.

O. D. Castner, for plaintiff.

Wm. H. Hilton, for defendant.

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

POWERS, J. Appeal by the defendant in a bill in equity, brought to remove a cloud upon the plaintiff's title to certain real estate in Waldoboro. By the decree the plaintiff was enjoined from asserting any title to, and ordered to release to the plaintiff all his interest in two third parts of the premises. The evidence is not reported, but instead thereof the facts found by the justice who heard the case, and which, as far as material to the grounds relied upon to sustain the appeal, are as follows:

"At the October term of this court, 1903, for Lincoln County, and on the third day of November, 1903, a divorce from the bonds of matrimony was decreed to Etta M. Creamer from her husband, Alvin Creamer, and there was decreed to her in addition to one third interest in the real estate of said Alvin Creamer, that instead of alimony said Alvin Creamer should pay her the sum of four hundred dollars within thirty days from the date of the decree. In default of payment, execution to issue therefor. The libel for divorce was inserted in a writ of attachment, on which real estate was attached on March 13, 1903. Payment of the four hundred dollars not being made, execution issued on the tenth day of December, 1903,

in which the officer was commanded to collect interest from the date of the decree, instead of from thirty days thereafter, the time of payment provided therein.

Upon the execution the officer seized, on December 14, 1903, the whole of the estate described in the bill, instead of two third parts thereof owned by Alvin Creamer, as of the date of the attachment, the lien of which had expired before the execution was issued or the seizure made. Under this seizure the officer proceeded in accordance with the statute to advertise and sell the estate, and did sell the whole land on the eighteenth day of January, 1904, to the complainant, and gave him a sheriff's deed of the same. No objection is made to the formality of these proceedings, leading up to the sale, except that he sold the whole when he should have sold two third parts. The amount for which it was sold was four hundred and thirty four dollars, the whole of which the officer applied in satisfaction of the execution and costs of sale. This included two dollars interest for thirty days, erroneously directed in the execution to be collected, but less than one per cent of the decree, and also included illegal fees of the officer in making the sale, to the amount of fourteen dollars and eighty-eight cents.

At the date of the attachment Alvin Creamer owned the whole of the land described, and on Dec. 7, 1903, he owned two third parts in common and undivided of the same, the other third being then owned by his former wife Etta. On that day he conveyed by quitclaim deed his two third parts to his brother Frank N. Creamer, this defendant.

Since the sale to Hamant he has been in possession of the premises.

I find that Alvin Creamer gave the deed to the defendant for the purpose of preventing his former wife realizing upon her judgment, and the defendant knew of this purpose and participated in it, and that the conveyance was not bona fide, but was fraudulent and void as to Etta M. Creamer, and that on December 14, 1903, two third parts of said estate were liable to seizure and sale on her execution."

The objection that the sale was of the whole land instead of two thirds cannot be sustained. The sale of the whole conveyed all the

right, title and interest, of every nature, that the debtor had. R. S., chapter 78, section 32; *Millett* v. *Blake*, 81 Maine, 531.

As to illegal fees of the officer, it is settled that a levy by appraisement is not avoided because the officer has taxed, and caused to be satisfied in the extent, fees not authorized by law. *Wilson* v. *Gannon*, 54 Maine, 385. With much greater force does the principal apply to a levy by sale. In the latter case, whatever the amount of the judgment and costs of levy as taxed, the whole interest of the debtor is sold, and the officer must account to him for any surplus.

This brings us to the final and principal contention of the defendant, that there is a fatal variance between the execution and the judgment on which the plaintiff claims it was based, in that the officer was commanded to collect interest from the date of the decree, instead of from thirty days thereafter. At the date of the execution R. S. 1883, chapter 82, section 142, was in force, which provided that interest should be collected from the time of judgment or payment, and the form of the execution be varied accordingly.

Whether the error in the execution renders it void or only voidable depends upon whether it is amendable. Every valid execution must be founded upon a judgment. If there is sufficient in the execution, taken in connection with other facts, to identify it with the judgment offered in evidence to support it, then it ought not to be avoided, and the proceedings based upon it invalidated, by an error of an officer of the court. There is neither justice nor reason in visiting the consequences of such mistakes upon either an innocent creditor or purchaser, and the great weight of authority is in accord with this view.

"When an execution can properly issue, a mistake made by the officer in performing the duty of issuing it, is necessarily a mere error or irregularity. It is, however, necessary that an execution should have a judgment to support it; and that it should appear from the execution what judgment is intended to be enforced. The reason why the description of the judgment is inserted in the writ is, that the officer may know what he is to enforce, and that the writ may, by inspection, be connected with the authority for its issuance.

When a sale has been made by a sheriff, we apprehend the purchaser need show in support of his title, nothing except a judgment, an execution thereon, and a sale and conveyance under such execution. When the execution is offered in evidence, it may vary from the judgment in some respects, and correspond with it in others. The question, then, before the court is, Did this execution issue on this judgment? If, from the whole writ taken in connection with other facts, the court feels assured that the execution offered in evidence was intended, issued and enforced upon the judgment shown to the court, then we apprehend that the writ ought to be received and respected." Freeman Ex. section 42. When sufficient appears upon the face of the execution to connect it with the judgment, a variance in amount has been frequently disregarded, or an amendment allowed to make the execution conform to the judgment. Idem sections 42 and 67; *Bissell* v. *Kip*, 5 Johns, page 100, and cases there cited. *Jackson* v. *Ten Eyck*, 4 Wend. 462; *Jackson* v. *Page*, 4 Wend. 584; *Avery* v. *Bowman*, 40 N. H. 453; *Lewis* v. *Lindley*, 28 Ill. 147; *Durham* v. *Heaton*, Idem 264; *Becker* v. *Quigg*, 54 Ill. 390; *Corbin* v. *Pearce*, 81 Ill. 461; *Hunt* v. *Loucks*, 38 Cal. 372; *Dewey* v. *Peeler*, 116 Mass. 135; *Chesebro* v. *Barme*, 163 Mass. 79; *Berry* v. *Gates*, 175 Mass. 373; Note to *Kip* v. *Burton*, 101 Am. St. Rep. 550; 17 Cyc. 1044. In these cases executions calling for from one cent to one thousand dollars more than the judgments, have been amended, or treated as amended, and the sales under them sustained.

Turning now to the decisions in this state we find that in *Smith* v. *Keen*, 26 Maine, 411, the execution recited the recovery of a judgment for $600 damages more than was shown by the record, it was held that such a clerical error was amendable, and a levy under it, for the correct amount of the judgment was sustained. The execution in *Corthell* v. *Egery*, 74 Maine, 41, called for an insufficient balance as still due on the judgment. It was held to be amendable and the levy valid. In *Coffin* v. *Freeman*, 84 Maine, 535, the officer was commanded to collect one dollar more than the judgment. The court there said: "If this does not come within the provision of the statute as an error of the officer, it must fall under the principle

of the decisions above cited respecting the taxation of excessive fees by the officer. It does not avoid the levy. The creditor was not responsible for the error, and there was no intentional wrong on the part of any one." Cases in which the amount, which the officer is commanded to collect, is less than that called for by the judgment, stand upon the same principle. The question is one of identity between the judgment described in the execution and that shown by the record, not the amount of debtor's property which has been taken. In one case he has parted with nothing; in the other he has a full and adequate remedy, either at law or equity as the case may be. In either case he has suffered no harm.

So far as *Prescott* v. *Prescott*, 62 Maine, 428, is opposed to the principle of these cases, it must be regarded as unsupported by the weight of authority and not in harmony with the rule which permits amendments to mesne or final process in the interests of justice. Certainly in the case at bar the fraudulent grantee of the debtor stands in no better position than his grantor to object to the exercise of this salutary power for the protection of an innocent purchaser. *Jackson* v. *Esten*, 83 Maine, 162. The debtor has his remedy against the clerk, or against the creditor, to recover the excess. *Avery* v. *Bowman*, supra; *Hunt* v. *Loucks*, supra. The rights of no innocent third party are involved; and no one can be harmed by an amendment of a trifling clerical error on the part of an officer of the court. In a writ brought upon the judgment in *Prescott* v. *Prescott* setting out the debt as $600 and the whole amount including costs as due at the date of its rendition, instead of $600 and costs payable in twenty days after that date, it was held that the error was amendable. *Prescott* v. *Prescott*, 65 Maine, 478. We are unable to perceive any good reason why final as well as mesne process may not be amended, when no rights of innocent third parties have intervened except those which will be protected by the amendment. An execution is a judicial writ. If the court can permit amendments, to correct the mistakes made by parties and their attorneys in describing the judgment, it ought to be able to do so for the purpose of correcting the same mistake of its own clerk. "At the present day the power to amend executions so as to correct clerical misprisions,

is universally conceded and frequently invoked." Freeman Ex. section 63. There can be no substantial distinction between an error in the command to an officer to collect two dollars too much interest, and one to collect a like excess of debt or of costs.

In *Prescott* v. *Prescott*, 62 Maine, 428, it is said that no motion was made for an amendment or correction of the execution. It is, however, well settled that the court of its own motion may order such amendments to be made. *Hayford* v. *Everett*, 68 Maine, 505; *Caldwell* v. *Blake*, 69 Maine, 458; and that in collateral proceedings where such amendments are allowable, they will be treated as actually made. *Corthell* v. *Egery*, 74 Maine, 41; Freeman Ex. 71; *Dewey* v. *Peeler*, 161 Mass. 135.

Applying the foregoing principles to the case at bar, the only variance relied upon is that the officer was commanded to collect interest upon the amount of the judgment from the date of judgment, R. S., chap. 84, section 158, instead of from the time when it was payable as required by the statute then in force, a difference of two dollars. For aught that appears the execution recited correctly the name of the plaintiff and that of the defendant, the court which rendered the judgment and the term at which and the day on which it was rendered, the amount of the judgment and the time when it was payable. The bill charged and the answer did not deny that the execution issued on a judgment recovered in this court by Etta M. Creamer against Alvin Creamer on Nov. 3, 1903. There is no suggestion in the case that there was any other judgment between these parties. The findings of fact are equivalent to a finding that the execution issued on the judgment which was introduced to support it. It does not appear but that in its minutest detail the execution describes the judgment with absolute accuracy. The variance was in the command to the officer, which was not a part of the description of the judgment. There is nothing whatever to show that the judgment, execution and sheriff's deed were not successive links and parts of the same proceeding. "The burden to show error falls upon the appellant. He must show the decree appealed from to be clearly wrong otherwise it will be affirmed." *Proctor* v. *Rand*, 94 Maine, 313.

There can be no question that the execution was issued upon a valid judgment. The clerical error of the officer of the court is amendable. When it is in the furtherance of justice the power to amend should be exercised with a liberal hand. As between a fraudulent grantee and an innocent purchaser at an execution sale the court will amend its process to protect the latter. The equities are all with the plaintiff. Being in no fault himself, he should not be made to suffer by a mistake of the officer of the court for which he is in no way responsible, and which may be amended as between the original parties and those standing in no better position. The plaintiff is the only innocent third party affected, and his rights will be protected by the amendment. Such amendment may be made by the court of its own motion, and in collateral proceedings will be treated as actually made.

Decree below affirmed with additional costs.
Execution to issue therefor.

ISAAC W. GREENE *vs.* AUGUSTUS B. MARTIN.

Franklin. Opinion March 1, 1906.

Assessment of Road Tax. Non-payment of Road Tax. Tax Sale. "Prima Facie Proof of Title." Evidence. R. S., (1883) c. 6, § 83. R. S., c. 9, § 61.

1. By virtue of Revised Statues, chapter 9, section 61, a prima facie title in a party claiming under a tax sale for non-payment of road taxes assessed upon lands in unincorporated places is made out by producing in evidence the county treasurer's deed duly executed and recorded, the assessment signed by the county commissioners and certified by them or their clerk to the county treasurer, and by proving that the county treasurer complied with the requirements of law in advertising and selling.
2. Upon the issue whether the county treasurer did comply with the requirements of the law, his record of his doings made as a public officer, at or near the time, upon the public books of the office, is admissible in evidence.
3. Such record, however, is not the only evidence admissible upon that issue. Other evidence, such as the testimony of the treasurer and of other witnesses having knowledge of what was done, is also admissible.

4. To establish his title under the statute above cited, it is not necessary for the claimant under the tax sale to affirmatively prove (1) that the agent appointed to expend the money on the roads gave the bond required by law, or (2) that the sum assessed was expended on the roads, or (3) that the land owners themselves had not repaired the roads and so superseded the tax, or (4) that the sum assessed was ordered to be expended on the roads, or (5) that the agent in fact repaired the roads.
5. It is not essential to a valid assessment of a road tax upon lands in unincorporated places that the commissioners should specifically in terms assert in their record and certificate of assessment (1) that the divisions they made of the townships and tracts "were equitable, conforming as nearly as was convenient to known divisions or ownerships," or (2) that the sum so assessed was "proportionate to the value thereof," or (3) that it was not burdensome on the land owners to assess all the repairs on them instead of part on the county. It is enough if their findings to such effect can be inferred from their action.
6. It is not necessary to a valid assessment of such a tax that it should be expressly stated in terms that the roads for repairs of which the assessment is made are in the county. It is enough if that fact appears from the whole assessment.
7. In this case the defendant claiming under a tax sale of the demanded lot produced the evidence made sufficient by the statute to establish a prima facie title. This evidence was uncontradicted, and, as above stated, the objections made to the other proceedings of the commissioners, the agent, etc., did not vitiate the assessment or sale.

On report. Judgment for defendant.

Real action to recover parts of two lots of land in an unincorporated township, No. 3, R. 2, B. K. P., known as Jerusalem Township, in Franklin County, and sent to the Law Court on report. The land sued for had been sold for non-payment of a tax assessed for repairing county roads in the unincorporated townships and tracts of land in Franklin County, and the defendant was the purchaser at the tax sale. The proceedings relating to the assessment and sale were in accordance with the provisions of what are now sections 58, 59, and 60 of chapter 9 of the Revised Statutes. The decisive question in the case was whether or not the defendant made out a "prima facie proof of title" under the provisions of section 83, chapter 6, R. S. 1883, now section 61, chapter 9, R. S. 1903.

The case appears in the opinion.

Elmer E. Richards, for plaintiff.

P. H. Stubbs and H. M. Heath, for defendant.

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

EMERY, J. This is a real action to recover parts of two lots of land in an unincorporated township, No. 3, R. 2, B. K. P., known as Jerusalem Township in Franklin County, and comes before the law court on report. The defendant claims title under a tax sale for non-payment of a tax assessed upon the lots for the repairing county roads in the unincorporated townships and tracts of land in that county. The parties agree that the decisive question in the case is whether the defendant has made out a "prima facie proof of title" under the law in force at the time. R. S. (1883) ch. 6, sec. 83 — now R. S., ch. 9, sec. 61.

He has produced in evidence "the treasurer's deed duly executed and recorded, the assessment signed by the county commissioners, and certified by them or their clerk to the county treasurer," and also the treasurer's record and other evidence "to prove that the county treasurer complied with the requirements of the law in advertising and selling."

As to the treasurer's record, the statute does not in terms require the county treasurer to make and keep a record of his doings in advertising and selling lands for the non-payment of such assessments, but that circumstance does not exclude the record as evidence. The duties of the county treasurer could not be adequately performed without his keeping a permanent record of these transactions (advertising and selling lands for non-payment of taxes) and such record, therefore, if kept, must be considered as an official book and must be receivable as evidence on that basis. *Groesbeck* v. *Seeley*, 13 Mich. 329. In Wigmore on Evidence, sec. 1639, it is said that wherever there is an official duty to do, there is also a duty to record the thing done, and such record is admissible as evidence. The record made by the county treasurer in this case is not a mere private, personal memorandum made for his own private use. It is a public record, made by an official of his official doings upon the public books of his office, for the use of the office and the public. It may not be conclusive evidence of the matters recited,

but it is admissible as some evidence of them as between third parties. *Corinna* v. *Hartland*, 70 Maine, 355.

Indeed, the plaintiff in his argument makes no objection to the consideration of the record as evidence so far as it goes, but insists that it does not show that all the requirements of the law were complied with and objects to a proposed addition to it by way of amendment. The defendant, however, is not confined to the record for his evidence. There is no statute that the compliance with the requirements of the law shall be established only by the record. Other evidence is not excluded. Hence the treasurer's proceedings can be proved by any other competent evidence. Other additional and competent evidence was produced and it is not denied that all the evidence does show, prima facie at least, that the treasurer did in fact comply "with the requirements of the law in advertising and selling." No omission of any prescribed step on the part of the treasurer is pointed out, and we see none.

Objection is made that it does not appear from the evidence that the agent to expend the money ever gave the bond required by law; that the sum assessed was ever expended on the roads; that the land owners themselves had not repaired the roads and so superseded the tax; that the sum assessed was ordered to be expended on the roads; that the agent ever repaired the roads. These objections do not go to the assessment, nor to its certification to the treasurer, nor to the proceedings of the treasurer in advertising and selling. If any of them invalidate the tax, it is for the plaintiff to show that it exists in fact. It is matter of defense against the prima facie title, and need not be negatived by a claimant under that title.

It is further objected that it does not appear from the evidence that the commissioners made of the unincorporated townships and tracts "as many divisions as were equitable, conforming as nearly as was convenient to known divisions and ownerships," or that the sum so assessed was "proportionate to the value thereof." The assessment shows that the commissioners made divisions which apparently conformed to known divisions and ownerships. It also shows a valuation of each division and that the assessment upon it was proportionate to that valuation. It was not necessary that they should

assert in the assessment that they considered the divisions equitable, or that they considered the assessment proportionate. Such an assertion would add nothing. All tribunals are required to proceed according to law and render just judgments, but it is not necessary for them to say that they do.

It is also objected that the commissioners did not assert in their assessment that it was not burdensome upon the land owners to assess all the repairs on them, instead of part on the county. They expressed their judgment by their assessment. If all was assessed on the land owners, it was because the commissioners adjudged it was not burdensome. Their finding sufficiently appears from their act.

It is again objected that it does not appear that the roads were in Franklin County. We think that fact is naturally inferable from the language of the assessment.

The legislature having made the evidence introduced prima facie evidence of title for the defendant, and the plaintiff having offered no evidence, and having failed to point out any fatal defect in the evidence for the defendant, the entry must be,

Judgment for the defendant.

CLINTON E. PRESCOTT *vs.* INHABITANTS OF WINTHROP.

Kennebec. Opinion March 1, 1906.

Action Referred to Presiding Justice. Right of Exception Limited to Questions of Law, Findings of Fact not Subject to Exception. Questions of Law Defined. R. S., c. 79, § 55.

1. The right of exception to the rulings and decisions of the presiding Justice in any civil or criminal proceeding under R. S., ch. 79, sec. 55. is only to his rulings and decisions upon questions of law. His rulings and decisions upon questions of fact are not subject to exceptions.
2. When an action of law is referred to the court at nisi prius for decision without a jury, the question whether there is any evidence to support the decision is one of law; but if there be any such evidence, the force and

effect of any or all the evidence is a question of fact, and the decision of the court upon that question is not subject to exception.

3. In such case, the fact that a school district built a schoolhouse upon a small lot of land and enclosed the lot with a stone wall and thereafter occupied the building and lot for school purposes openly, notoriously, exclusively and continuously for more than twenty years is some evidence that such possession was adverse. Whether other evidence conclusively showed the contrary was solely for the Justice hearing the case, and his decision thereon is not subject to exception.

On exceptions by plaintiff. Overruled.

Real action to recover part of a lot of land in the town of Winthrop, upon which a former school district had built its schoolhouse and which was afterwards taken over by the town. The case was heard by the presiding Justice without a jury, each party having reserved the right of exception. The presiding Justice found for the defendant and the plaintiff excepted. There was no stenographer at the hearing so that a full transcript of the evidence could not be had. But in order to preserve the rights of the parties, the presiding Justice made a formal finding of facts which is as follows:

"This case involves a writ of entry to obtain possession of a schoolhouse and lot in district 8 in the town of Winthrop. The plaintiff claims to own 2-11 of the locus by virtue of a quitclaim deed from two of the heirs of Benjamin Stockin, the original owner of the lot who died in January, 1874, said deed being dated Sept. 16, 1904.

The defendants produced no record evidence of title, but claim a prescriptive title. The plaintiff denies the acquisition of a prescriptive title on the part of the defendants, and relies upon the following statement of facts.

One of the defendants' witnesses, John E. Lowell, testified that he heard his father and two other men who he understands were a committee on the part of the school district to purchase the schoolhouse and lot in question, have a conversation in which they said they had purchased the lot of Mr. Stockin, under whom the plaintiff claims title, and had agreed to pay him $15 for it. This conversation was made at some time prior to 1859, at which time it is conceded that the schoolhouse had been erected and the stone wall built around the lot.

No other evidence whatever was given as to the consummation of this transaction, although the same witness says that it was generally understood that no deed was ever given. The school district occupied the schoolhouse and lot, without the slightest question or interference on the part of the prior owner, Mr. Stockin, or anyone claiming under him, until 1886 when, under the act of the legislature, the school district system was abolished and the town took the legal title and possession of the school property.

At this time the town legally took the title and possession of this school property and occupied without interruption or question until 1897 when, on account of the decrease of the average number in attendance below the legal standard, the school was discontinued, but in no sense abandoned.

On December 8, 1859, Benjamin Stockin conveyed to Albert C. Frost the farm from which this schoolhouse lot was carved, and in his deed made the schoolhouse lot a boundary in these words: "running northerly on the west line of said road to the southerly corner of the schoolhouse Lot Dist No. 8 of Winthrop, thence on the north line of said lot westerly about four rods, thence northerly on the line of said lot about five rods to J. K. Lowell's south line, etc.," and all of the conveyances of the Stockin farm since that time have contained the same description, the last one being May 23, 1902, to the plaintiff.

The testimony of John E. Lowell, above referred to, was admitted under objection of the defendant's counsel, and exceptions were seasonably taken thereto and allowed."

Oakes, Pulsifer & Ludden, for plaintiff.

Cornish & Bassett, for defendants.

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

EMERY, J. This was a real action to recover part of a lot of land upon which a former school district (No. 8) in the defendant town had built its schoolhouse and which was afterward taken over by the town. The case was heard by the court without a jury, each party having reserved the right of exceptions. At the hearing, the

case narrowed down to the issue whether the occupation of the lot by the school district was under a claim of title adverse to the record owner. The court found for the defendant and the plaintiff excepted.

Upon the exceptions the only question of law is whether there was any evidence that the school district's occupation was adverse. If there was, the decision of the court must stand even if there was a large preponderance of evidence the other way.

There was evidence that the school district No. 8 in 1859 erected a schoolhouse upon and built a stone wall around the lot and occupied the schoolhouse and lot without any question or interference on the part of the record owner from that time down to 1886 when it was taken over by the town which has since held possession of it. There was also evidence that the record owner in afterward conveying adjoining land bounded it in part on "the School House Lot Dist. No. 8." All this was certainly some evidence that the School District was occupying the lot under a claim of title adverse to any one else, and that the record owner recognized its claim of title.

The plaintiff introduced evidence which he claims shows that the occupation was in fact by permission and not adverse to the record owner. We are not required, however, to consider the force and effect of this evidence since that question was solely for the justice hearing the case, and his decision thereon is not subject to exception. The right of exception is limited to rulings upon questions of law. *Kneeland* v. *Webb*, 68 Maine, 540. As stated above, the only question of law in this case was whether there was any evidence in support of the finding, We think there was.

Exceptions overruled.

HENRY H. PUTNAM

vs.

WILBUR A. GRANT et al.

Washington. Opinion March 3, 1906.

Estoppel. Burden of Proof. Account Books. Failure to Itemize. Evidence. Verdict Justified.

In an action to recover a balance of $418.88 due on a quantity of logs, it appeared that the plaintiff authorized the defendants to pay to a paper company on his account any sum which might be found due from him to that company, for an alleged overpayment by the latter for logs purchased by it of the plaintiff. The defendants contended that in accordance with this authorization they had paid the balance sued for to the paper company on the plaintiff's account, and set up this payment in defense to the action brought against them by the plaintiff.

Also it was admitted by the defendants that at the time the plaintiff authorized them to make the aforesaid payment to the paper company, he protested that there was a mistake in his account with the paper company. Also at the trial the plaintiff contended that there was nothing due from him to the paper company and that the defendants had no authority from him to pay the paper company the amount claimed on his account.

Held: (1) That the jury was authorized to find that the evidence did not create an estoppel against the plaintiff, as contended by the defendants, but did warrant the conclusion that the plaintiff authorized the defendants to pay to the paper company on the account of the plaintiff any sum which in fact might be found due from the plaintiff to the paper company.

(2) That it was incumbent upon the defendants taking upon themselves the burden of proving payment in the manner stated, to show by competent evidence that the plaintiff was indebted to the paper company, at the time the defendants assumed to make a settlement on his account. The defendants had essentially the same burden that the paper company would have had in a suit brought in its own name against the plaintiff, to recover the amount of this alleged overpayment for logs purchased of him.

It is well settled that when the entries in a book of accounts do not itemize the transactions recorded, but in fact comprise the details of several transactions, the book is not admissible as independent evidence.

In the case at bar, and for the purpose of proving that the plaintiff was indebted to the paper company by reason of having been overpaid on logs

sold by him to it, the defendants offered the paper company's account book called a "journal" authenticated by the testimony of the book-keeper who kept it, containing on the debit side of the paper company's account with the plaintiff a record of ten notes sent to the plaintiff, and on the other side a summary of credits. These entries did not purport to itemize the transactions to which they related, but in connection with them was an express reference to an "invoice book." Neither the "invoice book" nor the original scale bills from which some of the entries in the "journal" were made up, were produced in evidence by the defendants, nor any explanation given for their non-production.

Held: That under the facts as disclosed by the evidence, the jury was not chargeable with manifest error in reaching the conclusion that the evidence before them was not sufficient to warrant a finding that the plaintiff was indebted to the paper company on account of the alleged overpayment for logs.

On motion by defendants. Overruled.

Assumpsit to recover a balance of $418.88 alleged to be due on a quantity of logs sold by the plaintiff to the defendants June 1, 1898. Plea, the general issue. Tried at the April term, 1904, of the Supreme Judicial Court, Washington County. The defendants admitted that they owed the amount sued for, $418.88 with interest from June 1, 1898, unless they could prove payment. The defendants contended that the plaintiff was indebted to the Richards Paper Company by reason of an overpayment made by it to the plaintiff on logs purchased by it of the plaintiff nearly two years before the sale of the logs sued for in this action, and that the plaintiff had authorized them to pay to the Richards Paper Company, on his account, whatever sum might be found due from the plaintiff to the Richards Paper Company by reason of this alleged overpayment, and that in accordance with this authorization they had paid to the Richards Paper Company on the plaintiff's account, the sum sued for, to wit, $418.88.

The verdict was for the plaintiff for the full amount claimed, and the defendants filed a general motion to have the verdict set aside.

The case is fully stated in the opinion.

B. W. Hewes and W. R. Pattangall, for plaintiff.

Heath & Andrews, for defendants.

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

WHITEHOUSE, J. This was an action of assumpsit to recover a balance of $418.88, alleged to be due on a quantity of logs sold by the plaintiff to the defendants June 1, 1898. The defendants admitted in limine, that they were indebted to the plaintiff in the amount claimed, with interest from the time the logs were purchased, unless they could prove payment. The verdict was for the full amount claimed and the case comes to this court on a motion to set aside the verdict as against the evidence.

In setting up payment as a defense it was not claimed in behalf of the defendants that they had paid this balance of $418.88 directly to the plaintiff Putnam, but they contended that by Putnam's authority they had paid that amount to the Richards Paper Company, on Putnam's account.

In 1896 nearly two years before the sale to the defendants of the logs sued for in this case, Putnam had sold pulp logs to the Richards Paper Company, and his account with that Company had not been adjusted. The Paper Company gave its notes to Putnam for the logs to be delivered under the contract between them, and after the delivery of the last lot claimed to have discovered that the amount of the notes exceeded the value of the logs by $418.88, interest and discount being adjusted to June 1, 1898. The Paper Company had also purchased logs from the defendants and was indebted to them at the same time. Thereupon, as the defendants say, it was arranged by consent of all the parties, that instead of paying the amount sued for directly to Putnam the defendants should pay it to the Paper Company and that in pursuance of this arrangement it was allowed on their account against the Company. The defendants admit, however, that when Putnam consented to have the Paper Company's overpayment allowed on his account against the defendants, he protested that there was a mistake in the Company's account. At the trial Putnam contended that there was nothing due from him to the Paper Company and that the defendants had no authority from him to pay to the Company the amount claimed on his account.

The defendants further contended, however, that even if it should appear upon a full and legal adjustment, that Putnam was not indebted to the Richards Paper Company and that he never expressly authorized the settlement made by the defendants with the Paper Company on his account, yet by his statements and conduct he justified them in believing that he admitted the debt to the Paper Company and consented to its discharge in the manner proposed and that he was thereafter estopped from denying that there was such a debt or that it was so paid by the defendants.

It is the opinion of the court that the jury was authorized to find that the evidence did not create an estoppel against the plaintiff as contended by the defendants, but that the evidence did warrant the conclusion that Putnam consented to have the defendants pay to the Paper Company on his account any sum which in fact might be found due from him to the Paper Company.

It was accordingly incumbent upon the defendants taking upon themselves the burden of proving payment in the manner stated, to show by competent evidence that Putnam was indebted to the Paper Company, at the time the defendants assumed to make a settlement on his account. The defendants had essentially the same burden that the Paper Company would have had in a suit brought against Putnam in its own name, to recover the amount of this alleged overpayment for logs purchased of him.

The logs sold by Putnam to the Richards Paper Company comprising 800,000 feet or more appear to have been delivered at various times during the months of March, April, May and June, 1896, payment to be made by cash or note upon the delivery of each 100,000. The scale bills for each lot delivered were duly received and retained by the Paper Company, and a written statement purporting to show the number of feet in each lot of logs received, according to the scale bills, the price per thousand, a computation of the total value and the amount credited to him, was sent to Putnam at the end of each month. Letter-press copies of all these monthly statements of the items and details of the credits given were made on a book called an invoice book, which was kept in the custody of the Paper Company.

At the trial it appeared that due notice had been given to Putnam

to produce these original monthly statements, to be used as evidence in the case. Whether they were still in existence after the lapse of eight years and whether it was in the power of the plaintiff Putnam to produce them did not appear. They were not produced; and although no evidence was offered showing that either the original scale bills received by the Paper Company or the invoice book containing letter-press copies of the monthly statements, had been lost or destroyed, neither the invoice book nor the original scale bills were produced in evidence by the defendants, nor any explanation given of their non-production. But in lieu thereof the defendants offered the Paper Company's account book called a "journal," authenticated by the testimony of the book-keeper who kept it, containing on the debit side of this transaction a record of ten notes sent to Putnam between March 24 and June 30, aggregating $5700, and on the other side a summary of credits as follows:

1896.		
March 31,	. . . .	$ 1439.43
April 30,	. . . .	2042.19
May 30,	. . . .	1386.42
June 30,	. . . .	456.26
		$ 5324.30
	By balance,	375.70
		$ 5700.00

These entries do not purport to itemize the transactions to which they relate, but in connection with them an express reference is made to "invoice book page 367 and 368." The book-keeper also testified that the "scale bills and receipts" were the sources from which he obtained the items constituting the "lumped sums" credited in the journal. The situation is clearly distinguishable from the common instance where entries have been copied into a journal from a slate or slips of paper or other temporary records which have been obliterated or destroyed. In such a case the journal may be admitted as original evidence. *Hall* v. *Glidden*, 39 Maine, 445, and cases cited. "The first regular and collected record is the original one, and it is

immaterial that it was made up from casual or scattered memoranda preceding it." 2 Wigmore on Ev. Sec. 1558. In the case at bar the entries in the journal do not purport to be copies of original slips or memoranda; they simply claim to record the results of the several computations made by the book-keeper from figures afforded by the "scale bills and receipts." Furthermore so far as appears these original papers are still in existence. In contending for the admissibility of the journal as a book of original credits, it was conceded at the trial, as shown by the report of the evidence, that the items from which the "lumped credits" in the journal were made up, could be "worked out by taking time enough, taking all the original scale bills and notes."

In *Rumsey* v. *N. Y. & N. J. Telephone Co.*, 49 N. J. Law, 322, the action was to recover for the rent and services of a telephone. It appears that the number of each service was entered at the time upon a slip and these slips were sent to the main office where the gross number of calls for each month was entered in a book and after the lapse of three months, the slips were destroyed. It was held that as the entries introduced were only footings of each month's detailed statement contained in the original memoranda sent to the office, the books had no claim to originality, and however useful they might be to refresh the memory of the book-keeper, they were not admissible as independent evidence. It will be noticed that the facts were strikingly analogous to those at bar, and although it affirmatively appeared that the slips had been destroyed, the books were excluded. Indeed the general rule is too familiar and well settled to require the citation of authorities, that when the entries do not itemize the transactions recorded, but in fact comprise the details of several transactions, the book is not admissible as independent evidence. 2 Encyc. of Ev. 618; *Earle* v. *Sawyer*, 6 Cush. 142; *Henshaw* v. *Davis*, 5 Cush. 145; *Cargill* v. *Atwood*, 18 R. I. 303; *Nichols* v. *Haynes*, 78 Pa. St. 174; *Corr* v. *Sellers*, 100 Pa. St. 169.

It was contended at the trial, as before stated, that the lumped credits were admissible as original and independent evidence, and the journal was allowed to go to the jury, but the case fails to show that the court specified the ground upon which the book was admitted.

It appeared, however, that the notes given by the Paper Company to Putnam had been destroyed and the record of them in the journal was obviously admissible to refresh the book-keeper's recollection in regard to the dates and amounts of the several notes. So, too, if the journal had been offered by Putman as evidence against the Paper Company, the entries of lumped sums credited to Putnam would have been competent as admissions on the part of the Paper Company that logs of the value credited had been received from Putnam. But when offered by the defendants in favor of the Paper Company to prove that no more than the amounts credited had been received from Putnam, the entries of these lumped sums credited to him were not admissible as independent evidence. They could not be deemed original evidence for the reasons above stated. They could not be received as secondary evidence because the extrinsic evidence as well as the nature of the entries themselves satisfactorily disclosed the existence of primary and better evidence.

But assuming that the journal was admitted for the purpose of enabling the book-keeper to refresh his recollection as a witness in regard to the credits as well as in regard to the notes, it does not appear what instructions, if any, were given to the jury respecting the usefulness of the entries as such memoranda. It is the opinion of the court, however, that in view of the existence of the scale bills as primary evidence, and of the invoice book which was available as secondary evidence after notice to produce the original monthly statements, the jury are not chargeable with manifest error in reaching the conclusion that the evidence before them was not sufficient to warrant a finding that the plaintiff Putnam was indebted to the Richards Paper Company, on account of the alleged overpayment, at the time of the transaction in question.

The entry must therefore be,

Motion overruled.

JOHN S. WILLIAMS, Assignee,

vs.

COLUMBUS W. ELLIS et al.

Piscataquis. Opinion March 14, 1906.

Pleading. Prior Action Relating to Same Matter Pending. Demurrer Sustained. Facts Stated in Bill of Exceptions Not Considered, When.

1. When it is alleged in a declaration that another and prior action had been brought relating in some degree to the same subject matter and there is no allegation that such prior action had been determined it must be assumed to be still pending.
2. No action for the malice with which an act was done can be maintained while another action for the act itself is pending undetermined.
3. No statement of fact in a bill of exceptions to a ruling sustaining a demurrer to a declaration can be considered if it be not also stated in the declaration.

On exceptions by plaintiff. Overruled.

Action on the case brought by the plaintiff, as assignee of the estate of Clarence E. Lombard, to recover damages for the alleged interference of the defendants with the plaintiff's management of the trust property passing to him by virtue of the assignment made to him by said Lombard, by attachment and subsequent seizure of the assigned property.

The defendants demurred generally to the declaration, and the demurrer was sustained by the court of the first instance. Thereupon the plaintiff took exceptions.

The bill of exceptions alleges the following facts:

"Clarence E. Lombard made a voluntary assignment for the benefit of his creditors to the plaintiff, to which his creditors assented in writing, the defendants among others.

While the estate was being settled the defendants without notice to said plaintiff brought suit against the assignor and attached certain personal property in the hands of the said assignee, upon their

original debt being the promissory note of said Lombard. They recovered judgment and seized and advertised said property on that execution.

The plaintiff obtained an injunction from the Supreme Judicial Court forbidding the defendants from further interference with the trust property,— being property that was seized, which injunction was made permanent upon trial before the Supreme Judicial Court in equity; with costs to plaintiff upon the bill in equity praying for said injunction. Plaintiff now brings action against the defendants to recover damages sustained by reason of the defendants' attachment and subsequent seizure of said assigned property in withholding the same from his control and disposal in his trust capacity."

The pith of the case is stated in the opinion.

John S. Williams and Willis E. Parsons, for plaintiff.

Hudson & Hudson, for defendants.

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

EMERY, J. This case comes to the law court on exceptions to a ruling sustaining a general demurrer to the declaration. The pith of the case stated in the declaration is this: — The defendants, having a judgment and execution against one Lombard, caused to be seized upon the execution certain personal property owned and held by the plaintiff under an assignment to him for the benefit of Lombard's creditors. The plaintiff thereupon began legal proceedings against the defendants to recover the property and prevent its sale upon the execution. The defendants knew of the assignment and had become parties to it, and their act of seizure, etc., was done maliciously for the purpose of delaying the settlement of the estate under the assignment and obtaining an advantage over the other creditors of Lombard who had also become parties to the assignment. It is not alleged, however, that the legal proceedings begun by the plaintiff have terminated. It must therefore be assumed that they are still pending.

Upon the case stated, the action is not one for the recovery of the property, nor for damages for its taking or detention. Other legal

proceedings have been begun and are pending for those objects. It is not an action for malicious prosecution since there is no allegation of any prosecution of this plaintiff, but only of a seizure of his property on an execution against another. It is not an action for abuse of legal process since there is no allegation of any malice, oppression or injury in the manner, method, or hour of the seizure, but only in the seizure itself however made. In fine, the action is not based on the seizure, the act, but only on the spirit, the animus, with which the seizure was made, the act done, and is begun while some other action based on the act itself is still pending.

We think it clear that this action for the spirit, the animus, cannot be maintained until the pending action for the substance, the corpus, is terminated. The facts alleged in this action may fail of proof in the other, and it may there be found and adjudged that the assignment was not valid, and that the plaintiff had no title nor interest in the property seized. In such possible event, a judgment for the plaintiff in this action could have no foundation.

The plaintiff calls our attention to a statement in the bill of exceptions that the legal proceedings named in the declaration had in fact been terminated in his favor before this suit was begun, and he contends that we must therefore assume that to be the fact in passing upon the demurrer, though it is not alleged in the declaration itself. We cannot do so. No such fact is admitted by the demurrer and we can assume only such facts as the demurrer admits, viz, facts well pleaded in the declaration.

Exceptions overruled.
Declaration adjudged insufficient.

LIZZIE M. PURINTON *vs.* HUMPHREY PURINTON.

Kennebec. Opinion March 19, 1906.

Evidence. Letters Read to Witness. Admissions. "Best Evidence Rule." Exceptions will be Overruled, When.

During the trial in a divorce proceeding a witness testified that he had carried numerous letters from the plaintiff after her marriage to the defendant, to one Frank Bartlett, and that the plaintiff had often read aloud to the witness the contents of letters written by Bartlett to her, and by her to him. No effort was made by the defendant to procure the original letters and no notice had been given the plaintiff to produce them. Against the objection of the plaintiff the witness was allowed to testify as to what was read or stated in the letters by the plaintiff.

Held: That the ruling of the presiding Justice admitting this testimony was correct. When one voluntarily and without solicitation reads the whole or a portion of a letter to another, the party hearing does not undertake to repeat the contents of the original writing but only what the person purporting to read or state, has said. In such a case such statements assume the form of an admission by the party holding the letter, and testimony of such evidence becomes primary evidence.

When it is sought to use a written statement as an admission the "best evidence rule" so called, does not apply.

A certain letter in the handwriting of said Bartlett and which appeared to be one of many written by him to the plaintiff, was found under a couch in the room from which the plaintiff moved when she left her husband. This letter was admitted in evidence against the plaintiff's objection. *Held*, that the ruling admitting this letter was correct,

Exceptions will be overruled unless they affirmatively show, without aid from extrinsic evidence, not only that the ruling was wrong, but that the party complaining was aggrieved, so that if the ruling would be justified or would be harmless to the complainant upon any possible but not improbable situation unexplained by the exceptions, the doings below will not be disturbed or condemned.

On exceptions by plaintiff. Overruled.

Libel for divorce heard by the Justice of the Superior Court, Kennebec County, in vacation with the understanding and agreement that each party should have all the rights of exception as if the

case had been heard in term time. The charge in the libel was failure to support and cruel and abusive treatment. In his answer the defendant "denies every allegation laid in the libel of said Lizzie M. Purinton as cause for divorce and every specification offered therein under such allegations; and he also denies the allegation in the same libel that said Lizzie has been faithful to her marriage obligations ever since she became his wife and charges that on the contrary during the same time she has offered him extreme and continuous provocation, and that her conduct during the time aforesaid has been such as would have justified all that she charges or can truly allege against him, and that during the same time her conduct with relation to men other than her husband has been immodest, improper, scandalous, indecent and criminal."

A divorce was denied. During the hearing, the defendant offered certain testimony which was admitted against the plaintiff's objection, and thereupon the plaintiff excepted.

The pith of the case is stated in the opinion.

S. S. Brown, for plaintiff.

Thompson & Wheeler, for defendant.

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

SPEAR, J. This case involves a libel for divorce and comes up on exceptions to the admission of certain testimony. The charges in the libel were failure to support and cruel and abusive treatment. The answer of the libellee was a denial of every allegation laid in the libel as a cause for divorce and every specification offered therein under the allegations; and also a denial of the allegation in the libel that the libellant had been faithful to her marriage obligations ever since she became his wife and charged that on the contrary during the same time she had offered him extreme and continuous provocation and that her conduct during this time had been such as would have justified all that she charged or could truly allege against him and that during the same time her conduct with relation to men other than her husband, had been immodest, improper, scandalous,

indecent and criminal. Among the witnesses called by the defendant was one James Colby, who testified that soon after the marriage of the parties he carried numerous letters between this libellant and one Frank Bartlett for whom Mrs. Purinton had done housework before her marriage with the libellee, and that the libellant had often read aloud to the witness the contents of letters written by said Bartlett to her and by her to him, and the defendant's counsel asked the witness to give in testimony such portions of the letters so read or stated to him by the libellant as he could remember. No effort had been made by the libellee to procure the letters and no notice had been given by the libellant to produce any such letters as she might have in her possession. The libellant's counsel objected to such inquiry but the court allowed the witness to testify as to what was read or stated in them by the libellant. This ruling presents the first ground of exception.

The libellant claims that the letters themselves, if any such letters ever existed, were the best evidence of the contents of the letters and that no secondary proof of their contents should be received, until it was shown that the libellee had made all reasonable effort to obtain the letters. In other words, that the evidence offered to prove the contents of these letters or any part of them fell within the usual rule relating to the proof of the contents of written instruments. But we hardly think this position is tenable.

The case shows and the libellee contends that this evidence was not offered to prove the contents of the letters but the statements or admissions of the libellant herself as to some of the statements contained in these letters. Proof of her voluntary admissions against her own interest would clearly be admissible by the testimony of any competent witness who might have heard such admissions. We are unable to see why the source of her admissions, whether made by her as voluntary statements of her own, purporting to be quotations from memory or to be read from some writing, should modify the general rule with respect to their proof. When one voluntarily and without solicitation reads the whole or a portion of a letter or writing to another, the party hearing does not undertake to repeat

the contents of the original writing but only what the person, purporting to read or state, has said. This is entirely different from an attempt on the part of a witness, who, having read a letter himself, undertakes to testify to its contents when the letter of course is the best evidence. But when a party voluntarily assumes to state what is in a letter, or to read a portion of a letter, to another, then such statement assumes the form of an admission by the party holding the letter, and testimony of such admission becomes primary evidence under the general rule with reference to proof of admissions.

The testimony of Colby does not assume to give the legal effect of the letters but shows to the extent of his recollection what was said by the libellant to have been their terms and import.

The libellee's legal position is fortified by authority as well as reason. 16 Cyc. page 944, lays down this rule: "When it is sought to use a written statement as an admission the "best evidence rule" so called, does not apply; and a copy of a letter, for example, is competent when identified, without accounting for the original."

In *Kelly* v. *McKenna*, 18 Mich. 381, it was held that the copy of a letter which the writer of the original had admitted in its leading points to be a correct copy, was as to these points converted into admissions by him and became original evidence. The court said: "It was of no consequence that the paper was a copy of the letter he had written. When he made its contents identical with his declaration, the paper became an original for the purpose of showing his declaration to Bruce." So in the case at bar, the testimony of Colby became primary for the purpose of showing the declarations of the libellant which purported to be identical with the letters from which she was quoting.

In *Smith* v. *Palmer*, 6 Cushing, 513, the court say: "The admissions of a party stands on distinct grounds. The admissions of a party are not open to the same objection which belongs to parol evidence from other sources. A party's own statements and admissions are in all cases admissible in evidence against him, though such statements and admissions may involve what must necessarily be contained in some writing, deed or record. Thus, the statement of a party that certain lands had been conveyed might be admitted;

though the conveyance must be by deed or record. The general principle as to the production of written evidence, as the best evidence does not apply to the admissions of parties; as what a party admits against himself may reasonably be taken to be true."

In 1 Greenl. Ev. secs. 96 and 97, this rule is laid down: "It appears that the prevailing doctrine in England and this country is that a verbal admission of the contents of a writing by a party himself will supersede the necessity of giving notice to produce it; in other words, that "said admissions being made against the party's own interest can be used as primary evidence of the contents of a writing against him." In note A of section 96, above cited, it is said that while the rule as stated is denied in Ireland and New York, it is "the prevalent opinion in the United States."

In *Blackington* v. *Rockland*, 66 Maine, 332, involving the proof of a notice to a town for injuries received upon a defective highway, in which the objection was raised that the records of the city were not competent evidence to show that a bill for damages had been presented without the production of the bill itself, our court held: "It has been decided that oral admissions of a party are admissible evidence of facts though the facts are established by some writing. The records here would in effect be equivalent to the oral admission of an individual party or more than that." In this opinion the court also adopts the English decision in *Slatterie* v. *Pooley*, 6 M. & W. 664, which is referred to by Greenl. in Note A, supra, as the leading English case on this point.

In *Loomis* v. *Wadhams*, 8 Drake, 557, the court adopts the following quotations from Mr. Justice Parke: "What a party says is evidence against himself as an admission, whether it relates to the contents of a written paper or to anything else.

In *Clarke* v. *Warwick Cycle Mfg. Co.*, 174 Mass. 434, Chief Justice Holmes says: "It is to be remembered with reference to this and other exceptions that admissions are evidence against a party making them although they relate to the contents of a written paper or to a corporate vote."

See also *Wolverton* v. *State*, 16 Ohio, 173; *Edgar* v. *Richardson*,

33 Ohio St. 581; *Edwards* v. *Tracy*, 62 Pa. St. 374; *Taylor* v. *Peck*, 21 Grapp. 11 (Pa.)

The second exception involves the admission of a letter written by Bartlett, found by the libellee behind a couch in a room vacated by the wife when she left her husband.

The exceptions do not show whether this letter was opened when found, or written before or after the marriage of the libellant with the libellee, nor upon what grounds the judge found in the affirmative upon both of these points.

But it is a well settled rule of law that in the trial of a case it is to be presumed that things were rightly and regularly done except so far as the exceptions make it otherwise appear.

Exceptions must be overruled unless they affirmatively show, without aid from extrinsic evidence, not only that the ruling was wrong, but that the party complaining was aggrieved, so that if the ruling would be justified or would be harmless to the complainant upon any possible but not improbable situation unexplained by the exceptions, the doings below will not be disturbed or condemned. Among the latest authorities upon this proposition are *Toole* v. *Bearce*, 91 Maine, 209; *Hill* v. *Reynolds*, 93 Maine, 25; *Smith* v. *Smith*, 93 Maine, 253; *Look* v. *Norton*, 94 Maine, 547; *Atkinson* v. *Orneville*, 96 Maine, 311; *Copeland* v. *Hewett*, 96 Maine, 525.

Under these principles of law it must be held that the letter was in all respects properly admitted except those specifically stated in the exceptions, and, therefore, must be assumed that the evidence satisfied the court that the letter was written after the marriage and either found open or without any envelope.

When this letter was offered, it had already appeared in the case by legitimate evidence that Mrs. Purinton had been carrying on a clandestine correspondence with Bartlett, employing a private carrier; that many letters had passed between them. Then the letter found by the libellee was offered as one of the letters contained in the correspondence in which Mrs. Purinton had been an active participant.

The exceptions do not deny the passage of these letters between the libellant and Bartlett except the last one, simply alleging that

"Mrs. Purinton denies all such pretended reading of said letters by her to said Colby and denies any such letters as the defendant exhibits." The libellee presented only the letter which is the subject of the second exception.

The only real question under this exception is whether under all the accompanying circumstances the finding of this letter will warrant the inference that it was received by the libellant notwithstanding her denial of having received it.

In view of the fact that the letter was in the handwriting of Bartlett and appeared to be one of many which was written to her by him, and was found under a couch in the room from which the libellant moved when she left her husband, the conclusion seems irresistible that she received the letter. How otherwise could such a letter, admitted to be in the handwriting of Bartlett, have found its way into her room? If the letter had been forged or not in the handwriting of Bartlett with whom the evidence tends to show she had sustained a course of improper correspondence, it could not be admitted; but there is no pretence that it was forged or that it was in a handwriting other than Bartlett's or that there was any collusion with Bartlett by which it was placed there, but a simple denial on her part that she ever received it. If that letter was not placed in that room through her hands we are at a complete loss to know how it got there. The only reasonable explanation is that she received it and accidentally dropped it behind the couch or on the floor, and in that way left it to be found by her husband.

Exceptions overruled.

INHABITANTS OF ROCKPORT *vs.* INHABITANTS OF SEARSMONT.

Knox. Opinion March 19, 1906.

Insane Hospital. Illegal Commitment. Recommitment. Constitutionality of Section 40 of R. S., c. 144. Expenses of Commitments. Support in Insane Hospital. Paupers. Necessity of Notice to Town of Pauper Settlement. R. S., c. 27. R. S., c. 144, §§ 24, 39, 40.

An insane person whose pauper settlement was in the defendant town, was committed by the plaintiff town to the Insane Hospital at Augusta for support therein, but this commitment was discovered to be illegal, and thereupon the aforesaid insane person was again committed to said Hospital the second commitment being a legal one in accordance with the provisions of section 39 and 40 of chapter 144 of the Revised Statutes. The plaintiff town then brought an action against the defendant town, under the provisions of section 42 of said chapter, to recover the expenses of both commitments and the sums paid for the support of the insane person in said Hospital. The defendant town contended that said last named section of said chapter is unconstitutional.

Held: That this section comes clearly within the authority of the legislature in the exercise of the police powers of the state and is therefore constitutional; that in the exercise of this power the legislature has an undoubted right to divide the state into as many political divisions as it sees fit, whether counties, cities, towns or plantations, and impose upon them the care and support of paupers in any manner it sees fit.

Chapter 144 of the Revised Statutes is silent as to the requirement of any pauper notices, yet the entire scheme of the chapter is based upon the theory that the expenses and support incurred under it are in the nature of pauper supplies, while section 24 of said chapter expressly provides that these expenses shall be recovered "as if incurred for the expense of a pauper." It is therefore *held;* that proceedings under R. S., chapter 144, with respect to expenses and support of a person committed to an Insane Hospital by the town committing and not the pauper residence of such person, come within the purview of R. S., chapter 27, with reference to the notice required by one town to another in case of furnishing pauper supplies.

In the case at bar, the plaintiff town having given notice to the defendant town, under the recommitment, on the 27th day of February, 1905, is entitled to recover for expenses and support, either under the original or the new commitment for only three months prior to giving such notice.

On report. Action to stand for trial.

Action brought by the plaintiff town to recover the expenses incurred by it in committing to the Insane Hospital at Augusta one Grace E. Farnham, an insane person, whose pauper settlement was alleged to be in the defendant town, and also to recover the sums paid by the plaintiff town for the support of the said Grace E. Farnham in said Hospital.

The said Grace E. Farnham was twice committed to said Hospital. The first commitment was discovered to be illegal from the fact "that no physician appeared and testified before the municipal officers in regard to the insanity of Grace E. Farnham." Thereupon the said Grace E. Farnham was again committed to said Hospital in accordance with the provisions of sections 39 and 40 of chapter 144 of the Revised Statutes.

By agreement the case was sent to the Law Court on report for its determination, with the stipulation that if the action be maintainable it should stand for trial, otherwise judgment for defendant.

The case is stated in the opinion.

Arthur S. Littlefield, for plaintiff.

R. F. Dunton and Joseph E. Moore, for defendant.

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

SPEAR, J. This case comes up on report and involves the collection of expenses incurred by the town committing against the town of pauper settlement for the commitment of Grace E. Farnham to the Insane Hospital at Augusta and for support therein. It is not in controversy that the town of Rockport undertook to commit Grace E. Farnham to the Hospital and that the town of Searsmont is the place of her pauper settlement. Whether the plaintiff town succeeded so as to legally charge the defendant town with the expenses of commitment and support thereafter to the date of the writ, is the first question in issue. The case shows that Grace E. Farnham was originally committed to the Hospital by a certificate of commitment certified by the selectmen and attested by the town clerk on the

20th day of January, 1904; and that a regular pauper notice dated Jan. 25, 1904, and a notice of commitment to the Hospital dated Jan. 28, 1904, specifying an expenditure of $120.43 were respectively sent by the plaintiffs to the defendants, and admitted to have been duly received and denials returned.

But nearly a year after the commitment the superintendent of the Maine Insane Hospital having discovered or suspected an irregularity in the proceedings, thereupon, in accordance with sections 39 and 40, R. S., chapter 144, made application to the municipal judge of the city of Augusta for an inquiry with respect to the legality of said commitment. After due notice and hearing upon this application, on the 14th day of January, 1905, the municipal judge issued his certificate recommiting said Grace E. Farnham to the Hospital. No question is raised as to the legality of the proceedings involved in the recommitment. On the 27th day of February, 1905, the plaintiff town again notified the defendant town of the recommitment of Grace E. Farnham and it is admitted that the notice was received and a denial returned. The defendant town further says in the report that, if competent to be proved, it is admitted "that no physician appeared and testified before the municipal officers, in regard to the insanity of Grace E. Farnham; that Grace E. Farnham at the time of the commitment, and for a longer or shorter period prior thereto, was living in the town of Rockport." The record erroneously states that the physicians did appear as required, before the municipal officers.

In view of the first part of the above admission it requires but little discussion to establish the illegality of the original commitment. It is claimed, however, by the defendant town that the municipal officers, for the purpose of commitment to the Insane Hospital, act in a judicial capacity and that their record is conclusive, citing as authority for their contention, *Eastport* v. *Belfast*, 40 Maine, 265, which holds that their record "cannot be impeached by parol evidence. If it is erroneous as a record it may be reversed. But if the selectmen have jurisdiction of the case it is competent proof of the judgment." The kernel of this citation in its application to the present case is contained in the clause "but if the selectmen have

jurisdiction of a case it is competent proof of the judgment." Want of jurisdiction was the important defect in the proceedings of the municipal officers in this case.

One of the jurisdictional facts authorizing the selectmen of the town to act at all in a case of commitment to the Insane Hospital is the requirement of section 17, chapter 144, that "in all cases of preliminary proceedings for the commitment of any person to the Hospital to establish the fact of the insanity of the person to whom insanity is imputed, the evidence of at least two reputable physicians given by them under oath before the board of examiners shall be required." It would seem from an examination of the statute that compliance with this section is imperative and mandatory, not necessarily as a matter of record but as a matter of fact, independent of the other proceedings required by the statute. A moment's reflection reveals the importance of this evidence and the wisdom of the legislature in requiring it. Above all things else it should be made to positively appear, as a preliminary step to any action whatever on the part of the selectmen, that the person in contemplation of commitment is beyond question insane. To fail to make an adequate investigation in this respect, and thereby commit a person not insane, would be monstrous if not criminal.

A careful comparison of sections 16 and 17, of chapter 144, will we think, clearly substantiate this view that the above requirement is intended to be an independent jurisdictional fact. It will be observed by a careful reading that section 16 prescribes in detail all that is to be done by municipal officers to effect a legal commitment of a person to the Hospital, including the form of certificate upon which the superintendent is to receive and hold such person until restored or discharged by law. Then the last clause of this same section provides that "the municipal officers shall keep a record of their doings and furnish a copy to any interested person requesting and paying for it." What "doings"? Only those specified in section 16. No future doings are, or, as is perfectly apparent, could be referred to. The language of the statute is specific. It leaves no room even for an inference as to a record of subsequent "doings." So that apparently, everything necessary to be done is complete under

section 16. Now then it should be emphatically noticed that this section does not require, and the record therein specified need not contain any reference to the fact that the evidence of at least two reputable physicians was given before the board of examiners.

Therefore the record required by statute is complete without reference to the evidence required by section 17. It consequently follows that the evidence of the physicians required by the latter section, is entirely additional to the requirements of section 16 and need form no part of the record of the things therein specified to be done but must become, if the alleged default of such evidence is put in issue, a matter of proof, dehors the record, as a necessary jurisdictional fact upon which to base any legal proceedings of commitment on the part of the municipal officers. While not necessary that it shall be included in the record required by section 16, yet some record must show that the requirements of section 17 have been complied with; but such record cannot be made conclusive of the statements therein contained and may be attacked collaterally.

An analysis of the statute without any reference to the decisions seems to warrant the above construction.

But even if the record required by statute contained a false statement as to a jurisdictional fact our opinion would still be the same with respect to the right of the defendants to attack it collaterally.

It is a well settled principle of law that even the judgment of a superior court may be collaterally attacked by any person not a party to it, if fraudulently obtained. In such case the attack does not seek a contradiction but an impeachment of the record. The general rule governing this class of cases is well stated in *Sidensparker* v. *Sidensparker*, 52 Maine, 481, and *Vose* v. *Morton*, 4 Cushing, 27. That the record in the case at bar may be attacked collaterally by showing that it is false with respect to statements therein contained relating to jurisdictional facts, we call attention to the analogous cases of *Holman* v. *Holman*, 80 Maine, 139; *Coolidge* v. *Allen*, 82 Maine, 23, and *Winslow* v. *Troy*, 97 Maine, 130.

Our conclusion is that the original commitment was illegal. But as the recommitting was legal we now come to the second proposition raised by the defense, that section 42 of chapter 144, under

which the plaintiffs seek to recover is unconstitutional. This section reads as follows: "When a person has unlawfully been committed to a Hospital and recommitted under the three preceding sections, the person or town liable for the support of such person, had his original commitment been lawful, is liable for the expenses of the examination and commitment under such unlawful commitment, for the support of such person thereunder, for the expenses of the examination and recommitment under the three preceding sections, and for support thereafterward furnished under such recommitment, and such liability shall extend to the town of such person's settlement, and to any person ultimately liable for such patient's commitment and support under a lawful commitment."

The facts show that it was enacted before the commencement of any of the proceedings contained in this case, therefore the claim of the defendants that it is retroactive is more specious than substantial. They reason thus: Suppose there had been no recommitment, then it is clear there would have been no liability at all. The statute then, they say, takes effect at the date of the recommitment, and the legislature accordingly could not revive the account and make it a claim by a direct act of that date. And how could it indirectly?

This statute simply makes the town of the pauper settlement of the person committed to the Insane Hospital liable for all the expenses of an illegal commitment, including support during the unlawful confinement, and for all the expenses of the recommitment made in accordance with the statute, and for support furnished under such recommitment after the date thereof. The very foundation of this section is the provision for a recommitment.

If there had been no recommitment in this case, even though the statute existed, the plaintiff town would have no standing. But a recommitment having been made, so that the person to whom insanity is imputed is lawfully within the hospital, then the statute takes effect and covers the whole proceeding as one transaction, the recommitment being but a continuation of the proceedings of the original commitment. Without a commitment, legal or illegal, there could be no recommitment. The one is the complement of the other.

While recommitment is the occasion which calls the statute into effect yet the statute when applied affects the remedy and not the rights of the parties. It does not make that a debt which was not a debt before. The defendant town was under every obligation to pay all the expenses under the original commitment, except for the interposition of a legal objection. This statute comes in and prescribes a remedy by which this objection is overcome and the just rights of the parties established.

We think this section comes clearly within the authority of the legislature in the exercise of the police power of the state.

In the exercise of this power the legislature has an undoubted right to divide the state into as many political divisions as it sees fit, whether counties, cities, towns or plantations, and impose upon them the care and support of paupers in any manner it desires. The exercise of this power of the legislature has been manifested in many instances in this state in the division of towns, and the setting off of a part of a town as an independent municipality or incorporating it with another, wherein it has exercised arbitrary power as to the residence and care of the paupers residing in the towns so divided or parts so incorporated. And this power has never been questioned. It has been conceded that these acts are a portion of the police power that may be exercised by the legislature according to its wisdom and sense of right.

While chapter 144 is silent as to the requirements of any pauper notices, either in the original or the recommitment proceedings, yet we think the entire scheme of the chapter is based upon the theory that the expenses and support incurred under it are in the nature of pauper supplies.

In fact section 24 expressly provides that these expenses shall be recovered "as if incurred for a pauper."

We are therefore inclined to the opinion that the proceedings under R. S., chapter 144, with respect to expenses and support of a person committed to the asylum by the town committing and not the pauper residence of such person, comes within the purview of R. S., chapter 27, with reference to the notice required by one town

to another in case of furnishing pauper supplies. That is, the plaintiff town in this case having given notice to the defendant town under the recommitment, on the 27th day of February, 1905, is entitled to recover for expenses and support either under the original or the new commitment only three months prior to giving such notice.

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

Case to stand for trial.

JOHN E. CHURCH *vs.* HEBRON E. KNOWLES.

Kennebec. Opinion March 19, 1906.

Construction of Statutes. Legislative Intent. Scienter. Sale Contrary to Statute. Promissory Note Given. Requested Instructions Refused. R. S., c. 19, § 19.

Section 19 of chapter 19 of the Revised Statutes reads as follows: "Whoever sells or disposes of any animal infected or known to have been exposed to infection, within one year after such exposure, without the knowledge and consent of the municipal officers, shall be fined not exceeding five hundred dollars or be imprisoned not exceeding one year."

This section describes two offenses and it seems improbable that if the legislature intended both to depend upon scienter that it should have expressly said so in one case and remained silent in the other. *Held:* that the action of the legislature, as read from the language of the section, shows a deliberate purpose to omit the element of scienter as an ingredient of the first named offense.

The plaintiff sold a pair of oxen to the defendant, taking the promissory note of the defendant in payment therefor. There was evidence tending to show that at the time of the sale, these oxen were infected with tuberculosis, of which they afterward died. The plaintiff brought an action on the aforesaid note, and at the trial contended that at the time of the sale he had no knowledge of the infection of the oxen. The defendant requested the presiding Justice to instruct the jury that if the oxen were infected with tuberculosis at the time of the sale, the plaintiff could not recover. The presiding Justice declined to give this requested instruction,

but instructed the jury as follows: "If they were sold on inspection and the plaintiff was absolutely ignorant of any infection and had reason to suppose that they were all right and sound, and had no sufficient reason to doubt it, he is entitled to recover on this note."

Held: that the instruction given by the presiding Justice was erroneous, and that the instruction requested by the defendant should have been given.

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

Assumpsit on a promissory note given by the defendant to the plaintiff in payment of a pair of oxen sold by the plaintiff to the defendant, brought in the Superior Court, Kennebec County. Plea, the general issue with a brief statement alleging "that the consideration for the alleged promise was the sale of two oxen which were sold by said Church to said Knowles at said Augusta, on Oct. 28, 1903, that said oxen were then and there infected with tuberculosis, and that said Church had no consent from the municipal officers of said Augusta, that said oxen had been within one year before said sale been exposed to infection from tuberculosis to the knowledge of said Church; and that said Church neglected to inform said Knowles of such infection or exposure, and said Knowles did not then and there know of the same," and "that by reason thereof said oxen were entirely worthless and were killed by the State Cattle Commissioners; that said Knowles was put to great expense and damage in caring for and endeavoring to cure said oxen which he claims to recoup." At the trial, the defendants requested the presiding Justice to instruct the jury that if the oxen were infected with tuberculosis, at the time of the sale, the plaintiff could not recover. The presiding Justice declined to give this instruction, but instead thereof gave the instruction stated in the opinion. The verdict was for the plaintiff. The defendant filed a motion for a new trial, and also took exceptions both to the refusal of the presiding Justice to instruct as aforesaid and to the instruction given in the place of the requested instruction.

The case appears in the opinion.

Sheldon & Sawtelle, for plaintiff.

Williamson & Burleigh, for defendant.

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

SPEAR, J. This was an action of assumpsit on a promissory note given by the defendant to the plaintiff in payment for a pair of oxen. There was evidence tending to show that the oxen were at the time of sale infected with tuberculosis, of which they afterward died.

The defendant requested the court to instruct the jury that if the oxen were infected with tuberculosis at the time of sale, the plaintiff could not recover.

This instruction the court declined to give, but instead gave the following: "If they were sold on inspection and the plaintiff was absolutely ignorant of any infection and had reason to suppose that they were all right and sound, and had no sufficient reason to doubt it, he is entitled to recover on this note."

To this instruction and refusal to instruct the defendant excepted. A motion was also filed to set aside the verdict as against the evidence, but it will not be necessary to consider it.

The exceptions in this case involve the construction of R. S., chapter 19, sec. 19, which provides: "Whoever sells or disposes of any animal infected or known to have been exposed to infection, within one year after such exposure, without the knowledge and consent of municipal officers, shall be fined not exceeding $500 or be imprisoned not exceeding one year." The object of construing a statute is to ascertain the intent of the legislature. This should be done by an examination of the phraseology of the statute itself, and by ascertaining the circumstances and conditions surrounding, and the subject matter, object and purpose of the enactment of, the statute.

"When the language of the statute is clear and plain, consequences must be disregarded." *Clark* v. *Me. Shore Line R. R. Co.*, 81 Maine, 477. The language of the above statute is clear and explicit and free from ambiguity. It describes two offenses and prescribes the penalty therefor. First, it declares that, whoever sells or disposes of any animal infected, &c., shall be fined, which constitutes one offense. Second, it says, whoever sells or disposes of any animal known to have been exposed, &c., shall be fined, and this

constitutes the second offense. That is, if a person sells an animal actually infected, without knowledge, he is liable; if he sells an animal known to have been exposed, though not infected, he is liable.

While the phraseology of this statute is admitted by the plaintiff to be clear and free from ambiguity, yet he says the legislature did not intend to make the law so drastic as the language of the statute conveys. He asserts that the very essence of criminal intent is based upon knowledge, and that, to say one cannot exercise his constitutional right of selling his own property, to him unknown to be within the inhibition of any law, is in violation of the well established rules of criminal procedure. The plaintiff's position might be well taken if the statute described an offense that was malum in se. But it does not. The offense here charged is malum prohibitum. The element of moral turpitude is not an attribute of the first offence described in this section. Under the second, in a degree, it might be, for it involves the question of scienter; it not being necessary to prove infection at all, only knowledge of exposure.

The legislature described two offenses in the same section and same sentence, and it seems improbable, if they intended both to depend upon scienter, that they should have expressly said so in the one case and have remained silent in the other. We think the action of the legislature, as read from the language of this section, shows a deliberate purpose to omit the element of scienter as an ingredient of the first offense.

If there were any doubt as to the inherent meaning of this statute, the application of the familiar rules of construction would remove it. The circumstances and conditions underlying the enactment of this section are clearly disclosed by the chapter of which the section is a part. It is apparent from the various provisions of this chapter, that the object of it was to prevent and suppress the dangerous and insidious disease of tuberculosis, a menace not only to the cattle herds throughout the state, but to human beings who are necessarily consumers of milk. This chapter provides for a commission whose duty it is to exercise great vigilance and care in the effort to suppress this disease and prevent its spread, and authorizes the expenditure of large sums of money to accomplish this end. Therefore, it is clear

that the object and purpose of the section now under consideration, was to place the most effective check possible upon the transfer of cattle, either infected or known to have been exposed to infection, in order to prevent as absolutely as possible the contagion of this baneful disease.

Now an interpolation into this section of a word requiring scienter such as "knowingly," which we believe the legislature intentionally omitted, so that it would read, "whoever knowingly sells, &c.," would operate to practically nullify the statute. Because, if a man should observe symptoms of disease about his cattle, involving the incipient stages of tuberculosis or any of the contagious diseases specified in chapter 19, such knowledge would be subjective, ordinarily discoverable only upon a test examination, and practically incapable of proof. In such case, a dishonest man might, by the sale of his stock, cause the infection of a dozen herds with little fear of discovery. While the dishonest man undoubtedly does do this now without detection, it is yet no reason why he should escape when discovered.

The section under consideration is a health measure, in which the right or convenience of the individual must in all instances be held subordinate to the public welfare and safety, and is to be construed with technical strictness. Such a construction is amply sustained by the authorities.

Com. v. *Emmons*, 98 Mass. 6, was a complaint charging the respondent with being the keeper of a billiard room and admitting a minor thereto without the written consent of his parents. The minor was twenty years of age, fully grown and did business independent of his parents. The respondent offered evidence that he informed the boy that a minor was not allowed to enter, and upon interrogation he replied that he was of full age. This evidence was excluded under a statute providing that no minor should be permitted to enter a billiard room, and the court said that the evidence excluded was immaterial, the prohibition of the statute being absolute; that the defendant admitted him to his room at his peril and was liable to the penalty whether he knew him to be minor or not.

See also *McCutcheon* v. *People*, 69 Ill. 603; *Ward* v. *State*, 48 Ind. 289.

Com. v. *Farran*, 91 Mass. 490, involved an indictment under a statute that provided "whoever sells or keeps or offers for sale adulterated milk . . . . shall be punished" &c. The defendant contended that it was incumbent upon the state to prove that he committed the offense knowing the milk to be adulterated; but the court held that the language of the statute did not require such proof; that it was evident the legislature did not intend that it should do so. And one of the reasons given for the probable enactment of the statute was that they regarded it as impracticable in most cases to prove knowledge in offenses to which the statute was intended to apply.

Com. v. *Boynton*, 2 Allen, 160, was an indictment for being a common seller. The defendant offered evidence to show that the beer sold was not intoxicating and that if it was he had no knowledge of it and bought it as a non-intoxicating liquor. Yet the court held, that want of knowledge would not avail him in the defense; that if the defendant purposely sold liquor which was in fact intoxicating he was bound at his peril to know the nature of the article which he sold. See also *State* v. *Eaton*, 97 Maine, 289.

Com. v. *Raymond*, 97 Mass. 567, was a case of indictment for selling a calf less than four weeks old under a statute prohibiting such sale. Upon the question raised on exceptions, whether it was necessary to allege that the defendant had knowledge that the calf was less than four weeks old, the court held that it was not necessary to allege it in the indictment. That "under this clause, as under the laws against the sale of intoxicating liquor or adulterated milk and many other police, health and revenue regulations, the defendant is bound to know the facts and obey the law, at his own peril. Such is the general rule where acts which are not mala in se are mala prohibita from motives of public policy and not because of their moral turpitude or criminal intent with which they are committed. Under these principles we think the instruction requested by the defendant should have been given. The instruction given was erroneous.

While a consideration of the exceptions disposes of the case yet for the information of the parties interested we deem it proper to say that the motion should be sustained upon the plaintiff's own testimony, even under the instructions which were given to the jury.

Exceptions sustained.

In Equity.

EDWIN O. CLARK, Admr.,

vs.

CHARLES E. B. CHASE, ASHUR H. CHASE AND CHARLES K. MILLER, Judge of Probate.

Lincoln. Opinion February 26, 1906.

Equity Courts. Power to Enjoin Actions at Law. Inequitable Conduct. Unconscionable Advantage. Laches. R. S., c. 84, §§ 17, 18, 19, 20, 21.

1. While the court may not bar a legally blameless suitor from enforcing his most strict technical legal rights because of any hardship thereby resulting, it may by the exercise of its equity powers bar a plaintiff from enforcing even in an action at law an unconscionable advantage gained by his own inequitable conduct toward the defendant.
2. It is inequitable for a person, having a legal right to call for an accounting, to long delay action without reason until after the death of the party liable to account, and such conduct will authorize the court to restrain him from prosecuting after such death an action at law against the sureties upon the bond for the accounting.
3. The facts, that a Probate Court upon the petition of the ward cited the administrator of the guardian, deceased after the ward came of age, to settle an account of the guardianship, and refused to allow the account presented to him, and that no appeal was claimed by the administrator, do not constitute an irrefragable right of action by the ward against the sureties upon the guardian's bond. An equity court can nevertheless enjoin the prosecution of the action if the failure to settle the account was caused by the inequitable conduct of the ward.

4. A plaintiff, who would be refused a decree in a suit in equity because of his laches or other inequitable conduct handicapping the defense, cannot now escape the equity powers of the court and the consequences of his laches by resorting to an action at law. When the defendant in an action at law has, without fault of his, been seriously handicapped in his defense by the laches or other inequitable conduct of the plaintiff, the court can in the exercise of its equity powers enjoin the plaintiff from prosecuting the action at law.

5. In the case at bar a Probate Court minor ward delayed, apparently without reason, asking for an accounting by the guardian till the guardian's death eight years after the ward came of age. He then caused the administrator of the guardian to be cited to settle in the probate court an account of the guardianship, which the administrator was unable to do. The ward then brought an action at law against the administrator of a deceased surety on the guardian's bond for the failure to settle an account upon citation according to the terms of the bond.

Held: that the laches of the ward, in his long delay till the death of the guardian, had given him an unconscionable advantage over the defendant, and that he should be enjoined from prosecuting the action.

In Equity. On appeal by plaintiff. Sustained. Decree below reversed.

Bill in equity brought by Edwin O. Clark as administrator of Joseph Clark to restrain and enjoin the prosecution of an action at law brought in name of Chas. K. Miller, Judge of Probate for Knox County, for the benefit of Chas. E. B. Chase and Ashur H. Chase, on guardian's bond of John C. Weston against said Clark as administrator of estate of Joseph Clark one of the sureties on Weston's said bond. The defendants filed a general demurrer to the bill.

Hearing had on bill and demurrer at the April term, 1905, of the Supreme Judicial Court, Lincoln County. The Justice of the first instance, after the hearing, entered the following order: "Demurrer sustained pro forma for the purpose of having the Law Court determine the legal questions involved. Bill dismissed." Thereupon a decree according to the order was filed. The plaintiff seasonably appealed, and the appeal was brought to the Law Court "to have legal questions first settled, and for this purpose by agreement."

All the material facts are stated in the opinion.

Joseph E. Moore, for plaintiff.

Arthur S. Littlefield, for defendants.

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

EMERY, J. This is a bill in equity to enjoin an action at law against a surety upon a guardian's bond for a breach of the bond by the principal. The question submitted is whether the facts alleged in the bill show any reason in law or equity why the action at law should not be maintained. A condensed statement of the allegations of fact in the bill material to our answer to the question is as follows:—

In February, 1875, Mr. Weston was appointed by the Probate Court guardian of Charles Chase and Ashur Chase two minors under the age of fourteen years (who will hereinafter be referred to as the wards) and gave the usual guardian bond of that date signed as sureties by William Brown and by Joseph Clark, the latter being the plaintiff's intestate. Mr. Weston assumed the care and management of the property of his wards, and made advances and paid bills for their support and education during their minority to a large amount. Charles Chase came of age February 8, 1891, and Ashur Chase on Nov. 8, 1894, during the lifetime of Mr. Weston the guardian. The next year, in 1895, Mr. Weston conveyed to the wards (then both of age) certain valuable real estate which they accepted and still possess. They afterward made no claim upon Mr. Weston, nor any request for his accounting to the Probate Court as their guardian during his life time up to his death Feb'y 25, 1903, nearly nine years after the youngest ward came of age and nearly eight years after the conveyance of real estate to them by Mr. Weston as above stated.

Immediately after the appointment of an administrator upon the estate of Mr. Weston the wards caused the administrator to be cited to render to the Probate Court an account of Mr. Weston's guardianship. Under this citation the administrator filed a brief account claiming a prior settlement in full between Mr. Weston and the wards after they became of age, and alleged that he could not find among the books and papers of his intestate any detailed accounts. The Probate Court refused to allow the account in discharge of Mr. Weston and the administrator did not appeal. The wards thereupon brought in the name of the Judge of Probate an action at law on the guardian's bond against the plaintiff as Administrator of Mr. Clark

one of the sureties on the bond, without joining either the Administrator of the guardian or of the other surety, and claim of this plaintiff the full amount of the penal sum $6000.

The wards claim (1) that the plaintiff failed to give in 1875, the full statutory notice of his appointment as Administrator necessary for his protection by the special statute of limitations in favor of Administrators, (2) that the failure to have the guardian's account allowed by the Probate Court was a breach of the guardian's bond, (3) that the statutory limitation of an action for that breach only began to run from that time, (4) that the non-allowance by the Probate Court of the account filed by the guardian's Administrator is conclusive upon the plaintiff here and hence it is not open to him now to allege or prove a settlement between the guardian and the wards. Granting these premises and taking no account of equitable defenses the wards would seem to be entitled to judgment. The mere hardship upon the plaintiff though evident and severe would be no ground of defense or relief in law or equity. Even an equity court cannot bar an innocent suitor from his legal rights because of any hardship their enforcement may cause others. It is only some illegal or inequitable conduct of the wards in the premises that can be allowed to stay their suit. The question therefore, is, was there any such inequity toward this plaintiff in their conduct as will authorize the court to restrain them from proceeding to obtain the judgment claimed in this action.

Although the administrator of the guardian could find no detailed accounts of Mr. Weston's guardianship they might have existed and might have been found and produced by Mr. Weston had he been cited during his lifetime. Again, he might perhaps have shown a settlement with the wards after they became of age and a release by them from any obligation to account to the Probate Court. Such settlement and release might have been valid. *Ela* v. *Ela*, 84 Maine, 423. The conveyance of real estate to the wards might have been shown by his testimony to be for such settlement and release. In fine, it is possible that Mr. Weston might have fully and satisfactorily accounted in every detail, or might have shown that he was legally released from accounting, had he been cited to account in his

lifetime when he could have the benefit of his own testimony. The wards had nearly nine years after the majority of the younger, to call him to account, but they both remained quiescent and silent for that long time, until death has closed the lips and extinguished the mind of Mr. Weston. Then, almost immediately after his death, when his testimony could no longer be adduced against them, they have made this move against his estate and against the administrator of one of his sureties deceased nearly thirty years ago.

We think every fair minded person must instinctively feel that this conduct of the wards was unfair and inequitable to the heirs and creditors of the deceased guardian, and especially so to the administrator of the long deceased surety who could not be heard at all in the Probate Court. He could not move in the matter. They could. By delaying action through nine years of time until the death of the guardian who, alone perhaps, by his testimony might have relieved his estate and sureties, they certainly have placed the administrator of the surety at a most grievous disadvantage. Can there be any doubt that if they were proceeding originally upon the equity side of this court to enforce an accounting, with this delay unaccounted for, the court would deny them an accounting on the ground that their unexcused delay of action had given them an unconscionable advantage, that is, because of their laches?

That statutes for limitation of actions have been enacted does not necessarily give a party invoking the equity powers of the court the full statutory time in which to do so. He must do equity; must proceed seasonably while the other party has fair opportunity and means to defend. He cannot purposely wait until death or other cause of probable event has removed that opportunity. If it appear that by unnecessary delay he has placed the other party at a substantial disadvantage the court will dismiss his suit. In *Lawrence* v. *Rokes*, 61 Maine, 38, at pp. 42-43, this court said: "If by the laches and delay of the complainant it has become doubtful whether the other parties can be in a condition to produce the evidence necessary to a fair presentation of the case on their part . . . . or if they be subjected to any hardship which might have been avoided by more prompt proceedings although the full time may not have

elapsed which would be required to bar any remedy at law, the court will deal with the remedy in equity as if barred."

In *Forest* v. *Walls*, 93 Maine, 405, this court dismissed a bill in equity on the ground that the plaintiff wards had unnecessarily delayed until after the death of the guardian saying tersely and accurately (at p. 412): "Parties should not sleep upon their rights while others interested are dying and the evidence of the facts is fading out." The case *Rives* v. *Morris*, 108 Ala. 527, (18 So. Rep. 743) illustrates the point. There, after the death of the executor, the legatees under the will brought a bill for an accounting of the executorship against the sureties on his bond. The bill was dismissed solely because the legatees had waited till after the death of the executor thereby depriving the sureties of his knowledge and evidence. It is sufficient to refer to the elaborate opinion in that case for ample reasoning and citations of authorities if the proposition needs them.

But these wards remind us that they are not asking in this court for any accounting either by bill in equity or by an action of account. They say they made their claim for an accounting in the Probate Court, the court having jurisdiction of all the guardianship matters, and that they have established in that court their right to an accounting; that all these questions of settlement and laches were necessarily determined there by that court's granting the order and refusing to allow the account presented as a compliance with the order; that by sheer force of the statute, such order and failure to comply with it constitute a breach of the bond at that time, giving them a legal right, a legal cause of action, unaffected by any equitable considerations, and entitling them to judgment in their action at law as a matter of course.

Conceding all that can be fairly argued in favor of the exclusive jurisdiction of the Probate Court and the finality of its decrees, it is no new nor doubtful doctrine that an equity court has power to stay and prohibit the enforcement of a legal judgment even one regularly rendered by a superior court of general jurisdiction, when the inequity of enforcing it is made to appear. A Probate Court is an administrative rather than a judicial court. It cannot bind a court of full equity powers by a decision that a given course of conduct is not

inequitable, and cannot compel the equity court to enforce its decree however inequitable the conduct of the party obtaining it. It is to be borne in mind that the surety here is not asserting there is no breach of the bond but is claiming that the wards induced that breach by their own conduct; hence that the question here is not whether this court sitting in equity shall or can reverse or modify the decree of the Probate Court, but is whether this court can restrain the wards from enforcing that decree on account of their own inequitable conduct in obtaining it. We have no doubt it can.

The power of a court of equity to inquire into the conduct of persons seeking its aid to enforce a decree of the Probate Court is illustrated by the case of *Phillips, Judge, &c.*, v. *Rogers*, 10 Pick. 105. In that case an administrator had been charged by the Probate Court with a balance due the estate and it did not appear that he had paid it over. Long afterward, when the administrator had become insolvent, demand was made upon him for payment, but he was unable to pay. The distributee then within one year after such demand brought a bill in equity on the administrator's bond against principal and sureties (that being an appropriate remedy in that State) to recover the amount. The distributee claimed there, as the wards do here, that his cause of action did not accrue until he had made demand and his demand not being complied with there was then a breach of the bond giving him a legal right to maintain a suit upon it. The court, however, dismissed the bill on the ground that the real claim, that for the balance of the account, was stale, even though the demand therefor and the consequent right of action were recent. The inequity of the delay, the hardship resulting from it, was the basis of the decision.

Even in a common law court in an action of law upon a probate bond when the Probate Court had decreed a balance due, the surety can defend, despite the probate decree, upon the ground of the fraud of the beneficiary in obtaining the decree. *Baylie Judge* v. *Davis*, 1 Pick. 206. *Woodbury* v. *Hammond*, 54 Maine, at p. 341. By parity of reasoning if the decree was obtained by other unlawful conduct of the beneficiaries the surety should be allowed to defend on that ground even in an action at law. So if the decree was

obtained by the inequitable conduct of the beneficiary an equity court at least may relieve the surety upon that ground.

But the wards further insist that the doctrine of laches can be invoked only in defense to a suit in equity, and never in support of a bill for affirmative relief. They argue that they are not seeking relief in equity but are proceeding at law to enforce a strict legal right and hence are not subject to the equity power of the court to deny them judgment because of their laches. Were they proceeding in equity the court as above shown would have power to relieve the surety from the consequences of their laches. Is the court shorn of this power by their proceeding in an action at law?

In those states and countries where there is no dividing wall between law and equity such a question could not arise. There in every case, however presented, the court can exercise without question its full powers, whether styled legal or equitable, to prevent injustice, to prevent either party suffering from the unfair, inequitable conduct of the other. While in this state the dividing wall has not yet been wholly removed, the equity powers of this court have been so enlarged by legislation and by natural growth that now practically no case properly brought before the court in either form of procedure, legal or equitable, is exempt from their exercise. When in 1874 the people through their legislature authorized the court to exercise full equity powers according to the usage and practice of courts of equity in all cases where there is not a plain adequate and complete remedy at law they practically empowered the court to prevent any injustice being done under the forms of law. Since that enactment the equity powers of this court can and do grow and expand with the growth and expansion of ideas of justice. Again, since 1893, at least, when what is known as the Law and Equity act was passed, the court can exercise equity powers directly in an action at law, can give effect in them to mere equitable defenses, and can also give effect to equitable answers to defenses based on strict law. Again in the same act it was provided that, when the court was proceeding under the act, "there appears to be any conflict or variance between the principles of law and those of equity as to the same subject matter the rules and principles of equity shall prevail." R. S. ch. 84, sec. 17-21.

In *Somerset Ry.* v. *Pierce*, 88 Maine, 86, the laches of the defendants was regarded as a ground for granting affirmative relief.

The subject matter between these parties is the question whether the wards can now exact from the administrator of the surety of their deceased guardian the full penalty for a breach of the bond which might not have occurred but for their own laches. According to the principles of equity they clearly cannot, as already shown. If the principles of law are in conflict or at variance with these principles of equity they must now give way. The court has the power and duty to recognize and enforce the principles of equity in this subject matter in whatever form it is presented. We think they require us in this case, for the reasons heretofore given, to restrain the wards from further prosecuting their suit against this plaintiff, if the facts shall prove to be as alleged. It should be understood that this conclusion is not based on the alleged settlement, but upon the delay, the laches, of the wards so heavily handicapping the defense. The principle settled is that this court with its present equity powers will not allow one party to gain by his own laches an advantage over the other party who could not himself move in the matter.

We were urged by both parties at the argument to also consider and pass upon the effect of sundry other allegations in the bill. It is not only unnecessary, but inexpedient, to do so at this time. The plaintiff may not be able to prove them. We further express the opinion that it would have facilitated progress in the case if the actual facts had been first determined, since, if sufficient facts are not proved this judgment goes for nothing, and is labor and time wasted, both of court and counsel.

It may be that instead of proceeding by a separate bill in equity, the facts alleged should have been pleaded in the action at law under R. S., ch. 84, sect. 17, p. 21, authorizing the pleading of equitable defenses in actions at law, but since the defendants here make no objection to the course taken and specifically ask us to determine the matters alleged upon the merits and in this proceeding, we waive the question of procedure.

The pro forma decree sustaining the demurrer and dismissing the bill must be reversed, and the case remitted for answer and hearing

upon the issues of fact. All questions of fact put in issue will of course be open to the parties.

Decree reversed.
Demurrer overruled.
Defendants to answer.

EDWARD T. FINN

vs.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY.

Kennebec. Opinion March 19, 1906.

Evidence. Cross-examination. Collateral Matters. Compromise Offers. Intention of Party Seeking Compromise Governs. Preliminary Question as to Intention to be Determined by Presiding Justice. Judicial Discretion not Exceptionable.

In an action on the case for negligence, the plaintiff introduced testimony tending to show that the accident in which he was injured was occasioned through the negligence of the foreman, who assured him, without any action or warning as he was about to enter the place of danger to begin his work, that everything was all right. The foreman was a witness for the defendant, and on cross-examination was asked whether he had not on the evening of the accident requested the night editor of the local newspaper not to publish any account of the accident in the paper, and denied that he had done so. The plaintiff then offered evidence that the foreman on the evening of the accident did request said night editor to suppress the account of the accident, which evidence was excluded.

Held: that the answer of the foreman that he had not requested the suppression of the account of the accident was in response to a question involving a collateral matter brought out on cross-examination and therefore could not be contradicted.

As tending to show an admission of liability on the part of the company for the accident, the plaintiff offered evidence that a few weeks after the accident the plaintiff, without any request on his part and before he had made or filed any claim, was sent for by the local manager of the defendant company and was offered by the company through such manager two checks covering the expenses of the accident, accompanied by a receipt which he

was requested to sign for said amount; that said statement or receipt contained a clause releasing and discharging the defendant company from all liability for this particular accident which was then specifically mentioned and described; that the plaintiff refused to sign and the checks were not delivered to him. This evidence was also excluded.

Held: that the above offer fell within the rule of compromise offers which is in cases of tort that, when a party has reasonable ground for anticipating that a demand will be made against him for damages, the claim may then be said to so far exist as to authorize him, without any move on the part of the claimant, to seek a settlement of it and to be protected in so doing by the general rules of law applicable to compromise settlements. That is, an offer to purchase peace either with intent to prevent a possible controversy or to end one that has arisen, cannot be used in evidence as an admission of liability.

Held: Also, that the admissibility or non-admissibility of evidence offered to prove an alleged compromise depends upon the intention of the party seeking it. If he intends his offer to be a compromise settlement it is inadmissible. If he intends it to be an admission of liability, coupled with an endeavor to settle such liability, then it is admissible to prove such liability.

In the case at bar it was clearly within the province of the court to determine the preliminary question of fact as to what was the intention of the defendant in making the alleged offer of settlement. To the exercise of his discretion in this respect no exception can lie.

On exceptions by plaintiff. Overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant company, and alleged to have been caused by the negligence of the defendant company. Plea, the general issue. Verdict for defendant.

At the trial, the plaintiff offered certain evidence which was excluded, and thereupon the plaintiff excepted.

The case is stated in the opinion.

Williamson & Burleigh, for plaintiff.

Cornish & Bassett, for defendant.

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

SPEAR, J. This was an action on the case for negligence. The plea was the general issue. The plaintiff, a telephone lineman, while in the employ of the defendant company, was injured by a live wire of high voltage with which a telephone cable, upon which he had

been directed to work by the defendant's foreman of a crew, came in contact. The verdict was for the defendant. The case comes up on exceptions by the plaintiff to the ruling of the presiding justice in excluding certain evidence that was offered by him.

1. The plaintiff introduced testimony tending to show that he was in the exercise of due care himself and that the accident was occasioned through the negligence of the foreman who assured him, without any caution or warning as he was about to enter the place of danger to begin his work, that everything was all right.

The foreman was a witness for the defendant and testified that he had no recollection of saying that everything was all right, but that if he did say so his meaning was misconstrued by the plaintiff; but the plaintiff contends that his testimony was to the general effect that, personally, he had been guilty of no negligence in providing a reasonably safe place for the plaintiff to work nor in any other respect. On cross examination he was asked whether he had not on the evening of the accident requested the night editor of the local newspaper not to publish any account of the accident in the paper, and he denied that he had done so. The plaintiff then offered evidence that the foreman, on the evening of the accident, did request said night editor to suppress the account of the accident, which evidence was excluded.

In discussing this exception we shall assume that the foreman was not a fellow servant of the plaintiff but represented the master at the time of the accident in the discharge of a duty owed by the master to the plaintiff.

It is a familiar rule of evidence that a witness cannot be contradicted as to collateral matter brought out upon cross examination. Was the answer by the foreman, then, that he had not requested the suppression of the account of the accident in response to a question involving a collateral matter? We think it was.

What is collateral matter? In *Page* v. *Homans*, 14 Maine, 478, it is said "that a collateral fact not bearing upon the issue elicited in cross examination is not to be contradicted." From this it would appear that "a fact not bearing upon the issue" is collateral. In *Ware* v. *Ware*, 8 Maine, 42, at page 53 it is said questions are

merely collateral that "have no immediate connection with the cause." Wigmore on Evidence, volume 2, sec. 1003, lays down the test as to whether evidence elicited upon cross examination is collateral, to be this: "Could the fact as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction."

The plaintiff's brief frankly says: "We do not claim that the evidence should have been received on the ground that it was an admission of liability by an agent of the defendant which would bind the corporation . . . . on the contrary had the foreman not been a witness in the case an offer of the answer in question would, we think, have been rightfully refused."

Applying the above tests, could the plaintiff have shown, independently of any contradictory effect, that the foreman on the evening of the accident requested the night editor not to publish any account of the accident? If not, then the denial of the foreman that he did make such a request was with respect to a collateral matter.

Now the issue in the case on trial involved the alleged nonperformance by the master of the duty to provide a reasonably safe place for the servant to work, due to the alleged negligence of the foreman in not having the place made safe. The alleged request of the foreman to the night editor of the newspaper, if true, was long after the accident and entirely without the scope of his duty or authority, and could have no possible relevancy tending to prove or disprove the issue in question, as conceded in plaintiff's brief above quoted. The evidence offered was therefore to contradict a collateral matter brought out on cross examination.

But the plaintiff says further that while the alleged suppression was entirely independent of his duties to the corporation and unauthorized by it, yet it should have been admitted for the purpose of contradicting the witness; but it seems to us that this is seeking the admission of testimony in direct violation of the rule just considered, the very reason for which assumes that collateral evidence is capable of being contradicted, and the very object of which is to prevent

such contradiction and the consequent extension of a trial by the introduction of contentions irrelevant to the main issue.

II. As tending to show an admission of liability on the part of the company for the accident, the plaintiff offered evidence that a few weeks after the accident the plaintiff, without any request on his part and before he had made or filed any claim, was sent for by the local manager of the defendant company at Ellsworth, Maine, the home of the plaintiff, and was offered by the company through such manager two checks covering expenses of the accident accompanied by a receipt which he was requested to sign for said amount; that said statement or receipt contained a clause releasing and discharging the defendant company from all liability for this particular accident, which was therein specifically mentioned and described; that the plaintiff refused to sign the same and the checks were not delivered to him. The exclusion of this evidence constitutes the second ground of exception.

The real question to be determined upon this branch of the case is whether the attempted negotiations of a settlement by the defendant company falls within the rule protecting compromise settlements. If it did, then the offer of the defendant was inadmissible. It is a rule too familiar to require citation that an offer to compromise a claim or to purchase peace cannot be shown to prove admission of liability. The plaintiff contended that the defendant's offer does not fall within this rule because there was no evidence that any claim had been made or filed by him, and that until a claim is made or an actual controversy arises the rule does not apply. But the rule is not so limited, and the alleged limitation is not sustained, either by reason or authority.

The rule relating to a matter so important to both sides of a controversy should be founded upon a substantial and not upon a meaningless distinction. Suppose a collision of trains on a railroad by which a person in the exercise of due care is injured, where liability is as a rule fixed by law? Can it be said in this case that no claim exists against the defendant until the party injured formally presents one? The only distinction between this and other cases of tort for injuries, is with respect to the diligence required to be proven

against the tort feasor to bring him within the rule of ordinary care. In either case it seems to us it would be a delusion to claim that the tort feasor was not authorized to anticipate a claim. A normal state of mind would naturally raise such anticipation.

Now what makes the difference, whether a defendant, impressed with this view of the situation, waits until the claim against him is formally filed, or anticipates what he believes to be true, that the claim will be filed, and then attempts to make overtures of settlement or to buy his peace? We are unable to discover any good reason why he should not do so in the one case as well as in the other and be protected in so doing. In cases of tort the proper rule should be that, when a party has reasonable grounds for anticipating that a demand will be made against him for damages, the claim may then be said to so far exist as to authorize him, without any move on the part of the claimant, to seek a settlement of it and to be protected in so doing by the general rules of law applicable to compromise settlements. That is, an offer to purchase peace made either with intent to prevent a possible controversy or to end one that has arisen, can not be used in evidence as an admission of liability.

And why should not this be so? The early reasons underlying the principles of law pertinent to compromise settlements applied to business conditions and methods entirely different from those which prevail today. If we go back the short period of fifty years we shall find the existence of corporations employing large bodies of employees to be comparatively a rare instance; but today nearly all the industries of the state are operated through the agency of corporations, engaged in kinds of business that entail every degree of hazard known to the operation of machinery and the use of the ordinary utensils of labor. Under these conditions, accidents, the risks of which must necessarily be assumed by the employees and for which no liability can be fixed, must constantly and frequently occur. Should there be a rule of law existing in this state that an employer of labor whether a corporation or individual, in view of an accident and injuries to one of his employees, for which he is in no sense liable, shall not be allowed the privilege of approaching such employee and assuming the payment of the necessary expenses of his injuries and continuing, or offering

to continue, his name upon the pay roll; or of paying him a definite sum of money, or aiding in the support of his family, without having his act of generosity and kindness offered in evidence against him as an admission on his part of liability? It seems to us that such a rule under present conditions would be far more liable to operate injuriously to the interests of the employee than to those of the employer. We think the time has come when, if a different rule has obtained, the one which we have herein laid down should be substituted for it and hereafter prevail as the rule of law in this state.

While we are unable to find that the exact point in controversy has been decided in our state we believe that the best modern authorities sustain the views above expressed. Wigmore on Evidence, volume 2, sec. 1061, after discussing very fully the rule and the various theories which have been given for it, finally lays down what the writer believes to be the true theory as follows: "The true reason for excluding an offer of compromise is that it does not ordinarily proceed from and imply a belief that the adversaries' claim is well founded but rather a belief that a further prosecution of that claim, whether well founded or not, would in any event cause such annoyance as is preferably avoided by the payment of the sum offered; in short, the offer implies merely a desire for peace, not a concession of wrong done. . . . By this theory, the offer is excluded because as a matter of interpretation and inference, it does not signify an admission at all. There is no concession or claim to be found in it, expressly or by implication. It would follow then, conversely, that if a plain concession is in fact made, it is receivable, even though it forms part of the offer to compromise; but this much has long been well understood."

The same authority quotes with approval *Colburn* v. *Groton*, 66 N. H. 151, in which Chief Justice Doe in an elaborate opinion said: "The preliminary question is, not merely whether an admission of fact was made during a settlement or negotiation, or whether a statement or act was intended to be an admission, which is a question not of time or circumstances but of intention. On that question the time and circumstances may be material evidence; an offer of payment whether accepted or rejected, is evidence, when the party making it

understood it to be and made it as an admission of his liability. It is not evidence when he made it for the purpose of averting litigation not intending to admit his liability . . . . . the entire claim may be paid to avoid a lawsuit the payer intending to admit nothing but his desire for peace."

From these authorities it would seem clear that the admissibility or non-admissibility of evidence offered to prove an alleged compromise depends upon the intention of the party seeking it. If he intends his offer to be a compromise settlement it is inadmissible. If he intends it to be an admission of liability coupled with the endeavor to settle such liability then it is admissible to prove such liability. But who is to determine the preliminary question of intention? The court should do so unless the only inference from the testimony offered shows that the intention in offering the compromise was not to buy peace. If an intention to buy peace can be inferred from the offer, then it is within the province of the court to determine the preliminary question, himself, or submit it to the jury with proper instructions.

In the case at bar, it was clearly within the province of the court to determine the preliminary question of fact as to what was the intention of the defendant in making the alleged offer of settlement. To the exercise of his discretion in this respect no exception can lie.

Exceptions overruled.

EMERY, J. I concur in the opinion as to the first exception. I concur in the result as to the second exception. I think it immaterial whether or not the offer of the local manager was for the purpose of compromise, he not having been a witness. His acts or statements, days after the event which he did not witness, at the most only indicated his then personal opinion upon the question of the defendant company's liability, an opinion based solely upon the statements of others. These statements may have been unfounded in fact. The opinion itself may have been erroneous. In any case it was a mere opinion and not evidence of any material fact.

MARY H. D. TUTTLE *vs.* GEORGE A. TUTTLE COMPANY, et al.

Sagadahoc. Opinion March 21, 1906.

Promissory Notes. Failure of Consideration. Contracts. Corporation Promoters. Corporations not Liable on Contracts made by Its Promoters, When.

When a promissory note is given for two or more independent considerations and there is a failure of any of such considerations, such failure is a defense pro tanto to such note in an action between the original parties or between others standing in no better position than the original parties.

In the absence of ratification or adoption after its organization or of a charter or statutory provision imposing liability, a corporation is not liable for services performed for it before its organization under a contract made by its promoters although the contract may have been made on its behalf with the understanding that it should be bound.

In the case at bar, there has not been any resolution or other act of the defendant corporation or of its officers which recognizes a liability on its part to the plaintiff or her husband on account of any agreement made with them by its incorporators. The act of the corporation as evidenced by the vote of its board of directors is no such recognition of liability as would amount either to the creation of a new contract by the corporation or the ratification or adoption of a contract originating with its promoters; for by this resolution the note in suit was ostensibly given for another purpose, to pay a liability of the business which it was purchasing. Whatever else may have been the secret intention of the directors individually, they were unable to give effect to it by concealing the character of the transaction, and if there was a bona fide claim the plaintiff should have seen to it that the liability of the corporation was definitely established.

It is therefore *held* that at the date of the note in suit, which was given for $3000, there was no liability on the part of the defendant corporation to the plaintiff beyond the debt of $1,400 which the defendant corporation assumed in part payment of the business which it was purchasing, and that there was a partial failure of the consideration for which the note was given and that it was an error to assess the damages at the full amount of the note.

On motion by defendants. Sustained.

Assumpsit on a joint promissory note given by the defendants to the plaintiff. The note reads as follows:

"$3000 Feb. 11, 1902.

On demand after date we promise to pay to the order of Mary H. D. Tuttle three thousand dollars at — with interest at 6 per cent. per annum payable every three months.

Value received. GEORGE A. TUTTLE COMPANY
By George A. Tuttle, President."

Written on the back of the note is the following:

"George A. Tuttle. Waiving demand and notice. John S. Millin. Waiving demand and notice."

The writ runs against the George A. Tuttle Company and John S. Millin, and contains three counts, together with an averment that George A. Tuttle "has long since deceased" and that "Walter E. Tuttle is the executor of the goods and estate of said George A. Tuttle deceased." Plea, the general issue and a brief statement as follows:

"And for a brief statement of special matter of defense to be used under the general issue pleaded the said defendants further say: that when the note in suit was executed and delivered the said George A. Tuttle Company then owed the plaintiff in suit the sum of fourteen hundred dollars, and no more; that this was the entire and only consideration for said note, and that the same was made for three thousand dollars at the suggestion of the plaintiff or her agent, that by this means, if said defendant corporation became financially involved the plaintiff would receive her pay in full. And defendants say that there is no valid consideration in law for this note, all of which the plaintiff well knew."

This action was tried at the April term, 1904, of the Supreme Judicial Court, Sagadahoc County. Verdict for plaintiff for $3000 "with interest from August 11, 1903." The defendants then filed a general motion to have the verdict set aside and a new trial granted.

The case is stated in the opinion.

Jesse C. Ivy and George M. Seiders, for plaintiff.

Arthur J. Dunton and William H. Newell, for defendants.

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

PEABODY, J. Assumpsit on promissory note. The case is before the court on motion of defendants for new trial. The action is on a joint promissory note of the defendants to Mary H. D. Tuttle for $3000, dated February 11, 1902, with interest at six per cent payable on demand. The jury found a verdict for the plaintiff for the full amount of the note and interest.

The plaintiff is the wife of Edward P. Tuttle. The defendant, John S. Millin, is treasurer of the George A. Tuttle Company and owner of the majority of the capital stock. The defendant, Walter E. Tuttle, is the executor of the will of George A. Tuttle, deceased. George A. Tuttle, an elder brother of Edward P. Tuttle, carried on a dry goods business in Bath. On account of poor health he was obliged to give up his business and on the eighth of February, 1902, the defendant corporation was organized and George A. Tuttle transferred to said corporation all the merchandise and assets of George A. Tuttle & Co., for which stock was issued in part payment.

The plaintiff claimed that the note was founded upon the following considerations: first, the balance due on a promissory note of the said George A. Tuttle & Co. to the plaintiff assumed by the corporation as one of the obligations of the business purchased by it in accordance with the vote of the directors which authorized the assumption of all outstanding liabilities of the business formerly conducted by George A. Tuttle; second, the services of the plaintiff and her husband in raising three thousand dollars and lending it to the defendant company and the endorsing by Edward P. Tuttle of a promissory note for two thousand seven hundred dollars made by George A. Tuttle to W. W. Pendexter, dated February 8, 1902, payable sixty days after date, whereby the defendants were enabled to buy out and unite the business of W. W. Pendexter and George A. Tuttle & Co.; third, the services of Edward P. Tuttle rendered in buying out W. W. Pendexter, effecting the organization of the corporation, and thereafter supervising and directing its business.

The defendants claimed that there was no consideration for and no

liability on the note beyond the amount of one thousand four hundred dollars, the balance remaining due on the old obligation of George A. Tuttle & Co. In order to find a verdict for the plaintiff for the whole amount sued for the jury must have found in the evidence facts supporting the second and third claims of the plaintiff; and it is necessary therefore to consider whether these services rendered and to be rendered as claimed therein were sufficient in law to support the joint promise upon which this suit is founded, and whether the jury were warranted in their conclusions of fact by the evidence introduced.

The plaintiff's second claim can be speedily set aside as in no wise established by the testimony of her own principal witness. The testimony of Mr. E. P. Tuttle as to the offer made by him and his wife to the promoters of the corporation prior to its organization is as follows: "that if the corporation should give my wife a note for $3,000 we would surrender the note for $1400. That that $3000 note could stand as long as affairs looked all right, for a reasonable length of time, they to pay the interest on the same quarterly." In reply to the question, "What was the $3000 note to be for?" he says, "For securing the business for them, securing the location and the stand and advancing $3000 cash payment, and endorsing the note of my brother."

It appeared in evidence that both the loan obtained for the corporation by Mr. and Mrs. Tuttle and that secured by Mr. Tuttle's endorsement were afterwards paid, and it cannot be supposed that the $3000 note in this suit, so far as it relates to these transactions, was ever intended to be more than security for the protection of Mr. and Mrs. Tuttle in temporarily lending their credit to the company or its promoters. Such is the evident meaning of Mr. Tuttle's own proposition. Even if it were possible to detect in the transaction a sufficient consideration for a promise to pay the amount of this note as an additional obligation, such an understanding could not be inferred from the relations of the parties or the testimony of Mr. E. P. Tuttle himself, who is the actual plaintiff in the case.

The third claim, that of a consideration founded upon the personal services of Mr. E. P. Tuttle, is of a more plausible character; but

the services in question seem but slightly connected with the circumstance of executing this note and to have been rendered for other reasons of personal interest. If any compensation was expected or contracted for it does not seem to have been in the form of the note which is here sued.

But a final defense to the present action is the absence of any promise by the corporation, one of the parties' defendant, beyond the amount of the $1400 liability of George A. Tuttle & Co. to the plaintiff.

The following is the record of the directors authorizing the note.

"February 8th, 1902. Special meeting of the Board of Directors, called by the president, pursuant to the power given him in the By-Laws. Present, George A. Tuttle, John S. Millin. It was voted: That the company purchase the stock, fixtures and entire business, including good-will of George A. Tuttle, paying therefor $2400 cash and in capital stock of the corporation, 68 shares, and that the company assume all outstanding liabilities of the business formerly conducted by George A. Tuttle and none other. Voted: That the President be directed to give to Mrs. Mary H. D. Tuttle the note of the company for $3000, payable on demand, with interest at 6 per cent. per annum, payable every three months, said note being given to cover the outstanding liability of the business of George A. Tuttle."

It appears clearly from the record of the case that whatever rights accrued to the plaintiff or her husband beyond the original $1400 were in no sense a liability of the business of George A. Tuttle but arose from some agreement between E. P. Tuttle and the promoters of the corporation incident to its organization or from benefits conferred on the corporation and accepted by it without contract.

In England it has been held in the more recent cases that in the absence of a charter or statutory provision a contract made by the promoters of a corporation on its behalf before incorporation is a nullity and that the corporation cannot ratify or adopt it and thus make it binding upon it after incorporation, although an action quasi ex contractu may be maintained against it if it accepts the benefit of such a contract. *Kelner* v. *Baxter*, L. R. 2 C. P. 174;

Melhado v. *Porto Alegre New Hamburgh & B. Ry. Co.*, L. R. 9 C. P. 503; In re *Empress Engineering Co.*, 16 Ch. Div. 125; In re *Northumberland Ave. Hotel Co.*, 33 Ch. Div. 16; 1 Clark and Marshall, Private Corporations, 306.

A similar view has been taken by the Supreme Court of Massachusetts. *Abbott et als.* v. *Hapgood et al.*, 150 Mass. 248; *Holyoke Envelope Co.* v. *U. S. Envelope Co.*, 182 Mass. 171; *Bradford* v. *Metcalf*, 185 Mass. 205.

A more liberal view is taken by the courts in other states, which hold generally that a contract made by the promoters of a corporation on its behalf may be ratified or adopted by the corporation when organized and that the corporation is then liable both at law and in equity on the contract itself and not merely for the benefits received. *Stanton* v. *N. Y., etc., Ry. Co.*, 59 Conn. 272; *Smith* v. *Parker*, 148 Ind. 127; *Grape Sugar and Vinegar Mfg. Co.* v. *Small*, 40 Md. 395; *Low* v. *Railroad*, 45 N. H., 370; *Bell's Gap Ry. Co.* v. *Christy*, 79 Pa. St., 54; *Buffington* v. *Bardon et al.*, 80 Wis. 635; *Whitney* v. *Wyman*, 101 U. S. 392.

The American courts, however, insist in every instance on an express resolution or some other act by the corporation subsequent to organization showing an intent to be bound: *Ireland* v. *Globe Milling and Reduction Co.*, 20 R. I. 190.

Consequently it is held that a corporation is not liable in the absence of ratification or adoption or of a charter or statutory provision imposing liability, for the salary of a superintendent or other person for services performed for it before its organization under a contract made by its promoters, although the contract may have been made on its behalf and with the understanding that it should be bound and although the promoters who made it have become its stockholders and officers. *Western Screw & Mfg. Co.* v. *Cousley*, 72 Ill. 531; *Little Rock & Ft. Smith R. Co.* v. *Perry*, 37 Ark. 164; *Carey* v. *Des Moines Co.-Op. Coal & Min. Co.*, 81 Iowa, 674; 1 Clark & Marshall, Private Corporations, 304.

Nor is it bound by an agreement by its promoters that a person shall be employed by it at a certain salary when it shall be organized.

In the case of *Oakes* v. *The Cattarugus Water Co.*, 143 N. Y. 430,

it was held by a divided court that while such a contract was not binding upon the corporation at its inception, yet it might be ratified by the president on behalf of the corporation when it attained a legal existence, and that there being evidence that the services were performed at the request of the president who was also the chief promoter of the corporation and that he acknowledged the indebtedness and promised to pay it, there were under the circumstances questions of fact for the jury.

There has not been in the case at bar any resolution or other act of the corporation or of its officers which recognizes a liability on its part to E. P. Tuttle or his wife on account of any agreement made with them by its incorporators. The act of the corporation as evidenced by the vote of the Board of Directors is no such recognition of liability as would amount either to the creation of a new contract by the corporation or the ratification or adoption of a contract originating with the promoters; for by this resolution the note is ostensibly given for another purpose, to pay a liability of the business which it is purchasing. Whatever else may have been the secret intention of the directors individually they were unable to give effect to it by concealing the character of the transaction, and if there was a bona fide claim the plaintiff should have seen to it that the liability of the corporation was definitely established.

Since at the date of the note there was no such liability on the part of the corporation beyond the $1400 debt of George A. Tuttle & Co. to the plaintiff which it assumed in part payment of the business, there was a partial failure of consideration, and it was an error to assess the damages at the full amount of the note. The rule is stated in a recent case, "Whenever a promissory note is given for two or more independent considerations and there is a failure of consideration as to one, as where the title to one of the articles sold is not in the vendor at the time of the sale or where there is a breach of warranty or a misrepresentation as to quality, for the purpose of avoiding circuity of action, the law will allow the defendant in an action between the original parties, or between others standing in no better position, to show such partial failure of consideration in reduction of damages." *Hathorn* v. *Wheelwright*, 99 Maine, 351.

Motion sustained.

CHARLES W. YOUNG *vs.* AETNA INSURANCE COMPANY.

Washington. Opinion March 22, 1906.

Fire Insurance. Maine Standard Fire Insurance Policy. Compulsory Arbitration. Referees Must be Disinterested. Disqualifying Partizanship. Award by Referees Will Be Set Aside, When. R. S., c. 49, §§ 1, 4, 5.

1. All the referees provided for in the Maine Standard Fire Insurance Policy to fix the amount of the loss must be disinterested men, not only in the narrow sense of being without relationship and pecuniary interest, but also in the broad, full sense of being competent, impartial, fair and open minded and substantially indifferent in thought and feeling between the parties and without partizanship or bias either way.
2. When it appears that even one of the referees was not thus disinterested, the award in which he joined will be set aside.
3. An unexplained refusal by a referee nominated by the insurance company to agree upon any man in the vicinity of the property as the third referee is unreasonable and is evidence of want of the requisite disinterestedness. Such refusal coupled with the explanation that it is because of the objection of the insurance company thereto shows disqualifying partizanship.

On report. Judgment for plaintiff.

Assumpsit in which the plaintiff sought to recover of the defendant company, under a policy of insurance of the standard form, the sum of $1400 as insurance on his frame building with brick boiler-house addition, situated in Calais, Me., and used for storage of non hazardous merchandise and $300 as insurance on machinery, belting, shafting, gearing and tools, boilers, engine and connections, pipes and piping, contained in said frame building and boiler-house, which building and contents were totally destroyed by fire.

The parties failed to agree as to the amount of the loss, and thereupon under the provisions of the policy and the statute—R. S., chapter 49, sections 4 and 5—chose two referees, Albert H. Sawyer of Calais, and Charles W. Allen of Portland. These two referees were unable

to agree upon a third referee. Application was then made to the Insurance Commissioner, as provided in section 5 of said chapter, to appoint a third referee and the Insurance Commissioner appointed as third referee George Moulton, Jr., of Bath. While Mr. Sawyer and Mr. Allen were attempting to agree upon a third referee, Mr. Allen under the date line of Portland, Maine, March 2, 1903, wrote Mr. Sawyer the following letter:

"Dear Sir:—

Yours of the 1st inst. received. I have no doubt whatever but there are just as good men in Calais as in any other part of the state, but inasmuch as the insurance people whom I represent, object to local man, I deem it advisable to select third referee from some other part of the state. Can you not send me list of a few names outside Calais or Washington County?"

The three referees met and considered the matter of the plaintiff's loss but were unable to agree. Mr. Allen and Mr. Moulton determined the loss to be $1353.06 and made an award for that sum.

Mr. Sawyer contended that the loss should be fixed at $1700 the full amount of the policy, and refused to join in the award made by the other two referees.

The plaintiff then brought this action against the defendant company, contending among other things that Mr. Allen was not a "disinterested" referee such as the law requires and that therefore the award made by Mr. Allen and Mr. Moulton was not binding upon the plaintiff.

The action was tried at the October term, 1905, of the Supreme Judicial Court, Washington County. Plea, the general issue with a brief statement alleging tender and payment of the amount of the award $1353.06 to Benjamin Y. Curran, attorney for the plaintiff. At the conclusion of the evidence it was agreed to report the cause to the Law Court for decision, under the following stipulations: "Upon so much of the evidence as is legally admissible the Law Court is to enter such judgment as the legal rights of the parties require. In the event that the Law Court shall set aside the award,

the plaintiff is to recover the full amount of the policy less so much as has already been paid under the award.

The pith of the case fully appears in the opinion.

Symonds, Snow, Cook and Hutchinson, and Curran & Curran, for plaintiff.

William T. Haines and Hanson & St. Clair, for defendant.

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

EMERY, J. This is an action upon a fire insurance policy of the standard form, upon a factory building and machinery which were destroyed by fire within the terms of the policy. Referees to determine the amount of the loss had been chosen as provided in the policy and by statute R. S., c. 49, secs. 4-5, and these referees had made their award. The plaintiff, however, contends that the evidence shows such bias and want of impartiality on the part of one or more of the referees as to require the court to set aside the award and render judgment for the amount shown by the evidence before the court to be the actual loss.

The contract and the statute called for "three disinterested men" to appraise the amount of the loss. None of the three referees, or appraisers, in this case had any pecuniary interest in the defendant company, or in the plaintiff's property loss, or in the result of the appraisal; nor was either of them related to the plaintiff. In fine, none of them had any such interest as would disqualify him from acting in an official capacity between the parties under the sanction of an official oath and responsibility, however manifest might be the impropriety of his so doing. *McGilvery* v. *Staples,* 81 Maine, 101, and cases there cited.

We think, however, that something more than absence of pecuniary interest and relationship is required to constitute disinterestedness in this class of cases. The men who act as referees in these cases are not officials acting in behalf of the state under the sanction of official oath and responsibility. They are mere private persons holding no permanent commission from public authority and not required

to take any oath to safeguard their action. Again, they are not freely chosen by the parties like ordinary referees where each party has an absolute veto which he may exercise until all three men are satisfactory to him in all respects. The mode of choosing them that the parties were obliged by the policy and the statute to follow in this case was as follows: Each party nominated three men from whom the other party chose one. These two were to choose the third man if they could agree upon one. As they did not agree the Insurance Commissioner appointed the third man. It is evident that each party's freedom of choice was thus materially abridged. True, the parties stipulated in the contract of insurance that the referees should be chosen in that way, but nevertheless it cannot be held that in fact there was perfect freedom of choice. The plaintiff was obliged to make the stipulation or go without insurance protection of his property. He could not obtain fire insurance except from an incorporated insurance company, R. S., c. 49, sec. 1, (assuming but not deciding that restriction to be constitutional.) No incorporated company could issue a fire insurance policy without that stipulation, R. S., c. 49, sec. 4.

Assuming, as we should, that the stipulation as to referees was required by the legislature as in furtherance of justice, we think the legislative purpose must have been to secure an adjustment of the amount of the loss more speedily, cheaply and accurately than could be done by a court and jury. The spirit of the statute requires that the three referees shall be as free from pecuniary interest and relationship as judges and jurors are required to be, and also be as free from bias, prejudice, sympathy and partizanship as judges and jurors are presumed to be. If there is no other restriction as to the men to be nominated for the other party to choose from, or as to the third man however appointed, than that they shall not be relatives and have no pecuniary interest, then either party may have forced upon him as referee, at least one violent partizan of the other party, or at least men incompetent, opinionated or biased. The purpose of the statute might thus be wholly defeated and made to work an injustice.

From the foregoing considerations and others we are satisfied that the insurance statute and the insurance contract require that the referees shall be "disinterested" not only in the narrow sense of being without relationship and pecuniary interest, but also in the broad, full sense of being competent, impartial, fair and open minded, substantially indifferent in thought and feeling between the parties, and without bias or partizanship either way. *Brock* v. *Insurance Company*, 102 Mich. 583; *Bradshaw* v. *Insurance Co.*, 137 N. Y., 137; *Hall* v. *Assurance Co.*, 133 Ala. 637, (32 So. Rep. 257); *Hickerson* v. *Insurance Co.*, 96 Tenn. 193, (33 So. W. Rep. 1041).

Turning now to the evidence in this case we find the following facts among others: The property insured was situated in Calais, a city on the extreme eastern frontier of the state. The referee chosen by the defendant from the three men nominated by the plaintiff, was Mr. Sawyer of Calais. The referee chosen by the plaintiff from the three men nominated by the defendant, was Mr. Allen of Portland, nearly three hundred miles distant from Calais. Practically, Mr. Sawyer was the choice of the plaintiff, and Mr. Allen the choice of the defendant. When these two undertook to agree upon a man as third referee, Mr. Allen declined to agree upon any man in Calais, though freely admitting there were as good men in Calais as anywhere else in the state. He gave as a reason for his refusal that the defendant company objected to any local man.

This refusal, apart from the excuse given for it, was unreasonable. Assuming, as Mr. Allen admitted, that there were as good men in Calais as anywhere else in the state, it is not a reasonable inference from the fact of their residence in Calais and consequent probable better knowledge of local conditions affecting values there, that none of them were proper persons to act as appraising referees. His refusal to consider any of them shows that Mr. Allen was not an impartial, indifferent arbitrator, and, coupled with the excuse given, it shows that he regarded himself as the representative of the defendant company. From this circumstance alone, without considering others appearing in the evidence, we think it clear that Mr. Allen was not the disinterested referee required by the statute and the policy, and hence that the award must be adjudged not binding on

the plaintiff, and must be set aside. *Brock* v. *Insurance Co.*, 102 Mich., 583; *McCullough* v. *Insurance Co.*, 113 Mo., 606; *Insurance Co.* v. *Bishop*, 154 Ill. 9; *Hickerson* v. *Insurance Co.*, 96 Tenn. 193 (33 So. W. 1041.)

The defendant company refused to comply with the plaintiff's request for another arbitration of the amount of the loss, and it was stipulated in the report of the case, that if the court adjudged the award invalid, judgment should be awarded for the plaintiff for the full amount of the insurance $1,700, less $1,353.06 already paid.

Judgment for the plaintiff for $346.94 and interest from the date of the writ.

STATE OF MAINE *vs.* GEORGE W. SINGER.

Lincoln. Opinion March 22, 1906.

Criminal Pleading. Libel. Indictment. Disjunctive Charging. Demurrable for Uncertainty.

An indictment charging, in the disjunctive, that the defendant, "did wilfully and maliciously libel and defame one Nathaniel J. Hanna . . . . by printing and publishing, or causing to be printed and published, in a newspaper," a certain libellous and defamatory statement, is demurrable for uncertainty.

State v. *Barnes*, 32 Maine, 530, doubted and distinguished.

On exceptions by defendant. Sustained.

The defendant was indicted for libel at the April term, 1905, of the Supreme Judicial Court, Lincoln County. The indictment charged that the defendant "did willfuly and maliciously libel and defame one Nathiel J. Hanna of Bristol in said County of Lincoln, then a deputy sheriff within and for said County of Lincoln, specially charged with the enforcement of the prohibitory law within said County of Lincoln, and also a fish warden, specially charged with the enforcement of the laws relating to sea and shore fisheries, by printing and publishing, or causing to be printed and published, in

a newspaper called "The Damariscotta Herald," a newspaper printed and published in said Damariscotta and of which the said George W. Singer was then and there printer and publisher, with the intent then and there to provoke the said Nathaniel J. Hanna to wrath, expose him to public hatred, contempt and ridicule, and to deprive him in his said capacities of deputy sheriff and fish warden, of public confidence, "a certain libellous and defamatory statement. To this indictment the defendant filed a general demurrer. The presiding Justice before whom hearing on the demurrer was had, overruled the demurrer and adjudged the indictment good. Thereupon the defendant excepted and exceptions were allowed "with the right of the respondent to plead over."

The form of charging in the indictment was in the *disjunctive* and this is the only point considered by the Law Court.

The case appears in the opinion.

Weston M. Hilton, County Attorney, for the state.

Wm. Henry Hilton, for defendant.

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

SAVAGE, J. Demurrer to indictment for libel. It is claimed that the indictment is faulty in several particulars, only one of which do we have any occasion to notice.

The indictment charges that the defendant "did wilfully and maliciously libel and defame one Nathaniel J. Hanna . . . . by printing and publishing, *or* causing to be printed and published, in a newspaper" . . . . a certain libellous and defamatory statement. We think this form of charging, in the disjunctive, is fatal. "It is an established rule" says Bishop, following Chitty, "in respect to the statement of the offense in the indictment that it must not be stated in the disjunctive, so as to leave it uncertain what is really intended to be relied upon as the accusation." 1 Bishop on Criminal Procedure, 2nd. Ed. sect. 585; 1 Chitty on Criminal Procedure, 2nd. Ed. sect. 585; 1 Chitty on Criminal Law, 641. The

rule applies even in civil pleading. 13 Ency. Pl. & Pr. 45; 1 Chitty's Pleadings, 15th Am. Ed. 237.

This disjunctive charge violates the rule of certainty in criminal pleading. It is elemental knowledge that all essential matters must be alleged with such certainty that the defendant may be apprised of the precise nature of the charge against him, and this, that he may be able to prepare to meet the charge by pleading or proof, and that the final judgment may protect him against future charges for the same offense. To be charged with printing and publishing a libel is one thing and to defend against it, evidence of one kind may be required, while to meet the charge of having caused a libel to be printed and published may require evidence of another and entirely different character. The distinction goes to the essence of the charge. In *State* v. *Barnes*, 32 Maine, 530, the defendant was directly charged with the publication of a libel. The manner of the publication was laid in the disjunctive, that is, "by letter, circular or pamphlet." The court held, without discussion, that this description was not of the essence of the offense, but was only of the mode of publication which was unimportant. This seems to be contrary to the general run of authorities. But however that may be, we think that this rule should not be extended to a case where the alternative is not in what manner the defendant himself made the publication, but whether he did make publication himself, or caused or procured another to make it. The cases are not alike.

Exceptions sustained. Demurrer sustained. Indictment quashed.

N. E. HOLLIS *vs.* ARTHUR P. LIBBY et al., Admrs.

EDWIN C. SWIFT *vs.* Same.

MATTHEW LUCE, JR., Admr., *vs.* Same.

Waldo. Opinion March 27, 1906.

Contracts. Options. Elections to Sell Must Be Exercised Within a Reasonable Time.

On July 13, 1897, the defendants' intestate, Isaac C. Libby, made to each of the plaintiffs in the first two cases, and to the plaintiff's intestate in the third case, the following proposition in writing: "Sir: On account of your transferring your 205 shares of stock in the Waterville & Fairfield R. & L. Co. to the Augusta Safe Deposit & Trust Co. for a term of five years from date I hereby agree to buy said stock at the expiration of that term at $4000, optional with you to sell or not."

Each of the parties to whom this proposition was made, shortly thereafter, and within the same month, accepted the same by transferring their several blocks of stock and by entering into a trust agreement with the Trust Company, which, although not entirely in accordance with the stipulation in Mr. Libby's offer, was evidently assented to by the latter and was in accordance with his wishes and desires. Mr. Libby died in October, 1899, and these defendants were appointed administrators of his estate in November of the same year. On February 10, 1904, the counsel for the plaintiffs transmitted to the defendants written notices signed by the several plaintiffs, and dated February 4, 1904, in which they each gave notice to the defendants, as administrators, that each demanded performance by them of the agreement made by Mr. Libby on July 13, 1897, and therein each offered to transfer and deliver to them as administrators all right, title and interest of each in the stock deposited by them in the Safe Deposit & Trust Co.

Held: That the proposition made by the defendants' intestate, by the acceptance of each of the parties to whom it is made, ceased to be a proposition merely, and became a valid contract for a sufficient consideration, enforceable against Mr. Libby in his lifetime and against his estate after his death; that the obligation upon the part of Mr. Libby was to purchase the stock of each of these parties, at the price named, at a time definitely ascertainable from the contract itself, viz: At the expiration of the term of five years from July 13, 1897, if at that time these plaintiffs or either of them, elected to sell this stock for that price; that if these plaintiffs, or either of them, had then chosen to exercise their option of selling under

these contracts, it was their duty, to make such an election, to give the administrators notice thereof and to tender performance upon their part, either at the date named or within a reasonable time thereafter; that February 10, 1904, almost one year and eight months after the time definitely named in the contract, when notice was first given by the plaintiffs to the defendants of their election to sell under the contracts, under all the circumstances of the case, was not within a reasonable time.

Because of this failure upon the part of these several plaintiffs to seasonably exercise the option given to them by the contracts these actions cannot be maintained.

On report. Judgment for defendants in each case.

Three actions of assumpsit to recover damages for an alleged breach of a contract made by the defendants' intestate, Isaac C. Libby, with the plaintiffs in each of the first two cases and with the plaintiff's intestate in the third case.

These three actions were heard together at the April term, 1905, of the Supreme Judicial Court, Waldo County. The plea in each of these actions was the general issue with the following brief statement:

"1. That the alleged agreement, upon which the plaintiff relies and mentioned in his writ and declaration, was at most only an offer or proposition to purchase the stock mentioned therein with a definite date allowed for the acceptance thereof that the plaintiff did not accept the offer or proposition at the time therein fixed: and that the plaintiff did not tender performance on his part within a reasonable time after said date.

"2. That being no more than an offer or proposition, the same expired and became null at the death of the intestate, Isaac C. Libby.

"3. Defendants will rely on the statute of limitations.

"4. That even if there was any cause of action, against the intestate, or against these defendants as administrators of the estate of the said intestate, it accrued more than six years before the suing of the plaintiff's writ, and that the defendants were appointed administrators of the estate of the said intestate and had given due notice thereof, more than eighteen months before the suing out of plaintiff's writ, and that the action is barred by the special statute of limitations, then in force in relation to suits against administrators upon claims

or demands against the estate upon which they were administering, and that this suit, and other proceedings in relation to the same, or in relation to any claim or demand against the estate of the intestate were not instituted within the period of time limited therefor by said statutes."

At the conclusion of the evidence, it was agreed to report the same to the Law Court under the following stipulations:

"By agreement of parties these three cases are reported to the Law Court upon the foregoing evidence, so far as the same is applicable to each of the cases. The Law Court to pass upon and decide all questions of law and fact involved, and to order such judgment as the cases may require. All evidence may be regarded as seasonably objected to with reasons stated and the Court shall consider only such testimony as is legally admissible."

The three several contracts on which these actions were brought are as follows:

"WATERVILLE, ME., July 13, 1897.

"N. E. HOLLIS:

"Sir: On account of your transferring your 205 shares of stock in the Waterville & Fairfield R. & L. Co. to the Augusta Safe Deposit & Trust Co. for a term of five years from date I hereby agree to buy said stock at the expiration of that term at $4,000 optional with you to sell or not. I. C. LIBBY."

"Any sum of money I may receive for services from said Waterville & Fairfield R. & L. Co. during next five years I hereby agree to divide with N. E. Hollis, E. C. Swift, H. B. Goodenough and Matthew Luce equally as interest on this investm't.

I. C. LIBBY."

"WATERVILLE, ME. July 13, 1897.

"MATTHEW LUCE:

"Sir: On account of your transferring your 205 shares of stock in the Waterville & Fairfield R. & L. Co. to the Augusta Safe Deposit & Trust Co. for a term of five years I hereby agree at the expiration of that term to buy said stock at $4,000 optional with you to sell or not. I. C. LIBBY."

"Any sum of money I may receive for services from the Waterville & Fairfield R. & L. Co. during next five years I hereby agree to divide with N. E. Hollis, E. C. Swift, H. B. Goodenough and Matthew Luce equally as interest on this investment.

I. C. LIBBY."

"WATERVILLE, ME., July 13, 1897.

"E. C. SWIFT:

Sir: On account of your transferring your 205 shares of Waterville & Fairfield R. & L. Co. stock to the Augusta Safe Deposit & Trust Co. for a term of five years from date I hereby agree to buy said stock at that date at $4,000 optional with you to sell or not.

I. C. LIBBY."

The cases sufficiently appear in the opinion.

Cornish & Bassett, for plaintiffs.

Enoch Foster and R. W. Rogers, for defendants.

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

WISWELL, C. J. The evidence upon which these three cases were reported was taken out at the same time and the cases reported upon the same evidence, so far as it is applicable to the several cases, and they were argued together, the facts being substantially the same in each case. The actions are to recover damages for an alleged breach of a contract made by the defendants' intestate, Isaac P. Libby, with the plaintiffs in each of the first two cases and with the plaintiff's intestate in the third case. The facts are as follows: On July 13, 1897, the defendants' intestate made the following proposition in writing to the plaintiff Hollis.

"WATERVILLE, ME., July 13, 1897.

N. E. HOLLIS:

Sir: On account of your transferring your 205 shares of stock in the Waterville & Fairfield R. & L. Co. to the Augusta Safe Deposit & Trust Co. for a term of five years from date I hereby agree to buy said stock at the expiration of that term at $4000, optional with you to sell or not. I. C. LIBBY."

Any sum of money I may receive for services from said Waterville & Fairfield R. & L. Co. during next five years I hereby agree to divide with N. E. Hollis, E. C. Swift, H. B. Goodenough and Matthew Luce equally as interest on this investm't.

I. C. LIBBY."

An exactly similar offer, in substance and effect, was made by Mr. Libby in writing on the same day to the plaintiff Swift and to Matthew Luce, the plaintiff's intestate in the third case, except that in the offer to Swift the postscript in relation to the division of any money received for services was omitted, and in this offer the language was "I hereby agree to buy said stock at that date," instead of, as in the other two offers, "at the expiration of that term," both of which differences are immaterial. Shortly after the date of this proposition, and within the same month, these parties, together with other stockholders in the Railway and Light Company, including Mr. Libby, transferred and deposited their several blocks of stock in this Company to and with the Augusta Safe Deposit & Trust Company, and on the thirty-first day of the same month all of these stockholders entered into a trust agreement with the Trust Company which contained in detail provisions in relation to the holding of the stock, which, although not entirely in accordance with the stipulation in Mr. Libby's offer of July 13, seems to have been assented to by him, and we may assume, for the purposes of these cases, that the stipulation as to these parties transferring their shares to the Trust Co. was complied with by them.

The defendants' intestate died October 12, 1899, and these defendants were appointed administrators of his estate at the November term, 1899, of the Probate Court for Kennebec County, letters of administration being issued to them under date of November 13, 1899. On November 29, 1899, the administrators caused notices of their appointment to be published and posted, although it is claimed by counsel for the plaintiffs that the notices were not posted in strict compliance with the direction of the Probate Court contained in the letters of administration, but, as our conclusion is not based upon the

statute of limitations, plead by the defendants, it is unnecessary to decide this question.

On the tenth, twenty-first and twenty-second days of May, 1901, these first two plaintiffs and the plaintiff's intestate in the third case, severally filed in the Probate Court their demands and notices to the administrators, wherein they severally recited the contract of July 13, 1897, stated that they had complied with the terms of this contract in relation to transferring their shares of stock to the Trust Co., and, in the notice of the plaintiff, Hollis, said, "Now therefore, I, the said N. E. Hollis, of Braintree, Mass., in accordance with the statute in such cases made and provided, herein and hereby give notice to you as administrators aforesaid: First. That I shall at the expiration of the said term of five years exercise the option to sell to you the said 205 shares of stock for the said sum of $4000 and herein and hereby demand that you as said administrators hold yourselves ready to perform said agreement according to the terms thereof."

In the cases of Swift and Luce the language was the same with this exception that they both say, "I may at the expiration of said term of five years" etc., instead of "I shall" at that time.

Under date of February 4, 1904, the plaintiffs severally gave written notice to the defendants as administrators, that each demanded performance by them of the agreement made by Isaac C. Libby on July 13, 1897, and therein each offered to transfer and deliver to them as administrators all the right, title and interest of each in the stock deposited by each in the Safe Deposit & Trust Co. These written demands by each of the three plaintiffs were enclosed by their counsel in letters to the administrators dated February 10, 1904. Upon the same day, February 4, each of these plaintiffs gave written notice to the Augusta Safe Deposit & Trust Co., to transfer and deliver to the administrators their several blocks of stock in the Railway and Light Company, upon the payment by the administrators of the sum of $4000 for the account of each of the plaintiffs.

Various objections to the maintenance of these suits are raised by counsel for the defendants, only one of which need be considered by us, as that, in our opinion, is a fatal objection to their maintenance.

Let us first consider what the rights of all of these parties were under the proposition of the defendants' intestate dated 13 of July, 1897. This proposition, by the plaintiff's acceptance of the conditions stated therein as a consideration ceased to be a proposition merely, and became a valid contract for a sufficient consideration, enforceable against Isaac C. Libby in his lifetime and against his estate after his death. The consideration named in the proposal was that each of the parties to whom the proposal was made should transfer their respective blocks of stock to the Augusta Safe Deposit & Trust Co. This they did, and, although as we have seen, the trust agreement between the Trust Company and these and other stockholders differed somewhat from the terms of the proposal, it was, we think, only an elaboration of the terms briefly stated in the proposal, and was evidently not only assented to by Mr. Libby but was in accordance with his wishes and desires. This proposal then by such acceptance, became a valid and enforceable contract. The obligation upon his part was to purchase the stock of each of these parties for the sum of $4000 at a time definitely ascertainable from the contract itself, in the cases of Hollis and Luce, at the expiration of a term of five years from July 13, 1897, in the case of Swift "at that date" viz: At the expiration of the term of five years from July 13, 1897, if at that time these plaintiffs or either of them, elected to sell the stock for that price. The obligation upon the part of Mr. Libby was not to purchase the stock before that time, nor after that time, but at that date, or at the expiration of that term. The date thus definitely fixed in each of the three contracts was consequently July 13, 1902.

As to the rights and duties of the several plaintiffs under this contract, the question is not as to when they should accept and signify their acceptance of a proposal made by Mr. Libby, since, as we have seen they had already done this shortly after the proposal was made. There was no obligation upon the part of the plaintiffs to sell at that or at any other price, but the contract expressly gave them the right of election, the option to sell or not as they or either of them might then elect. And if these plaintiffs, or either of them, had then chosen to exercise their option of selling under these contracts, it was their

duty, to make such an election, to give the administrators notice thereof and to tender performance upon their part, unless such tender of performance became useless or unnecessary by reason of the conduct or reply of the administrators, and all this should have been done either at the date named or within a reasonable time thereafter. The cases show that the plaintiffs made no such election and gave no notice of such election to the administrators until the time that their written demands for performance by the administrators, and tenders of performance upon their part, were sent to the administrators by the plaintiffs' counsel on February 10, 1904, almost one year and eight months after the time definitely named in the contract.

This mere statement of the length of time that the plaintiffs allowed to elapse before taking affirmative action in the premises is sufficient to show that they did not exercise their option within a reasonable time after they had the right to do so, and after it was their duty to do so, if they desired to hold the estate to a performance of the contract. What is a reasonable time under the circumstances of any case may not always be an easy matter to determine, that one year and eight months, under the circumstances of this case, was very largely in excess of such a time is, we think, beyond question.

The determination of what is a reasonable time in a given case depends upon a consideration of all the circumstances of the case. This court has declared in several cases that a reasonable time is such time as is necessary conveniently to do what the contract requires should be done. *Howe* v. *Huntington*, 15 Maine, 350; *Saunders* v. *Curtis*, 75 Maine, 493; *Chapman* v. *Dennison Company*, 77 Maine, 205. The circumstances of this case have no tendency to show that the plaintiffs' demands for performance of the administrators and the tenders of performance upon their part were made within a reasonable time, upon the contrary they have quite the opposite effect. Nothing had to be done by these plaintiffs but to make their election to sell, notify the administrators thereof, and tender performance upon their part; they had all the intervening time, five years, to consider what that election should be; they could have done all that was required of them to do upon the date ascertainable from the contract, July 13, 1902, as well as in February, 1904.

Moreover, the estate of Mr. Libby was in the hands of the administrators appointed in November, 1899, a fact well known to the plaintiffs and which should have been a sufficient reason why they should have exercised some diligence in exercising and making known their election to sell, since it is a well recognized policy of the law to insure the speedy administration and distribution of the estate of decedents.

The demands or notices to the administrators filed in the Probate Court in May, 1901, cannot be considered as elections upon the part of the plaintiffs to sell, since the obligation of Mr. Libby was not to purchase during the period of five years but at the expiration of that term, and the election or option of the plaintiffs was to be exercised if at all on July 13, 1902, or at least, within a reasonable time thereafter. And these notices were not given for that purpose. In one notice, the plaintiff, correctly recognizing the time when he should avail himself of his option said, "I shall at the expiration of said term of five years exercise the option to sell to you" etc. and the other two plaintiffs said, "I may at the expiration of said term of five years" etc. They all evidently recognized the fact that the election must be exercised at or after the date named and not before, and that at that date, or after, they still reserved the right to do in this respect what they chose to do.

These notices were given for an entirely different purpose. As we have seen the administrators caused notices of their appointment to be posted and published on the 29th of November, 1899, under the statute then in force, Public Laws of 1899, chapter 120, actions against executors and administrators had to be commenced, with certain exceptions, within eighteen months after notice given by the administrator of his appointment. By another section of the same chapter, it was provided, that when an action on a contract does not accrue within said eighteen months, the claimant may file his demand in the Probate Court within that time, and the Judge of Probate shall direct that sufficient assets shall be retained by the administrator to pay whatever is found due on such claim. These demands or notices were filed in the Probate Court in accordance with this provision of the statute and proceedings were had in the Probate Court

thereon in accordance with the statute. But further discussion of this question is unnecessary because the counsel for the plaintiffs do not rely upon the filing of these demands for this purpose, and the only allegation in the plaintiffs' writs of demands for performance and tenders of performance by them, is that such demand and tender was made in each case on February 11, 1904.

Because of this failure upon the part of these several plaintiffs to seasonably exercise the option given to them by the contracts these actions cannot be maintained.

Judgment for the defendants in each case.

FANNIE DAVIS *vs.* CITY OF BANGOR.

Penobscot. Opinion March 27, 1906.

Municipal Corporations. Drains and Sewers. Overloaded Sewer. Non-liability of Municipality. R. S., c. 21, §§ 2, 18.

The injury sustained by the plaintiff, by reason of the flowing back of water and sewage onto her premises from a public sewer, with which the plaintiff's property was properly connected, was not at all caused by any failure of the defendant to maintain and keep in repair this sewer to its original extent and degree of efficiency. It was caused by the sewer becoming overloaded by reason of the same being extended in the direction away from its outlet and by the construction of several other sewers which connected with and emptied into the one in question. But all of these extensions and new sewers, as expressly admitted by the counsel for the plaintiff, were laid out, located and ordered constructed by the municipal officers of the defendant city. Under these circumstances the plaintiff cannot recover. The case comes directly within the principles laid down in *Keeley* v. *Portland*, 100 Maine, 260.

On motion and exceptions by defendant. Sustained.

Action on the case brought by the plaintiff to recover damages for injuries sustained by her by reason of the flowing back into the cellar of her house of the water and sewage in a certain public sewer

in the defendant city, known as the Davis Brook sewer, with which the premises occupied by the plaintiff were properly connected.

The verdict was for the plaintiff for $192.60, and the defendant filed a motion for a new trial. Defendant also excepted to certain instructions given to the jury by the presiding justice during the charge.

The case appears in the opinion.

H. L. Mitchell and A. L. Blanchard, for plaintiff.

E. P. Murray, City Solicitor, for defendant.

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

WISWELL, C. J. In this action the plaintiff seeks to recover for injuries sustained by her by reason of the flowing back into the cellar of her house of the water and sewage in a certain public sewer in the city of Bangor, known as the Davis Brook sewer, with which the premises occupied by her were properly connected. The trial resulted in a verdict for the plaintiff and the case comes here upon the defendant's motion for a new trial and exceptions.

By R. S., c. 21, sec. 18: "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. . . . . 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 is absolutely barren of any evidence showing or having any tendency to show a failure upon the part of the defendant municipality to maintain and keep in repair this sewer to its original extent and degree of efficiency. What the evidence does show is that subsequent to the construction of the original sewer, with which plaintiff's premises were connected, it had been extended in the direction away from its outlet, and that several other sewers had been located and constructed which emptied into the one in question, thereby at times overloading the sewer beyond its capacity, by reason of which

the injuries complained of were caused. But all these extensions and new sewers, as expressly admitted by the counsel for plaintiff, were laid out, located and ordered constructed by the municipal officers of the defendant city.

The presiding justice instructed the jury as follows:

"The claim is that it was of sufficient capacity to drain that territory over which it passed; but that some years afterwards, at various times, the city conducted into that sewer other and independent sewers, not a part of the original plan of the sewer from the brook to Walter Street, but independent sewers; and they say that overloaded this sewer, so that in consequence of that overloading the water backed up and did the injury here complained of. If that is so then the city would be liable for the injury suffered." If the foregoing instruction be correct in the abstract, upon the authority of *Blood* v. *Bangor*, 66 Maine, 154, where, as said in the opinion, "the city itself, through the joint action of its common council and board of aldermen caused two other public sewers to be connected with" the sewer in question, the instruction was erroneous and prejudicial to the defendant in this case, because this extension and these new sewers were not connected with the sewer in question by the city itself, through the joint action of the two boards of the city government but were located and connected with this sewer by the municipal officers, as admitted by plaintiff's counsel, which admission must have been lost sight of for the moment by the presiding justice.

"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 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." *Keeley* v. *Portland*, 100 Maine, 260. The case therefore comes exactly within the rule laid down in *Keeley* v. *Portland*, that 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.

Motion and exceptions sustained.

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

SAME *vs.* SAME.

Kennebec. Opinion March 29, 1906.

Debt. Judgment. Chose in Action. Assignment Without Seal. Chose in Action Purchased by Administrator with Assets of Estate. Administrator Cannot Recover in Representative Capacity, When. R. S., c. 84, § 146.

In the first above entitled cause which is an action of debt brought by the plaintiff on a judgment recovered by one Albert A. Robbins against the defendant, it is alleged in the declaration that February 10, 1900, said Robbins for a valuable consideration assigned this judgment "to Alvah R. Hayes (the plaintiff) then the administrator de bonis of the Dingley Brothers' estate." The consideration for the assignment of this judgment was a note for $150 payable to F. B. Dingley, Admr., d. b. n., Dingley Brothers' estate, surrendered by the plaintiff to the defendant. *Held:* That the plaintiff is not entitled to a judgment in his right and capacity as administrator, but that he may be allowed to take judgment in his individual capacity.

If the plaintiff assumed the responsibility of employing the funds of the estate to purchase this judgment, he should be deemed to have done so in his individual capacity; and if an administrator thus changes the nature of the debt originally due the intestate by a contract made with himself, he must sue for the new debt in his own name and not in his representative capacity.

The assumption that the plaintiff can maintain this action and recover judgment in his capacity as administrator is incompatible with the right of the defendant to testify as a witness in his own behalf respecting matters that

happened before the death of the plaintiff's intestate. In an action on a judgment brought by the original judgment creditor or by an assignee in his individual capacity the defendant would be a competent witness as to all matters material to the issue. It would be the privilege of the defendant to give personal testimony that before the death of the plaintiff's intestate he had paid the Robbins judgment in full, but, under the provisions of section 112 of chapter 84 of the Revised Statutes, the fact that the plaintiff brings the action as the representative of a deceased party precludes the defendant from giving any such evidence in his own behalf, although Robbins, the judgment creditor, would be a competent witness for the plaintiff. Under the operation of such a rule any person could effectually close the mouth of his adversary as a witness by assigning his claim to an administrator of some estate.

It is not alleged in the declaration that the cause of action accrued to the estate which he represented but for aught that appears it may have been one accruing to him in his own right. The words describing him as administrator of the estate may therefore be stricken out as merely descriptio personæ and he may be allowed to take judgment in his individual capacity.

Under the provisions of section 146 of chapter 84 of the Revised Statutes, a judgment is deemed a chose in action upon which an action may be maintained by an assignee in his own name, and an assignment of the same in writing although without seal is sufficient.

In the second above entitled cause which is an action of debt on a judgment for costs of nonsuit recovered by the plaintiff in a suit brought against him as administrator by the defendant, *Held:* That this judgment properly belonged to the plaintiff in his own right and that he is entitled to recover in his individual name and capacity.

See *Rich* v. *Hayes, Admr.*, post.

On exceptions by defendant. Overruled.

Two actions tried at the same term of the Supreme Judicial Court, Kennebec County, and heard together at the Law Court.

The first suit was an action of debt on a judgment recovered by one A. A. Robbins at the March term, 1899, of the Supreme Judicial Court, Kennebec County. The plaintiff sued under an assignment from said Robbins. The plaintiff introduced the assignment of the judgment declared on, to the admission of which the defendant objected on the following grounds: First: "Because the same was not under seal. Second: Because the assignee of the judgment is not authorized to bring suit upon it in his own name. Third: Because said assignment does not convey a title to the plaintiff. Fourth: Because such assignment, if it conveys any title to the

plaintiff, conveys such title to him in his individual capacity and not in his capacity as administrator as alleged in the declaration.

"These objections were severally overruled pro forma and the assignment was admitted, to each of which several rulings and said admission the defendant excepted. The presiding justice then ordered a verdict for the plaintiff and also judgment for the plaintiff, to each of which orders the defendant excepted."

The second suit was an action of debt on a judgment for costs recovered by the plaintiff in an action in which he was defendant in his capacity as administrator de bonis non of Fuller Dingley, who was surviving partner of the firm of James B. Dingley and Fuller Dingley of Gardiner, Maine. The plaintiff introduced the record of said judgment, to the admission of which the plaintiff objected on the ground that the evidence tended to show a judgment in favor of said plaintiff in a personal capacity and not in his capacity as administrator. To a ruling admitting the same the plaintiff excepted. The presiding justice rendered judgment for the plaintiff, to which order the defendant excepted.

The declaration in the first action is as follows: "In plea of debt, for that one Albert A. Robbins of Gardiner, in the County of Kennebec and State of Maine, by the consideration of our Justices of our Supreme Judicial Court held within and for the County of Kennebec, on the twenty-fourth day of March, 1899, recovered judgment against the said Abraham Rich for the sum of seven hundred and eight dollars sixty-five cents damages, and nine dollars and seventy cents costs of the same suit, as by the record thereof now remaining in said court appears, which judgment thereafterwards on the tenth day of February, 1900, the said Albert A. Robbins by assignment in writing, a copy of which is annexed to this writ and made a part thereof and to be filed in court with this writ, for a valuable consideration did assign the said judgment debt, being a chose in action not negotiable, to Alvah R. Hayes, then the administrator de bonis of the Dingley Brothers' estate, and thereby and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff, to have and recover of the said Abraham Rich the said judgment, which still is in full force and not reversed

or annulled or satisfied, with interest upon the same from said twenty-fourth day of March, 1899, yet the said Abraham Rich though requested hath never paid the same but wholly refuses so to do."

Plea in this action, the general issue with the following brief statement: "That there is no assignment of the judgment in said declaration set forth to the plaintiff in his capacity as administrator de bonis non of Fuller Dingley, surviving partner of James B. Dingley, formerly doing business under the firm name of Dingley Brothers, as set forth in said declaration."

The declaration in the second action is as follows: "In a plea of debt, for that the said Alvah R. Hayes, in his said capacity of administrator de bonis non of said Fuller Dingley, who was duly qualified as surviving partner of said firm of James B. Dingley and Fuller Dingley, by the consideration of our Justices of our Supreme Judicial Court held at Augusta, within and for our said County of Kennebec, on the first Tuesday of March, A. D. 1902, to wit, on the fifteenth day of March, A. D. 1902, recovered judgment against the said Abraham Rich for the sum of three hundred and seventy-eight dollars and ninety-seven cents, costs of suit, as by the record thereof now remaining in said Court appears; which judgment is still in full force and is not reversed or annulled or satisfied, whereby an action hath accrued to the plaintiff, to have and to recover of the said Abraham Rich the said sum of three hundred and seventy-eight dollars and ninety-seven cents, with lawful interest thereon, from the said fifteenth day of March, A. D. 1902; yet though often thereto requested, the said defendant has never paid the same, but neglects and refuses so to do."

Plea in this action, the general issue with the following brief statement: "That said judgment, if any, is a judgment in favor of Alvah R. Hayes in his personal capacity and not in his capacity as administrator as declared upon in said declaration."

The case appears in the opinion.

Memorandum.—One of the Justices sitting at the term of the Law Court at which these cases were argued, did not sit in these

cases, being disqualified under the statute by reason of having ruled therein at nisi prius.

George W. Heselton and Heath & Andrews, for plaintiff.

Williamson & Burleigh, for defendant.

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

WHITEHOUSE, J. The first of these cases is an action of debt on a judgment for $708.65 recovered in 1899 by Albert A. Robbins against the defendant Rich. It is alleged in the declaration that Feb. 10, 1900, Robbins, for a valuable consideration, assigned this judgment "to Alvah R. Hayes then the administrator de bonis of the Dingley Brothers estate." In support of this allegation the following instrument signed by Robbins was offered in evidence: "For a valuable consideration, in a note of one hundred and fifty dollars payable to F. B. Dingley, admr., d. b. n. Dingley Bros.' estate, dated Feb. 1, 1899, to me this day surrendered by A. R. Hayes, admr., d. b. n. of same estate, I assign and transfer to said estate the within judgment debt with full power in my name but without expense to me to collect the same."

The plea was the general issue with a brief statement denying that there was any assignment of the judgment to the plaintiff in his capacity as administrator as set forth in the declaration.

It was accordingly contended in behalf of the defendant, first, that the instrument in question was ineffectual as an assignment and inadmissible as evidence because not under seal; second, that under our statutes an assignee of a judgment could not maintain an action in his own name, and third, that in any event the instrument could not operate as an assignment of a judgment to Hayes in his capacity as administrator of Dingley Brothers but only as an assignment to Hayes in his individual capacity, and hence fails to support the plaintiff's declaration.

These objections were severally overruled pro forma by the presiding judge, the assignment received as evidence, and judgment ordered for the plaintiff for $888.95. The case comes to this court on exceptions to this ruling.

The first and second propositions appear to have been decided against the defendant's contention. In *Dunn* v. *Snell et als.*, 15 Mass. 481, the court say "The objection to the assignment as offered to be proved by the witnesses is that it was not by deed and the objection rests upon the general principle, which was assumed by the counsel that an assignment of a specialty must be by an instrument of as solemn a nature as the instrument itself which is to be assigned. Considering a judgment as a specialty it is obvious that, upon this general principle, it could never be assigned; because there is no instrument in pais of so high a nature as the record of a judgment in court . . . . It is not doubted that this debt, upon which the judgment was rendered, might have been assigned by writing without seal . . . . The judgment is only evidence of the debt and if the execution is delivered over, with intent to transfer the debt, upon a fair bargain upon a valuable consideration, there is no reason why the transaction should not be as binding upon the parties as the parol assignment of a debt before it is reduced to judgment. And, in this case, the execution was in fact delivered to the use of the assignee so that the judgment creditor could not have obtained another execution upon that judgment."

In *Prescott* v. *Hull*, 17 Johns. 284, the court said "I do not consider the want of a seal essential. The mere delivery of a chose in action upon good and valid consideration would be sufficient even were it a specialty." See also *Wood* v. *Decoster*, 66 Maine, 542, and *Ware* v. *Railroad Company*, 69 Maine, 97.

In the two last named cases it was also decided that under section 146, chapter 84 of the Revised Statutes (originally chapter 235, laws of 1874,) a judgment must be deemed a chose in action upon which an action might be maintained by the assignee in his own name.

In considering the peculiar terms of the instrument in question and its operation as an assignment with reference to the defendant's third contention, it is allowable to observe the situation of the parties at that time and the obvious purpose of this assignment.

In October, 1904, the defendant Rich obtained a verdict of $2093.25 against the plaintiff Hayes in his capacity as administrator de bonis non on the estate of Dingley Brothers. The action which

finally resulted in this verdict was commenced April 9, 1900, and was based on a note originally for $3000 bearing date Dec. 29, 1894, given by Dingley Brothers to Rich. The motion for a new trial in this case was overruled by the law court and the case went to judgment in October, 1905.

It is true that the plaintiff Hayes obtained the assignment of the Robbins judgment two months before the actual commencement of the original suit of *Rich* v. *Hayes*, last described but it has been seen that the note on which this action was brought was dated Dec. 29, 1894. It may reasonably be inferred from all the circumstances disclosed by the evidence to which we are permitted to refer that both Hayes and Fred B. Dingley, his predecessor in the administration of the estate in question had reason to apprehend that a suit would be brought by Rich on his note against Dingley Brothers and having an opportunity to purchase the Robbins judgment at less than twenty cents on the dollar, Hayes appears to have consummated the arrangement alleged to have been made by Fred B. Dingley, and obtained an assignment of the judgment in the obvious hope of being allowed to offset the full amount of it against any judgment that might be recovered by Rich on his $3000 note. But a judgment against Rich standing in the name of Robbins as plaintiff could not be offset against a judgment obtained by Rich against Hayes in his capacity as administrator d. b. n. of the estate of Dingley Brothers, and the suit at bar was manifestly brought for the purpose of obtaining a judgment in the name of Hayes, the assignee, in his capacity as administrator in the expectation that in this form the Robbins judgment could be offset pro tanto against the larger judgment of Rich against Hayes, administrator. Accordingly, on the rendition of the judgment for $2093 in favor of Rich, a motion to offset the Robbins judgment was promptly made.

It is the opinion of the court, however, that in the case at bar the plaintiff is not entitled to a judgment in his right and capacity as administrator. In the first place it does not explicitly or satisfactorily appear that the $150 note invested by Hayes in the purchase of the Robbins judgment in fact represented any part of the assets of the estate of Dingley Brothers. It is described in the assignment

it is true, as "payable to F. B. Dingley, Adm'r. d. b. n. Dingley Brothers' estate," but there is no evidence from any witness having personal knowledge of the matter that it was given for any debt due the firm of Dingley Brothers in their lifetime.

But if it be assumed that the Robbins judgment was purchased by Hayes with funds belonging to the estate of Dingley Brothers, still, in a broader view of the question, insuperable objections present themselves arising from considerations of sound public policy, and the rights of a party in the situation of Rich as defendant in a suit in the Robbins judgment which must prevent the plaintiff Hayes from recovering a new judgment in his name and capacity as administrator on the estate of Dingley Brothers. It is the recognized function of an administrator to settle the estate, reduce the assets to cash as far as necessary and practicable, pay the debts and legacies and under the order of court distribute the residue among those entitled to it under the intestate laws of the state. "So great a breach of trust is it for the representative to engage in business with the funds of the estate that the law charges him with all the losses thereby incurred without on the other hand allowing him to receive the benefit of any profits that he may make, the rule being that the persons beneficially interested in the estate may either hold the representative liable for the amount so used with interest or at their election take all the profits which the representative has made by such unauthorized use of the funds of the estate." 18 Cyc. 241 & 242, and cases cited.

In *Mead* v. *Merritt & Peck*, 2 Paige, 402, the facts were analogous to those at bar. In a suit by the defendant Peck against the plaintiff as executor of the will of one Sherwood, the plaintiff alleged that he had purchased a note against Peck and asked to have it set off against the claim of the latter upon Sherwood's estate. It was further alleged, it is true, that Peck's claim had been assigned to the defendant Merritt for the purpose of defeating the plaintiff's claim to a set off, and the question of jurisdiction was also involved. But in the opinion Chancellor Kent says: "Independent of this question of jurisdiction, it is evident that the complainant has no right to the equitable interposition of this court. The note of Peck, which he

purchased since the death of Sherwood, and now holds in his own right, could not, at law, be set off against Peck's demand upon the estate of the testator. And it would be inconsistent with the principles of sound policy to permit an executor to buy up claims against creditors of an estate, for the purpose of obtaining a set off in equity." 2 Paige, 405.

So in *Dudley* v. *Griswold*, 2 Bradf. N. Y. 24, the court say, "It is the duty of an executor or administrator to settle the estate pay the debts and distribute the surplus, and not to speculate in demands against creditors."

The distinction between the duty and authority of an administrator, and the functions of a trustee or receiver, is so well established and a matter of such common knowledge as to render unnecessary the citation of authorities or any extended discussion of the subject. It has been recognized from time immemorial as the characteristic duty of an administrator to settle the estate of his intestate with reference to the situation of the assets at the time of the death of the decedent, and not attempt, by trade or speculation to adjust the affairs of the estate upon an entirely different basis, which might seriously affect the question of distribution and in some instances render the estate insolvent. See the numerous cases upon the question of set off in *Rich* vs. *Hayes, Admr.*, 101 Maine, 324. In the case at bar it appears that at the time Hayes purchased the Robbins judgment, Rich was hopelessly insolvent and had no available property, with which to satisfy any judgment, except the note in suit in *Rich* vs. *Hayes, Adm'r.;* while, on the other hand, there is no evidence that Robbins was not entirely solvent and able to pay the note for $150, which the plaintiff held against him. It was the obvious duty of the plaintiff, if acting for the interest of the estate which he represented, to collect this note in cash, and not invest it in a worthless judgment at twenty cents on the dollar. If he assumed the repsonsibility of employing the funds of the estate for such a purpose, he should be deemed to have done so in his individual capacity; and if an administrator thus changes the nature of the debt originally due the intestate by a contract made with himself, he must sue for the new debt in his own name and not in his repre-

sentative capacity. *Helm* v. *Van Vleet*, 1 Blackf. (Ind.) 342; *Bond* v. *Corbett*, 2 Minn. 209; *Burdyne* v. *Mackey*, 7 Mo. 374.

Again the assumption that the plaintiff can maintain this action and recover judgment in his capacity as administrator is incompatible with the right of the defendant to testify as a witness in his own behalf respecting matters that happened before the death of the plaintiff's intestate. In an action on a judgment brought by the original judgment creditor or by an assignee in his individual capacity the defendant would be a competent witness as to all matters material to the issue. It would be the privilege of the defendant Rich, for instance, to give personal testimony that before the death of the Dingley Brothers he had paid the Robbins judgment in full but under the provisions of section 112 of chapter 84 of the revised statutes, the fact that the plaintiff brings the action as the representative of a deceased party precludes the defendant from giving any such evidence in his own behalf, although Robbins the judgment creditor would be a competent witness for the plaintiff. Under the operation of such a rule any person could effectually close the mouth of his adversary as a witness by assigning his claim to an administrator of some estate.

But it has been seen that the ruling of the presiding judge to which exceptions were taken fails to specify whether the judgment was ordered in favor of the plaintiff in his individual or representative capacity. But it is not alleged in the declaration that the cause of action accrued to the estate which he represented but for aught that appears it may have been one accruing to him in his own right. The words describing him as administrator of the estate may therefore be stricken out as merely descriptio personae and he may be allowed to take judgment in his individual capacity. *Bragdon* v. *Harmon*, 69 Maine, 29. *Fleming* v. *Courtenay*, 95 Maine, 128. *Same* v. *Same*, 98 Maine, 401.

Inasmuch therefore, as the plaintiff is entitled to judgment in his individual capacity, the entry in the first case must be,

Exceptions overruled.

The second case *Hayes, Admr.*, v. *Rich,* is also an action of debt on a judgment. It appears that Rich commenced an action against Hayes, Admr., and became nonsuit. Judgment for costs was accordingly rendered in favor of Hayes for $378.97. This judgment properly belonged to Hayes in his own right and in this action on that judgment he is entitled to recover in his individual name and capacity. *Buswell* v. *Eaton,* 76 Maine, 393. *Ticonic National Bank* v. *Turner,* 96 Maine, 380.

In this case therefore, the entry must also be,

Exceptions overruled.

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

Kennebec. Opinion March 29, 1906.

Judgments. Set-Off. R. S., c. 84, § 77; c. 86, § 27.

An administrator cannot offset against a judgment rendered upon a liability of the decedent another judgment on a claim with which the decedent has no connection in his lifetime purchased by the administrator with the funds of the estate for that purpose after the death of his intestate.

It is an established rule in courts of law if executors sue for a debt created to them since the testator's death, the defendant cannot set off a debt due to him from the testator. If the defendant could not set off in such a case neither could the executor, if he was the defendant, for the rule must be mutual.

It is provided by section 77 of chapter 84 of the Revised Statutes as follows: "In actions against executors, administrators, trustees or others in a representative capacity, they may set off such demands as those whom they represent might have set off in actions against them; but no demands, due to or from them in their own right, can be set off in such actions." The judgments which the defendant asks to have set off against the judgment in the case at bar were awarded to the defendant in his individual capacity, and by the express terms of the statute these judgments

could not have been set off against the plaintiff's note in suit before judgment and neither can the executions on these judgments be set off under the provisions of section 27 of chapter 86 of the Revised Statutes since the creditor in one is not the debtor in the other, "in the same capacity and trust."

See *Hayes, Admr.*, v. *Rich*, ante.

On report on motion by defendant to offset judgments. Motion denied.

Assumpsit on a promissory note for $3000 given to the plaintiff by the defendant's intestate. At the March term, 1901, of the Supreme Judicial Court, Kennebec County, the plaintiff obtained a verdict for $3180. This verdict was set aside by the Law Court. The action was again tried at the March term, 1903, of said S. J. Court, and the verdict was for the plaintiff for $2581.75. This verdict was likewise set aside by the Law Court. The action was again tried at the October term, 1904, of said S. J. Court, and the plaintiff recovered a verdict for $2093.25. A motion to set aside this last verdict was "overruled for want of prosecution" and the matter went to judgment in October, 1905. Thereupon a motion was made by the defendants to offset against this judgment, pro tanto, the judgments which might be rendered in favor of the defendant in two cases then pending in his name as administrator against the plaintiff. The case was then reported to the Law Court for decision on this motion to offset made by the defendant as aforesaid, with the stipulation that "the motion is to be determined as if all three actions were now ready to go to judgment." Therefore the only question in this case arises upon the aforesaid motion of the defendant to offset judgments.

This case is closely interwoven with the case *Hayes, Admr.*, v. *Rich*, reported on page 314 of this volume, and all the material facts fully appear in the two opinions.

Memorandum — One of the Justices sitting at the term of the Law Court at which this case was argued, did not sit in this case being disqualified under the statute by reason of having ruled therein at nisi prius.

Williamson & Burleigh, for plaintiff.

George W. Heselton and Heath & Andrews, for defendant.

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

WHITEHOUSE, J. The question involved in this case arises upon the motion of the defendant to set off against the judgment recovered by the plaintiff in this case, two judgments recovered by the defendant against the plaintiff. The case comes to this court on report.

In October, 1904, the plaintiff obtained a verdict of $2093.25 against the defendant in his capacity as administrator de bonis non on the estate of Dingley Brothers. The action which terminated in this result was commenced April 9, 1900, on a note given by the plaintiff to Dingley Brothers in 1894 for $3000. A motion to set aside the verdict was overruled by the law court, and the case went to judgment in October 1905.

Thereupon a motion was made to offset against this judgment, pro tanto, the judgment which might be rendered in favor of the defendant Hayes in two cases then pending in his name as administrator against the plaintiff Rich. The first of these cases was an action of debt on a judgment for $708.65, recovered in 1899 by Albert Robbins against the defendant Rich.

It was alleged in the declaration that Feb. 10, 1900, Robbins for a valuable consideration assigned this judgment "to Alvah R. Hayes then the administrator de bonis of the Dingley Brothers estate." In support of this allegation the following instrument signed by Robbins was offered in evidence: For a valuable consideration, in a note of one hundred and fifty dollars payable to F. B. Dingley, admr. d. b. n. Dingley Bros.' estate, dated Feb. 1, 1899, to me this day surrendered by A. R. Hayes, admr. d. b. n. of same estate, I assign and transfer to said estate the within judgment debt with full power in my name but without expense to me to collect the same.

It is contended in behalf of the defendant that if the action is maintainable at all the plaintiff is not entitled to recover in his representative capacity as administrator of the estate of Dingley Brothers but only in his individual capacity. This question came before the court in *Hayes, Admr.*, v. *Rich*, 101 Maine, 314, and upon the reasons and authorities there adduced it was held that the plaintiff

was entitled to recover only in his individual capacity and judgment was entered accordingly.

The second case, *Hayes, Admr.*, v. *Rich*, was also an action of debt on a judgment. It appears that Rich commenced an action against Hayes, Admr., and became nonsuit. Judgment for costs was accordingly rendered in favor of Hayes for $378.97. It was held by the court that this judgment properly belonged to Hayes in his own right and that in this case also he was only entitled to recover in his individual name and capacity. *Hayes, Admr.*, v. *Rich*, 101 Maine, 314, supra.

It is provided by section 77 of chapter 84 of the revised statutes as follows: "In actions against executors, administrators, trustees or others in a representative capacity, they may set off such demands as those whom they represent might have set off in actions against them; but no demands, due to or from them in their own right, can be set off in such actions."

Inasmuch as it has been shown by the court in *Hayes, Admr.*, v. *Rich*, supra, that the two judgments there rendered in favor of Hayes properly belonged to him in his own right, and as the new judgments have accordingly been awarded to him in his individual capacity, it follows that by the express terms of the statute above quoted, these judgments could not have been set off against Rich's note in suit before judgment. Neither could the executions on these judgments be set off under the provisions of section 27 of chapter 86 of the revised statutes since the creditor in one is not debtor in the other "in the same capacity and trust." Indeed the right to set off judgments in this state is not derived from any express statutory regulations, but depends upon the general jurisdiction and power of the courts over suitors at common law; but if the right to set off, in the manner proposed, assigned claims that are not negotiable, was recognized as existing at common law, it is remarkable that the legislature should prohibit its exercise before judgment, when the set off could be made with at least equal convenience. It is no less significant that the provision for offsetting executions should be limited to cases where "the creditor in one is debtor in the other in the same capacity and trust"; for ordinarily the right of the court to set off judgments

can only be exercised when the executions could be set off under the statute. *Copper Co.* v. *Brown*, 46 Maine, 418. In this case it should be observed that the "assigned claim" was a negotiable promissory note.

In *Ames* v. *Bates*, 119 Mass. 397, the facts were strikingly similar to those at bar, and although the decision of the case turned upon another point, the following observations of the court are worthy of consideration: "If Ames had continued to be the owner of the judgment recovered in his name, it might well be questioned whether Bates should be permitted to set off against it the judgment recovered by him in the name of Freeman and another when he could not have set off the claims upon which the judgments were founded. The reason why a party is not permitted by the statute to set off such claims may fairly be presumed to be, that is not just that one should be encouraged instead of paying his own debt to seek out claims against his creditor in order thus to change the position of parties pendente lite, and this reason is equally applicable to judgments which may afterwards be obtained upon such claims."

In the case at bar it is true, the assigned judgment was not purchased pendente lite, but about two months before the commencement of the original suit of *Rich* v. *Hayes, Admr.* It is manifest, however, from the history of these transactions disclosed by the evidence that both Hayes and his predecessor in the administration of the estate apprehended the suit by Rich on his $3000 note, and having an opportunity to purchase the Robbins judgment at less than twenty cents on the dollar, obtained the assignment of it for the express purpose of claiming a set off, pro tanto, against the note in suit or any judgment that Rich might recover upon it.

It is undoubtedly true that the principle of mutuality is implied in the use of the word set off, and that it is not necessarily confined to a nominal mutuality indicated by the record but in some cases may be a real mutuality of the indebtedness of the parties at the time of the commencement of the suit. *Collins* v. *Campbell*, 97 Maine, 23, and cases cited.

But if it be conceded in the case at bar that the Robbins judgment was purchased by Hayes with funds belonging to the estate of Dingley

Brothers, and that the assignment although in terms made "to the estate" and not to any person, was procured for the purpose of vesting the title thereto in Hayes as the legal representative of the estate, and making it a part of the assets of the estate, still in a broader view of the precise question here presented, irrespective of the provisions of the statute, there appear to be convincing reasons and an overwhelming weight of authority in support of the plaintiff's contention that an administrator cannot offset against a judgment rendered upon a liability of the decedent another judgment on a claim with which the decedent had no connection in his lifetime, purchased by the administrator with the funds of the estate for that purpose, after the death of his intestate. Some of these reasons are stated and authorities cited in *Hayes, Admr.*, v. *Rich*, supra. The questions involved in the two cases are so blended or intimately connected, that the considerations controlling the decision of the one, will be found in most respects equally important in the other.

It is a self evident proposition in the first place that Hayes can certainly have no greater right to offset a judgment against Rich, purchased by him from a stranger after the death of Dingley Brothers, than he would to offset a judgment obtained by him, for instance, on an account for goods of the estate sold by him to Rich; and since the essence of the doctrine of set off is its mutuality, it is equally axiomatic that if Rich could not offset against the Robbins judgment a debt due him from the estate, neither can Hayes set off a debt due him as administrator against a claim due Rich from the estate. It would obviously be immaterial whether the motion for a set off was made by Rich or Hayes. In *Dale, executor*, vs. *Cooke*, 4 Johns. Chancery 11, Chancellor Kent, speaking for the court, says: "It is an established rule in courts of law that if executors sue for a debt created to them since the testator's death, defendant cannot set off a debt due to him from the testator. I see no reason why the same rule should not prevail in equity. If the defendant could not set off in such a case neither could the executor, if he was the defendant, for the rule must be mutual."

See also *Dudley* v. *Griswold*, 2 Bradf. N. Y. 24; *Mead* v. *Merritt*, 2 Paige, 402, and *Root* v. *Taylor*, 20 Johns. 138.

Indeed this seems to be substantially a uniform rule in this country. In *Dayhuff* v. *Dayhuff*, 27 Ind. 158, the defendant sought to set off a claim due him against the administrator's claim against him for goods of the estate sold him; and although there was evidence that the administrator agreed to allow the set off as an inducement to the defendant to purchase the goods the court declared it to be a settled rule that in a suit by an administrator for a debt due the estate of the decedent originating after the death of the intestate the defendant cannot set off a debt due him from the intestate before his decease. In this case the suit was by the plaintiff in his representative capacity but this fact was held to be immaterial. The case was expressly affirmed in *Harte* v. *Houchin, Admr.*, 50 Ind. 327; *Miner* v. *Miner*, 8 Grattan, 1; *Cook* v. *Lovell*, 11 Iowa, 81; *Aiken* v. *Bridgman*, 37 Vt. 249; *Wisdom* v. *Becker*, 52 Ill. 342; *Lee* v. *Russell*, 18 Ky. Law, 951; *Grew, Executor*, v. *Burdette*, 9 Pick. 265; *Lamberton* v. *Freeman*, 16 N. H. 547; 25 A. & Eng. Ency. Law & Proc. 2 Ed. 534, and cases cited.

In 18 Cyc. of Law and Proc. 896, et seq. the rule upon this question is thus formulated: "Demands on which causes of action arise subsequent to decedents death are not proper subjects of set off against demands or causes of action arising in decedents lifetime because there is no mutuality of indebtedness between the parties."

On page 899 of the same volume is the following rule: "Claims against an estate purchased after decedent's death cannot be set off in an action against the purchaser thereof for a debt due the decedent, nor even on a debt created after the death of a decedent."

Both of these propositions are supported by numerous citations of authorities basing the rule for the most part upon considerations of sound public policy which require the estate to be settled as of the time of the decease of the intestate and forbid any alteration in the course of the distribution of the assets. See also *Irons* v. *Irons*, 5 R. I. 264; *Union Natl. Bank* v. *Hicks*, 67 Wis. 189; *Bizzell* v. *Stone*, 12 Ark. 378. In the last named case the same rule was held to be settled both at law and in equity, and whether the estate be solvent or insolvent.

In like manner it appears to have been uniformly held by the

courts of England that if an administrator brings an action upon a debt created against the defendant after the death of the intestate or upon which the cause of action arose after that event, the defendant cannot set off a debt on which there was a cause of action in the life-time of the intestate. *Shipman* v. *Thompson*, Willes, 103; *Tegetmyer* v. *Lumley*, Willes, 264; *Watts* v. *Rees*, 9 Exch. 696. Same case, 11 id 410. *Lambard* v. *Elder*, 17 Beavan, 542.

As stated by the court in *Hayes, Admr.*, v. *Rich*, 101 Maine, "It appears that at the time Hayes purchased the Robbins judgment, Rich was hopelessly insolvent and had no available property with which to satisfy any judgment, except the note in suit in *Rich* v. *Hayes, Admr.*; while, on the other hand, there is no evidence that Robbins was not entirely solvent and able to pay the note for $150 which the plaintiff held against him. It was the obvious duty of the plaintiff if acting for the interest of the estate which he represented, to collect this note in cash, and not invest it in a worthless judgment at twenty cents on the dollar."

Inasmuch as the attorneys for Rich have a common law lien upon the judgment which they have against Hayes personally for their costs of suit, it is not claimed that either of the judgments in *Hayes, Admr.*, v. *Rich*, can be offset against that; and upon the reasons and authorities above presented it is the opinion of the court that Hayes is not entitled to have either of his judgments offset against the judgment for $2093 in favor of Rich. Judgment must accordingly be entered in favor of Rich for both damages and costs without the set off claimed.

Motion denied.

STATE OF MAINE *vs.* WINFIELD S. EDMINISTER.

Waldo. Opinion March 28, 1906.

Exceptions Transmitted to Chief Justice. Same Under R. S., c. 79, § 55, Must Be Transmitted by Order of Justice Presiding at Nisi Prius.
R. S., c. 79, §§ 37, 44, 59.

Exceptions which are deemed frivolous and intended for delay by the Justice presiding at nisi prius, under R. S., c. 79, sec. 55, must be entered in the Law Court under R. S., c. 79, sec. 44, unless the Justice presiding orders that such exceptions be transmitted to the Chief Justice for the consideration and determination of the same by the Justices.

These exceptions in thirteen cases of *State* v. *Winfield S. Edminister*, were transmitted to the Chief Justice by the clerk of the court without any order or direction in relation thereto by the Justice presiding.

Ordered: That the cases be returned to the clerk to be entered at the next term of the Law Court.

On exceptions transmitted to the Chief Justice. Cases ordered to be returned to the Clerk of Courts, Waldo County, to be certified by him to the Law Court.

The defendant was convicted in thirteen criminal cases against him, at the same term of the Supreme Judicial Court, Waldo County. In each of these cases the defendant filed a motion in arrest of judgment. The presiding Justice overruled each of these motions and the defendant excepted in each case, and the exceptions in each case were "adjudged frivolous and intended for delay."

These exceptions were then transmitted to the Chief Justice by the Clerk of Courts, Waldo County, of his own motion, without any order or direction so to do by the presiding Justice who had adjudged the exceptions "frivolous and intended for delay."

The defendant contended among other things that under the provisions of section 55 of chapter 79 of the Revised Statutes, these exceptions were not legally in the hands of the Chief Justice so that they could be "considered and decided by the justices" as they had not been transmitted to the Chief Justice by the Justice who had adjudged the same to be "frivolous and intended for delay."

The facts and contentions are stated in the opinion.

B. F. Foster, County Attorney, for the state.

W. H. McLellan, for defendant.

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

WISWELL, C. J. By R. S. chap. 79, sec. 55, in relation to exceptions, it is provided that if the Justice presiding at nisi prius deems exceptions frivolous and intended for delay, "he may so certify on motion of the party not excepting; and such exceptions may then be transmitted at once by such Justice to the Chief Justice, ... and they shall be considered and decided by the Justices of said court as soon as may be." In these thirteen criminal cases the respondent's exceptions in each case were deemed frivolous and intended for delay by the Justice presiding and were so certified by him; the cases were subsequently transmitted by the clerk to the Chief Justice, but without any order or direction, in this respect, by the presiding Justice so far as the cases disclose. Counsel for respondent contends that for this reason, as well as because the exceptions were not adjudged frivolous upon the motion of the party not excepting, the cases are not properly before the Justices of this court for their determination, and that they should be entered at the next term of the law court.

We think that this contention must be sustained. The general provisions in relation to the entry of cases in the law court are contained in the R. S., c. 79, sec. 44, as follows: "At least ten days before the sitting of each term of the law court, the clerks of courts in the several counties of the state, shall certify to the clerk of such term, all cases pending in the supreme judicial and superior courts in their respective counties, marked 'law' and all other matters of which the law court has jurisdiction, except cases in which exceptions or appeals in proceedings in equity have been adjudged frivolous and intended for delay; and they shall be entered on the docket of the law court and shall, together with all matters therein pending, be in order for argument, determination or continuance in the alphabetical order of counties."

To this general rule there are two exceptions, one contained in the section of the statute already referred to, applicable to criminal cases and common law actions, and the other contained in section 37 of the same chapter in relation to exceptions and appeals in proceedings in equity, whereby it is provided that in case such appeal or exceptions are adjudged frivolous and intended for delay the sitting justice may so certify, "and such exceptions and appeals, and the record connected therewith, shall be transmitted to the chief justice." In this class of cases the appeal or exceptions shall be transmitted when they are certified by the justice as frivolous. While in the statute in relation to exceptions in these criminal cases it is provided that they "may then be transmitted at once by such justice to the chief justice." The distinction is obvious and must be presumed to have been intended. In the one case the statute is mandatory, while in the other the question as to whether or not the exceptions shall be presented to the justices for determination, without the opportunity of oral argument, is left to the discretion of the justice presiding. He may certify that the exceptions are deemed by him frivolous, and still may not order them transmitted to be argued, considered and determined in this summary manner. He may be of the opinion, notwithstanding his adjudication that the exceptions are frivolous, that the party should have an opportunity to argue the case orally before the law court.

In these cases, as we have seen there is nothing to show that the presiding justice ordered these cases transmitted for the consideration and determination of the justices, and a certified copy of the docket entries in each of the cases which counsel for the respondent files with his brief fails to disclose that any such order or direction was made. We think that under the statute which provides for such a determination by the justices of the court there must be such an order.

The cases will consequently be returned to the clerk to be certified by him to the next term of the law court in accordance with the general provisions of the statute.

So ordered.

IRVING B. HAYNES, Pro Ami

vs.

WATERVILLE AND OAKLAND STREET RAILWAY.

Kennebec. Opinion March 30, 1906.

Negligence. Damages. Lost Usefulness and Enjoyment. Expectancy of Life. Evidence.

1. That a street railroad company was authorized by the Railroad Commissioners to run cars before its track was finished and put in proper condition, does not exempt the company from liability for injuries resulting from the imperfect condition of the track.
2. When it appears that a horse frightened by an approaching street car would nevertheless have caused no injury but for the imperfect, unfinished condition of the railroad track, and hence that such condition of the track was a contributing cause of an injury done by the frightened horse, the street railroad company is liable for such injury even though there was no fault in the management of the car.
3. The expectancy of life of a person injured is an element to be considered in awarding damages for the injury. In determining this expectation of life, the age at which the last two deceased paternal ancestors died is a material factor.
4. The loss of earning power is not the extent of the damage sustained from a serious physical permanent injury to a person. The lost usefulness and enjoyment out of his prospective life are also elements of damage.

On motion and exceptions by defendant. Overruled.

Action on the case to recover damages for personal injuries suffered by the plaintiff July 22, 1903, at Oakland, Maine, by having his left hand crushed beneath the wheels of one of the defendant's street cars, and which injury was caused by the alleged negligence of the defendant. The injury to the hand was such that it had to be amputated. At the time of the accident, the plaintiff, then ten years of age was riding with his grandfather in an open wagon drawn by a single horse, owned and driven by the grandfather. Plea, the general issue.

This action was tried at the October term, 1904, of the Supreme Judicial Court, Kennebec county. Verdict for plaintiff for $6,500.

The jury also specially found that Gideon C. Haynes, the plaintiff's grandfather who owned the horse and who was driving at the time of the accident, was not guilty of any negligence respecting the harness or the team, which contributed to the accident. Defendant filed a general motion to have the verdict set aside, and also excepted to certain rulings made by the presiding Justice during the trial. Only one of the exceptions was urged at the Law Court.

The case is sufficiently stated in the opinion.

Harvey D. Eaton, for plaintiff.

Charles F. Johnson, for defendant.

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

EMERY, J. *Motion.* At the time and place of the injury to the plaintiff from being run over by a car of the defendant street railway company in Main Street, Oakland, the railway track was unfinished. The ground had been leveled to a level surface, the sleepers were laid on this surface, and the rails on the sleepers, but no ballast or earth had been filled in between the sleepers. The top of the rail was about a foot above the surface of the street. The plaintiff and his grandfather were riding in a wagon along the street to the left of the railway track and a car of the defendant was coming toward them. When the car came near, the plaintiff's horse was frightened by the car and after a few moments swerved violently and upset the wagon, throwing the plaintiff on the track in front of the moving car which ran over him to his injury. There was much conflict of evidence as to how all this happened, but we think the jury could have legitimately found from the evidence in favor of the plaintiff's contention that the horse, upon becoming frightened, first made a quick sharp turn to the right to get about and away from the car in that direction, but, meeting and seeing the unballasted track, was repelled by it and made an even sharper turn to the left with the effect of upsetting the wagon and throwing the occupants on the track. The jury might also have found that the horse would have got round and away but for the unfinished condition of the track, and that that condition, com-

bined with the frightening of the horse by the defendant's car, was a cause of the injury.

The defendant company contended that it had before that time been duly authorized by the Railroad Commissioners to operate its railroad with the track in its unfinished condition at that place, but, if so, that did not exempt it from liability for injuries caused by that condition to persons in the situation of the plaintiff. While the defendant may have had the right to run its cars at that place, yet it was bound to know that it might thereby frighten horses, and it should not have left its track in a condition to add to their fright and prevent their getting out of the way. There was some evidence, therefore, of causative negligence on the part of the defendant company. There was some evidence also of the plaintiff's freedom from contributory negligence. We do not think the evidence preponderates so heavily the other way as to show unmistakably that the jury erred on either issue.

The damages assessed were perhaps large, but not so glaringly excessive as to show clearly that sympathy or prejudice overcame the judgment of the jury. The total loss of the left hand by a boy ten years of age takes a great deal of usefulness and enjoyment out of his prospective life. The loss of earning power is by no means the extent of the injury.

The motion to set aside the verdict cannot be sustained.

Exceptions. As bearing upon the expectancy of life of the plaintiff, his grandfather was permitted to testify, against the defendant's objection, as to the age at which his own father and grandfather respectively had died. It is common knowledge that physicians and life insurance companies regard the longevity of one's ancestors as an important factor in determining his expectation of life. The various "mortality tables" only give averages, and in an individual case the expectation may be higher or lower than that average by reason of many circumstances peculiar to that case, such as the presence or absence of inherited disease, deformity, &c. A descent from robust, long-lived stock gives greater promise of long life than descent from frail, short-lived ancestry, other things being equal.

The defendant urges that if such evidence be admissible, then the

inquiry may branch out interminably as to the length of life of all one's ancestors on both sides through grandmothers and great grandmothers. The court has power, however, to restrain the inquiry within reasonable limits within which the effect or influence can be seen. In this case the inquiry did not go beyond those limits. This exception must be overruled. The others are not urged.

Motion and exceptions overruled.

JAMES HOPKINS SMITH, Petitioner,

vs.

ALBERT H. LIBBY, et als.

Cumberland. Opinion March 30, 1906.

Petition to Quiet Title. Easement. R. S., c. 106, § 47.

In a petition asking that the defendants be summoned to show cause why they should not bring an action to try their claim of title to the premises therein described, by virtue of sec. 47 of chap. 106, R. S., it appeared from the allegations that the right claimed by the defendants was a right of way or an easement to pass and repass over it, but it was not shown by any averment in the petition, or otherwise made to appear from the record, that there was ever any such interruption of or interference with the defendants' easement as would lay the foundation for an action on the case for damages.

Held: That this statute contemplates an exclusive and adverse possession which works a disseizin of the defendant, and that in cases where there is a joint or mixed possession, the petition cannot be maintained; that the defendant will not be required to bring a suit unless it is made to appear that the right which he claims can be fairly and conclusively tried by such a suit as may be directed, and that in this case it is not shown that there is any form of action which the court could order or which the defendants can bring that will determine the respective rights of the parties.

On exceptions by plaintiff. Overruled.

Petition under Revised Statutes, chapter 106, section 47, asking

that the defendants, Albert H. Libby, Ann G. Kimball, Henry Adamson, Clara E. Anderson, Arthur S. Anderson, Robert H. Anderson, Wilbur A. Anderson, the Town of Falmouth and persons unknown, "claiming either individually or as citizens or residents of said Town of Falmouth, or as members of the public," be summoned to show cause why they should not bring an action to try their claim of title to the premises therein described.

The defendants, Albert H. Libby, Ann G. Kimball and Henry Adamson each filed a motion, identical in substance, to dismiss the petition, the motion filed by Ann G. Kimball being as follows: "And now comes the said Ann G. Kimball and says that the petitioner ought not to have and to maintain his said petition, and that the prayer thereof ought not to be granted, because, she says, as appears from the allegations of the said petitioner in his said petition, the right which the respondent claims in the premises of the petitioner as set forth and described in his said petition is a right to pass and repass over said premises, to wit, an easement of a right of way therein; and, because there is no form of action which the court can order, or which the respondent can bring that will determine the respective rights of the petitioner and respondent.

"Wherefore the respondent prays that the petitioner's said petition may be dismissed for the foregoing reasons, all of which appear upon the record, and that the respondent may be allowed costs."

A hearing was had upon these motions at the April term, 1905, of the Supreme Judicial Court, Cumberland County, and the presiding Justice sustained the motions and the petition was dismissed as to the defendants, Albert H. Libby, Ann G. Kimball and Henry Adamson, and thereupon the plaintiff excepted.

The case appears in the opinion.

Symonds, Snow, Cook & Hutchinson, for plaintiff.

Carroll W. Morrill, for defendants, Albert H. Libby, Ann G. Kimball and Henry Adamson.

N. B. & H. B. Cleaves & S. C. Perry, for defendant Town of Falmouth.

Edwin E. Heckbert, for defendants, Clara E. Anderson, Arthur S. Anderson, Robert E. Anderson and Wilbur A. Anderson.

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

WHITEHOUSE, J. This was a petition asking that the defendants be summoned to show cause why they should not bring an action to try their claim of title to the premises therein described. It is founded on section 47 of chapter 106 of the Revised Statutes, which provides as follows: "A person in possession of real property, claiming an estate of freehold therein or an unexpired term of not less than ten years, or a person who has conveyed such property or any interest therein with covenants of title or warranty, upon which he may be liable, may, if he, or those under whom he claims, or those claiming under him, have been in uninterrupted possession of such property for ten years or more, file a petition in the Supreme Judicial Court setting forth his estate, stating the source of his title, describing the premises and averring that an apprehension exists that persons named in the petition, or persons unknown claiming as heirs, devises or assigns or in any other way, by, through or under a person or persons named in the petition, claim, or may claim, some right, title or interest in the premises adverse to his said estate; and that such apprehension creates a cloud upon the title and depreciates the market value of the property; and praying that such persons be summoned to show cause why they should not bring an action to try their title to the described premises. . . . . A person in the enjoyment of an easement is in possession of real property within the meaning and for the purpose of this section."

The petitioner represents that he has an estate in fee simple in the property described in his petition; that for more than ten years he and those under whom he claims, have been in uninterrupted possession of it, and that "an apprehension exists that the defendants claim a right to pass and repass over said property adverse to his said estate, and that such apprehension creates a cloud upon the title and depreciates the market value of said property."

The defendants filed a motion to dismiss the petition on the ground that it appears from its allegations that the right claimed by the defendants in the real estate described, is a right of way or an ease-

ment to pass and repass over it, and that there is no form of action which the court can order or which the defendants can bring that will determine the respective rights of the parties.

The presiding judge sustained the motion and dismissed the petition as to these defendants. The case comes to the Law Court on the petitioner's exceptions to this ruling.

It is the opinion of the court that this ruling was correct and that the exceptions must be overruled.

It is not shown by any averment in the petition, or otherwise made to appear from the record, that there has ever been any such interruption of or interference with the defendants' easement as would lay the foundation for an action on the case for damages. A writ of entry could not be maintained by the defendants, because they have no seizin of the land. There is no incompatibility between the petitioners' ownership of the estate in fee simple, and the defendants' right to an easement to pass and repass over it. "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 passage way." *Blake* v. *Ham*, 50 Maine, 311; *Nicholson* v. *Railroad Co.*, 100 Maine, 345.

Inasmuch then as the defendants have remained undisturbed in the enjoyment of their easement, and their legal rights have in no respect been violated, it is difficult to see on what ground they can reasonably be required to commence any action at law or in equity, to establish their right or quiet their title.

The section of the statute above quoted upon which the petition is founded is substantially a reenactment of the Massachusetts statute of 1852, the construction of which has often been brought in question before the courts of that State. In *Orthodox Cong. Soc'y* v. *Greenwich*, 145 Mass. 112, the court say: "Under the public statutes 'any person in possession of real property claiming an estate of freehold therein. . . . . may file a petition . . . . . against any person making an adverse claim.' . . . . It has always been held that this statute contemplates an exclusive and adverse possession which works a disseizin of the respondent; and that in

cases where there is a joint or mixed possession, the petition cannot be maintained." See also *Marshall* v. *Walker*, 93 Maine, 532.

But the precise question here involved appears to have been directly raised and determined in *May* v. *New England R. R. Co.* 171 Mass. 367. In that case there was a petition to compel the defendant company to bring an action to try its alleged title to a strip of land which the petitioner claimed to own in fee, but in which the defendant company claimed to have an easement by virtue of the location of its railroad; and it was held that one who has only an easement and who does not complain that his rights have been interferred with, cannot be compelled under the statute in question, to bring an action at law or a suit in equity to try his alleged right. In the opinion the court say: "We are not aware of any previous instance where one whose only claim was a right to an easement has been required to institute proceedings to try its extent or validity. It has usually been assumed that the action contemplated by the statute is a writ of entry, or possibly an action of tort in the nature of trespass. In the present case, the respondent could not maintain a writ of entry, having no seizin of the land; nor trespass, being out of possession." A respondent will not be required to bring a suit unless it is made to appear that the right which he claims can be fairly and conclusively tried by such a suit as may be directed. *Boston Manuf. Co.* v. *Burgin*, 114 Mass. 340. Usually the order specifies the form of process to be brought, but no form of process was specified in this case, and none to which the respondent can resort, upon the facts which now exist, has been pointed out and none occurs to us. This view is confirmed when we consider that the petitioner is under no such disability. We see no jurisdictional reason to prevent him from maintaining a bill in equity to remove a cloud upon his title, and in this way having his boundary line determined. It is true that the burden of proof will be upon him to show the extent of his ownership; but this is no objection to leaving him to pursue a remedy in his own name, instead of seeking to compel the respondent to go forward.

The entry must accordingly be,

Exceptions overruled.

CHANDLER W. ABBOTT *vs.* ALTON C. ABBOTT.

Knox. Opinion March 30, 1906.

Writ. Failure of Service on Defendant. New Service Ordered. Officer's Return of Service Defective. Return May be Amended According to the Fact. Statute 1905, c. 61, R. S., c. 83, §§ 17, 21, 23.

A writ on which an attachment of the defendant's real estate had been made, was entered at the return term of the writ without service upon the defendant. At the following term, the plaintiff moved for an order of service on the ground "that the defendant was not within the jurisdiction of the officer making the attachment and had no last and usual abode therein at the time when service should have been made." It appearing that no service of the writ had been made upon the defendant, and that the failure of service was without fault of the plaintiff or his attorney, a new service was ordered by virtue of sections 17 and 23 of chapter 83 of the Revised Statutes. The defendant was described in the writ as resident of Camden, in the State of Maine, and it was not alleged that the defendant had no abiding place in the state at the time the motion for a new service was made. *Held*: that the service ordered on the defendant as a resident could be legally made in either of the modes prescribed by the aforesaid section seventeen.

Under these circumstances, an officer's return that he had made service of the writ upon the defendant by leaving the summons and copy of the order at his last and usual place of abode would have been a full compliance with the order under the statutes.

But in the case at bar, the officer's return on the order of service is as follows: "By virtue of the foregoing order of the court, I have this day made service of the within writ upon the within named defendant by leaving at the last and usual place of abode a new summons in due form for his appearance at court at the time and place named in said order and with a copy of said order indorsed thereon certified by the clerk of the courts for said county of Knox." This return fails to state that the officer left the summons at the defendant's last and usual place of abode and is therefore defective.

There is no evidence in the case to show whether or not this omission was an error, and the exceptions must be sustained on this ground alone, and the case will be remanded to the court below where the truth in regard to the return may be ascertained and if necessary the officer will be allowed to amend his return according to the fact.

If the return is amended to show that the summons and copy were in fact left at the defendant's last and usual place of abode, the motion to dismiss the action must be overruled. If the return is not amended, the motion to dismiss must be sustained unless further service of the writ shall be ordered.

On exceptions by defendant. Sustained.

Writ returnable to and entered at the April term, 1904, of the Supreme Judicial Court, Knox County. Defendant's real estate had been attached upon this writ, but no service of the writ was made upon the defendant before entry at the return term. Defendant's counsel entered their appearance at the return term "for the especial purpose of objecting to any order of service upon defendant and for no other purpose."

At the following September term of said court, a motion for order of service was filed by plaintiff and the motion was granted and an order of service was made, returnable at the January term, 1905, of said court.

At said January term, the defendant filed a motion to dismiss the action on the ground that the service made by the officer was not in conformity to the order, but the presiding Justice overruled the motion and held that the service as returned by the officer was sufficient, and thereupon the defendant excepted.

The case is fully stated in the opinion.

J. H. Montgomery, for plaintiff.

R. I. Thompson and Arthur S. Littlefield, for defendant.

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

WHITEHOUSE, J. This case comes to the court on exceptions to the overruling of a motion to dismiss an action for want of proper service. The writ was returnable to the Supreme Judicial Court of Knox county at the April term 1904. At the return term the defendant's counsel entered their appearance upon the docket "for the especial purpose of objecting to any order of service upon the defendant and for no other purpose."

At the following September term a motion for an order of service

on the defendant was filed by the plaintiff's counsel accompanied by the following affidavit: "The defendant was not within the jurisdiction of the officer making the attachment and had no last and usual abode therein at the time when service should have been made; that said defendant was then and ever since has been a roving person with no permanent abiding place so that he could be come at to effect service within the knowledge of the plaintiff; that plaintiff supposed and believed that service had been made until this term began. Plaintiff now moves for an order for a new service upon said defendant under said writ in this action, real estate attachment having been made and returned on the same and recorded as required by law."

This motion was granted at the same term and the following order of notice was accordingly made thereon, to wit: "And now it appearing to the court that the property of the said defendant has been attached on the writ in said suit, and that no service of said writ has been made upon said defendant, without fault of the plaintiff or his attorney in said suit.

It is ordered, that a new summons issue, and be served upon said defendant, together with a copy of this order thereon, fourteen days, at least, before the next term of our Supreme Judicial Court, to be held at Rockland within and for said county of Knox on the first Tuesday of January next that he may then and there appear and answer to said suit if he shall see cause."

The officer's return on this order is as follows: "By virtue of the foregoing order of court, I have this day made service of the within writ upon the within named defendant by leaving at the last and usual place of abode a new summons in due form for his appearance at court at the time and place named in said order and with a copy of said order indorsed thereon certified by the clerk of the courts for said county of Knox."

No motion was made by the plaintiff for an order of service at the return term of the writ. The defendant is described in the writ as a resident of Camden in the County of Knox and State of Maine.

At the January term of the court 1905, the defendant filed a motion to dismiss the action on the ground that the service made by the officer was not in conformity to the order of court, but the pre-

siding justice overruled the motion and held that the service as returned by the officer was sufficient. To this ruling the defendant excepted."

It is contended in behalf of the defendant that the situation disclosed by the record was one calling for an order of notice to the defendant, as a non-resident by virtue of section 21, chapter 83 R. S.; that the terms of the order in question actually given, directing that a "new summons issue and be served on the defendant," required personal service on the defendant by giving him the summons in hand, and that substituted service by leaving the summons at the defendant's last and usual place of abode would not be sufficient.

It has been seen, however, that the defendant was described in the writ as a resident of Camden in the State of Maine, and that the reason given in the affidavit in September for the failure of service in season for the return term in April was that the defendant had no permanent abode that could be found by the officer "at the time when service should have been made" for the April term. The affidavit does not allege that the defendant had no abiding place in this state at the time the motion was made for a new service at the September term. It cannot be doubted that if the failure of service for the April term had been seasonably discovered and a motion for an order of service been made at that term, the court would properly have authorized the "new service" on the defendant as a resident of the state, by virtue of sections 17 and 23 of chapter 83 of the Revised Statutes. The former of these sections expressly provides for the "service of writs on residents," and declares that "when goods or estate are attached a separate summons shall be delivered to the defendant, or left at his dwelling house or last and usual place of abode . . . . which shall be sufficient service."

Inasmuch then as this substituted service at the defendant's place of abode is one of the methods specially provided for "serving writs on residents," it cannot be doubted that if such an order had been given at the April term service upon the defendant by leaving the summons and copy at his last and usual place of abode would have been a sufficient compliance with that order.

The legal situation was precisely the same after the failure of

service was discovered in September. The writ was produced from the files, showing that an attachment of real estate was duly made upon it and that the defendant is described as a resident of Camden. Non constat, that since the time mentioned in the plaintiff's affidavit when the officer was unable to find either the defendant or his place of abode in season for service at the April term, the defendant may have returned after a temporary absence and resumed or established his permanent abode in Camden. A motion was accordingly made for the "new service" authorized by section 23, above cited to be made on the defendant as a resident of the state precisely the same as it would have been at the April term. It was the ordinary request for an order for the service of a writ on a resident whose property had been attached and no service made before entry. The motion was granted and the terms of the order made in pursuance of it were appropriate for a service on the defendant as a resident of the state, and not appropriate for an order of notice to a non-resident under section 21 of chapter 84. It directs a "new summons to issue and be served on the defendant." A "summons" is properly ordered to issue to a resident, and a "notice" ordered to be given to a non-resident.

The service being ordered on the defendant as a resident could legally be made in either of the modes prescribed by section seventeen.

Under these circumstances an officer's return that he had made service of the writ upon the defendant by leaving the summons and copy of the order at his last and usual place of abode would have been a full compliance with the order under our statutes.

Furthermore in Ency. of Pl. & Prac. volume 19, page 624, it is said to be the "general rule that substituted service of process upon a resident defendant is equivalent to personal service and warrants a personal judgment against such defendant." So in *Johnston* v. *Robins*, 3 Johns. Rep. 440, service was made by leaving a copy at the defendant's dwelling house and on the defendant's motion to set aside the default entered against him, the court said: "It was decided in the case of *Jackson* v. *Griffiths*, 4th Term Rep. 465, that in every case of the service of a notice leaving it at the dwelling

house of the party was to be considered as a personal service for every purpose except to bring a party into contempt. We consider the declaration as having been personally served on the defendant." See also *Dunkle* v. *Elston*, 71 Ind. 585.

But as both the personal and substituted service of writs are regulated by the provisions of our statutes above quoted, it is unnecessary to pursue the inquiry in relation to the practice in other states or at common law.

But it appears from the officer's return in the case at bar that he made service of the writ upon the defendant "by leaving at the last and usual place of abode a new summons," etc. The return fails to state that he left the summons at the defendant's last and usual place of abode. This was doubtless an inadvertent omission, but the copy before the court has been found to be a true copy of the original return of the writ.

This defect in the officer's return was not discovered by counsel until the close of the arguments before this court and obviously was not brought to the attention of the presiding judge in the court below; otherwise, if it had been shown that the omission was an error, an amendment of the return in accordance with the fact would have been allowed by the court if deemed to be in the furtherance of justice. *Hobart* v. *Bennett*, 77 Maine, 401. As there is no evidence before this court in relation to it, the exceptions must be sustained on this ground alone, and the case remanded to the court below where the truth in regard to the service may be elicited and if necessary the officer be allowed to amend his return according to the fact. If the return is amended to show that the summons and copy were in fact left at the defendant's last and usual place of abode, the motion to dismiss the action must be overruled. If the return is not amended the motion to dismiss must be sustained unless further service of the writ shall be ordered. See chapter 61, Laws of 1905.

Exceptions sustained.

STATE OF MAINE *vs.* PERCY C. GILES, Appellant.

Lincoln. Opinion March 30, 1906.

Sea and Shore Fisheries. "Short Lobster Statute." Complaints for Violation Made by Private Persons. Right to Make Complaint Not Limited to Commissioner and His Deputies and Wardens. Statute 1885, c. 275. Statute 1889, c. 292, § 6; 1897, c. 285, § 48; 1899, c. 81. R. S., c. 32, § 51; c. 41, §§ 17, 37, 40.

Express provision of the statute is not required to authorize unofficial persons to make a complaint before a magistrate. It is a rule of the common law of immemorial origin that in the absence of statutory requirement to the contrary, all such complaints may be made by any person who can legally be a witness and who has knowledge or information of any violation of the criminal law.

In a certain class of cases in which the criminal and civil departments of the law appear to be blended, the incentive arising from the grievance of a private wrong, which in some degree actuates the complainant to demand a public prosecution of the guilty party, is recognized as a potent factor in the prompt and efficient administration of the law, and the absence of such a motive is always found to be a serious obstacle in the enforcement of sumptuary and kindred statutes.

Held: That the legislature never intended to confer upon the Commissioner of the Sea and Shore Fisheries and his deputies or the fish wardens the exclusive rights to make complaints before magistrates for violations of the provisions of chapter 41 of the Revised Statutes or to oust the court of its jurisdiction of such complaints when made and preferred by private or unofficial persons.

On exceptions by defendant. Overruled.

Complaint made by Charles E. Sherman, a private person, to C. H. Fisher, a Lincoln County Trial Justice, against the defendant for having in his possession fourteen cooked lobsters each less than ten and one half inches in length measured in the manner prescribed by statute.

On this complaint a warrant in due form of law was issued by the said trial justice and the defendant was duly arrested thereon and arraigned before C. R. Tupper, another Lincoln County Trial Justice, for trial and who found the defendant guilty of the offense alleged in

the complaint and warrant. The defendant then appealed to the Supreme Judicial Court in said County, and was tried at the October term, 1905, of said court. The jury found the defendant guilty of having in his possession ten lobsters less then ten and one half inches in length. After the verdict and before judgment, the defendant filed a motion in arrest of judgment. This motion was overruled by the presiding Justice and thereupon the defendant excepted.

The defendant's motion in arrest of judgment omitting the formal parts, is as follows:

"And now after trial and verdict of guilty and before judgment the said Percy C. Giles comes and says, that judgment ought not to be rendered against him, because he says that the said complaint and the matters therein alleged in the manner and form in which they are therein stated are not sufficient in law for any judgment to be rendered therein and that said complaint is bad in the following particulars.

"First. That Charles E. Sherman, the complainant, in behalf of the state had no authority and was incompetent to make said complaint.

"Second. The said Charles H. Fisher, Esq., the Trial Justice who received said complaint and issued the warrant thereon had no authority to do so.

"Third. That C. R. Tupper, Esq., the Trial Justice before whom said complaint and warrant were returned and of which he assumed jurisdiction and before whom the said Percy C. Giles was arraigned and tried, had no jurisdiction or authority to hear and try and punish said Percy C. Giles thereon."

The case appears in the opinion.

Weston M. Hilton, County Attorney, for the State.

Wm. Henry Hilton, for defendant.

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

WHITEHOUSE, J. This is a complaint against the defendant for having in his possession fourteen cooked lobsters each less than ten and one half inches in length measured in the manner prescribed by

statute. The complaint is signed by Charles E. Sherman, a private citizen, and is based on section seventeen of chapter 41 of the Revised Statutes.

After verdict of guilty and before sentence, the defendant filed a motion in arrest of judgment on the ground that a private citizen has no right or authority to institute a prosecution by signing a complaint for the violation of the laws relating to sea and shore fisheries; that no magistrate has authority to issue a warrant on such a complaint or authority to hear, try and convict upon such a process.

Inasmuch as the general supervision of sea and shore fisheries is conferred upon the Commissioner, and the duty of enforcing all laws relating thereto is expressly enjoined upon the Commissioner and fish wardens and all violations of such laws may be settled by the Commissioner upon such terms as he deems advisable, it is contended in behalf of the defendant that only the Commissioner and such officials as are thus qualified by bond and oath to aid him, are authorized to make complaint for the purpose of instituting prosecutions.

It is obvious that a construction involving such a distinct departure from the general policy of the state respecting the enforcement of its laws, should not be accepted as the correct one unless imperatively required by the express terms of the statute or by its manifest implication when considered in the light of its history and its relations to other similar statutes.

Prior to 1885 the interests of both the sea shore fisheries and of inland fish and game had been entrusted to the supervision of the same board consisting of two commissioners, but by chapter 275 of the public laws of that year, provision was made for the appointment of a third commissioner who should "have general supervision of the sea and shore fisheries and shell fish therein specified, the method of enforcing the laws relating to both classes of fisheries being left unchanged.

But section 6 of chapter 292 of the Laws of 1889 relating to lobster fisheries provided as follows: "All fines and penalties under this act may be recovered by indictment or action of debt, brought by any person, and together with all forfeitures, shall be paid into the county treasury in the county where the offense is committed."

In 1897 the legislature codified the laws relating to sea and shore

fisheries under chapter 285 of the public laws of that year, and by section 48 of the same chapter provided for the enforcement of these laws as follows:

"All fines and penalties under this act may be recovered by complaint, indictment or action of debt made or brought by any person in the county where the offense is committed, and shall be paid into the treasury of the county where the offense is committed, and by such treasurer to the state treasurer, to be added and made a part of the appropriation for sea and shore fisheries."

But in 1899 (chapter 81 of the public laws) the provision of the act of 1897 respecting the recovery of fines was amended so as to read as follows:

"All fines and penalties under this act may be recovered by complaint, indictment or action of debt, brought in the county where the offense is committed. The action of debt shall be brought in the name of the commissioner of sea and shore fisheries, and all offenses under, or violation of the provisions of this statute may be settled by the commissioner of sea and shore fisheries upon such terms and conditions as he deems advisable." Under section 48 of the act of 1897 above quoted, the action of debt could be brought "by any person" but experience had shown that this was no longer necessary or desirable. It was therefore provided by this amendment that the action of debt should be brought in the name of the commissioner. With a distinct declaration to this effect respecting the action of debt, the first sentence in section 48 of the act of 1897 could consistently stand only by striking out the words "by any person." This was obviously found to be the most convenient method of effecting the desired change. It was not necessary that these words should be retained after a separate provision was made for the action of debt. Express provision of the statute was not required to authorize unofficial persons to make a complaint before a magistrate. It is a rule of the common law of immemorial origin that in the absence of statutory requirement to the contrary, all such complaints may be made by any person who can legally be a witness and who has knowledge or information of any violation of the criminal law. 1 Bishop Cr. Proc. section 896. The words "by any person" could

be dropped with impunity, without affecting the procedure by complaint or indictment.

Furthermore if it had been the intention of the legislature to provide by this last amendment that all prosecutions under that chapter whether by complaint or indictment or action of debt should be instituted by the Commissioner or a fish warden, it is remarkable that it should have made explicit provision for the action of debt alone and made no allusion whatever to the complaint or indictment in that connection. Expressio unius exclusio alterius.

This view is strengthened by a comparison of the provisions of chapter 41 in question with those of chapter 32 relating to inland fish and game. Section 52 of the latter chapter provides that "the commissioner and every warden throughout the state and every sheriff and constable in his respective county shall enforce the provisions of this chapter"; and section 53 declares that "any officer authorized to enforce the inland fish and game laws may recover the penalties for the violations thereof in an action on the case in his own name . . . or by complaint or indictment in the name of the state." But these provisions enjoining upon the several officers named in section 52 the duty of enforcing the laws, and authorizing the officers named in section 53 to recover the penalties as therein specified, have never been construed to confer upon these officers the exclusive authority to make complaints before magistrates. The right of the citizen who has knowledge of the commission of an offense, to appear before a magistrate and make a complaint against the guilty party, has never been denied by reason of any of the provisions of chapter 32.

In like manner the sheriffs and their deputies, municipal officers and constables are expressly commanded in chapter 29 of the Revised Statutes, to be diligent and faithful in enforcing the numerous provisions of that chapter against the illegal keeping and illegal sale of intoxicating liquors; but no citizen having knowledge of the violation of any of the provisions of that chapter has ever been denied the privilege of making a complaint therefor before a magistrate, and no court having jurisdiction of the matter has ever refused to entertain such a complaint because not made by one of the officials mentioned.

But there are special considerations suggested by two of the sections of chapter 41 which tend further to illustrate the improbability that the legislature could have designed to restrict the method of enforcing the provisions of the act in the manner claimed by the defendant.

Section 40 declares that "No person shall set any net or seine within five hundred feet of the mouth of any weir under a penalty of fifty dollars;" and section 37 relating to the planting of oysters provides that: "Whoever trespasses upon such enclosure or injures such oyster beds, is liable in an action of trespass for all damages; and if he takes away any oysters therein without the consent of the owner, he shall forfeit not less than twenty nor more than fifty dollars, or be imprisoned not exceeding three months."

In a certain class of cases in which the criminal and civil departments of the law appear to be blended, the incentive arising from the grievance of a private wrong, which in some degree actuates the complainant to demand a public prosecution of the guilty party, is recognized as a potent factor in the prompt and efficient administration of the law, and the absence of such a motive is always found to be a serious obstacle in the enforcement of sumptuary and kindred statutes. So with reference to the sections of chapter 41 last quoted no valid reason is apparent why a private citizen whose fishing privilege or oyster bed is imperilled by the public wrong of his neighbor should be deprived of the right to take prompt measures to prevent the injury by making a complaint therefor in his own name. He should not be compelled to await the convenience of the Commissioner or his deputy for the commencement of a prosecution.

From this brief history and comparative analysis of the sections quoted from chapter 41, the conclusion is irresistible that the legislature never intended by any of those enactments to confer upon the Commissioner and his deputies or the fish wardens, the exclusive right to make complaints before magistrates for violations of the provisions of that chapter or to oust the court of its jurisdiction of such complaints when thus made and preferred.

The entry must therefore be,

Judgment on the verdict. Exceptions overruled.

PHILIP H. STUBBS

vs.

FRANKLIN & MEGANTIC RAILWAY COMPANY.

Franklin. Opinion April 3, 1906.

Real Actions. What a Receipt Settles. Equitable Estoppel. Plaintiff Estopped. No Recovery for Mesne Profits When Writ Contains no Claim for Same. R. S. 1883, c. 61, § 16.

A receipt settles only such matters as are comprehended in it by the intention of the parties.

The plaintiff as treasurer of a railroad company executed a mortgage of the road between certain termini to secure certain bonds. Within these bounds was that portion of the road which had been located and graded across the demanded premises with the knowledge and consent of the plaintiff. The defendant corporation represents, and is the successor in title of, the purchaser of the bonds.

Held: that while no estoppel can arise unless he who alleges it was induced to and did in fact act, relying upon the conduct of the party whom he seeks to estop, yet from the well known course of business in the commercial world there arises a presumption of fact, sufficient in the absence of any evidence to the contrary, that parties who purchase railroad bonds rely upon the trust mortgage and the property contained in it as security.

The plaintiff did not merely remain silent. His assisting in the execution of the mortgage from the railroad company was a positive affirmative act, which would naturally lead the purchaser of the bonds to believe that he did not have title to the property which the mortgage purported to convey. Under these circumstances the fact that the public records disclosed the true state of the title, that the railroad had no easement in the demanded premises, will not prevent the estoppel of the plaintiff from denying such an easement.

The mortgage was a representation made to those who might contemplate purchasing the bonds, for the purpose of influencing their action, and which naturally would have that effect. Plaintiff might have been ignorant of the true state of the title, but such ignorance will not excuse a party who by his own representation misleads, though innocently, a purchaser. When one of two innocent parties must suffer, the loss falls upon him whose acts occasion it.

In order to create an equitable estoppel, it is not necessary that there should be intentional moral wrong. There may be such negligence as is the equivalent of fraud.

Held: that the plaintiff is estopped from denying that the defendant has not the usual statutory easement in the location of its main track across the demanded premises.

Where a writ in a real action contains no claim for mesne profits, none can be recovered.

On report.

Judgment for plaintiff, subject to easement of defendant in a strip one and one-half rods wide on each side of its main track across demanded premises.

Real action to recover two parcels of land in the town of Strong, Franklin County. The defendant seasonably disclaimed part of the first parcel and afterwards by an amendment to its pleadings added the following thereto by way of brief statement:

"1. That the defendant had title at the date of said writ and for a long time prior thereto to so much of said premises as was used by it in connection with the maintenance and operation of its railway and that the plaintiff is estopped by his own acts and conduct from setting up or claiming any title to the same; said defendant having so used and occupied so much of the land in item one in the writ as is not disclaimed and of the land described in item two in the writ a strip three rods wide, being one and one-half rods on either side of the middle line of its railway track, across said land a distance of 1,068 feet.

"2. That the plaintiff has waived all claims to said land, so used and occupied by the defendant, or any damages therefor, said railroad having been legally located over the same.

"3. That if the plaintiff at any time had any claim or any right of action for any portion of said premises so used and occupied by it the same was extinguished and relinquished on or about the eighth day of May, 1903, at which time all claims between said plaintiff and defendant were released and discharged by mutual consent for a valid consideration."

The defendant is the successor in title of the Franklin & Megantic Railroad Company, which was organized in 1883, and which constructed its road across the demanded premises and built upon the first parcel a woodshed, roundhouse, repair shop, etc. No legal location of this road built by the Franklin & Megantic Railroad Com-

pany was shown and neither did a legal taking of any of the first parcel of the demanded premises for a woodshed, etc., appear.

The plaintiff, an attorney at law, was a promoter and one of the original associates of the Franklin & Megantic Railroad Company, a stockholder and director from the beginning to the end, its counsel, a member of the committee to secure rights of way, one of its managing directors, its general manager and ticket agent, clerk, treasurer and local superintendent, which offices he continued to hold until the organization of the defendant corporation in 1897. By the defendant's brief it was "admitted that the plaintiff had title to the property in question before the construction of the road and there is no evidence of any payment to him of land damages for the taking."

The action was tried at the May term, 1905, of the Supreme Judicial Court, Franklin County, and after the evidence on both sides had been taken out it was agreed to report the same to the Law Court and that "upon so much thereof as is legally admissible the court to render such judgment as the law and evidence require."

All the material facts are stated in the opinion.

Heath & Andrews, for plaintiff.

Cornish & Bassett and F. W. Butler, for defendant.

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

POWERS, J. This case, which comes to the Law Court upon report, is a real action to recover two parcels of land in the town of Strong. The defendant seasonably disclaimed part of the first parcel, and at a later term, by an amendment to its pleadings, abandoned all claim to the second parcel except a strip 1068 feet in length and three rods wide, being one and one-half rods on each side of its railroad track crossing said parcel. As to this strip and so much of the first parcel as was not disclaimed, the defendant contended that they were used by it in connection with the maintenance and operation of its railway, and that the plaintiff was estopped by his acts and conduct from setting up or claiming any title to the same.

It is admitted that the plaintiff's father died intestate, seized and

possessed of the real estate in controversy, and the evidence shows that by inheritance and by deeds the plaintiff in 1879 obtained a good title to the property. The defendant is the successor in title of the Franklin & Megantic Railroad Company, a corporation organized in 1883, which constructed its road across the demanded premises and built upon the first parcel a woodshed, roundhouse, repair shop, etc., in 1884. The case does not show a legal location of this road, under R. S. 1883, chapter 61, or a legal taking of any part of the first parcel for side tracks, woodsheds, repair shops, etc., under section 16 of that chapter.

The first defense interposed by the defendant is that all plaintiff's claim or right of action for any portion of the premises used or occupied by it in connection with the maintenance or operation of its railway, has been for a valid consideration extinguished and relinquished. It appears that on May 9, 1903, the plaintiff held certain interests in the Franklin & Megantic Railroad Company, the Kingfield & Dead River Railway Company, the Kingfield & Dead River Railroad Company, and the defendant corporation, consisting of stock, notes, second mortgage bonds, contracts and collateral. On that day he entered into a mutual agreement with Lewis & Maxcy the former holders of four-fifths of the first mortgage bonds of the F. & M. R. R. Co., and who at that time owned four-fifths of the stock of the defendant corporation, to convey to them for a valuable consideration all his said interests, and to give a receipt and discharge of all claims against the F. & M. R. R. Co., and the defendant. In June following this agreement was carried out. Lewis & Maxcy paid the plaintiff $16,000, relieved him from liability on a certain note held by one Mead, and received in return a transfer of all his interests named in said agreement and a receipt discharging "the said companies of all claims."

Does the receipt debar the plaintiff from maintaining this suit? We think not. Such a receipt settles only such matters as are comprehended in it by the intention of the parties. It is to be construed in connection with the agreement which it was given to carry out. That by its terms relates to the plaintiff's interests in the four railway corporations named. The opening clause reads: "With reference to my interests in the F. & M. R. R. Co., the F. & M. Ry. Co.

the K. & D. R. R. R. Co. I make the following offer." Then follows a list of stocks, bonds, notes and debts, concluding, "I will also give a receipt and discharge of all claims." The natural inference is, that the parties were dealing with personal property and with claims payable in money whose enforcement could give the plaintiff any interest in the road. Neither the agreement nor the receipt is under seal. They do not purport to deal with nor convey real estate. This settlement was made by experienced business men with the assistance of able counsel on each side. Neither the language nor form is such as we should expect to find them adopting, had they understood that they were conveying title to land. Moreover, the case shows that at the time the agreement was entered into and the receipt given, Lewis & Maxcy did not know but that the railroad had been legally located and the land legally taken. No difference had arisen between them in regard to the subject matter of this suit, a suit not to obtain damages for land taken, but to recover the land itself. It is impossible to conclude that it was at that time the intention of the parties, or in any way within their contemplation, that the receipt should debar the plaintiff from asserting title to real estate that he owned.

The defendant in its plea set up and relied upon an equitable estoppel based upon the plaintiff's acts and conduct. The doctrine of equitable estoppel has been so fully and frequently examined and expounded by this court, and so recently in *Rogers* v. *Street Railway*, 100 Maine, 86, that it is only necessary here to ascertain whether the elements exist which justify and call for its application to the facts of this case.

The plaintiff was a promoter and one of the original associates of the Franklin & Megantic Railroad Company, a stockholder and director from the beginning to the end, its counsel, a member of the committee to secure rights of way, one of its managing directors, its general manager and ticket agent, clerk, treasurer and local superintendent. All these offices he continued to hold until the organization of the defendant corporation by the holders of the first mortgage bonds in 1897, a period of nearly fourteen years. The case shows that the construction of the railroad and the erection of the

buildings upon his land was done with his knowledge and consent. At a meeting of the stockholders on Sept. 6, 1884, upon the plaintiff's motion it was voted: "that the directors be authorized to mortgage the railroad with all its appurtenances, with the franchise of said company, and all real and personal property, now acquired and used or that may be acquired and used in connection with said railroad, to secure bonds to the amount of $50,000." The same date the directors authorized the president of the road and the plaintiff as treasurer, to sign the trust mortgage and appointed him one of the three trustees of the mortgage. Sept. 15, 1884, the trust mortgage from the Franklin & Megantic Railroad Company to the plaintiff and the other trustees was executed by the plaintiff as treasurer of the corporation. It conveyed "the railroad of the Franklin & Megantic Railroad Company from its junction with the Sandy River Railroad Co. in Strong to its terminus in Kingfield, and all its appurtenances, with the franchise of said company, all its real estate and all its personal property of every nature now acquired and used or that may be acquired and used in connection with said railroad." At that time the railroad had been located and the grading done across the plaintiff's farm and his homestead constituting the demanded premises. The evidence does not show whether the buildings were erected on the first parcel of real estate before or after the mortgage was given. This trust mortgage securing the first mortgage bonds was foreclosed, and the defendant corporation, formed by the first mortgage bondholders, entered into its possession of the railroad August 16, 1897, and has continued to occupy and operate it ever since.

The mortgage purported to convey the railroad of the Franklin & Megantic Railroad Company from its junction with the Sandy River Railroad in Strong to its terminus in Kingfield, and included within these bounds was that portion of the road which had been located by the engineer of the company and graded across the demanded premises. It was made for the purpose of securing the bonds of the road and thus inducing would be purchasers to invest in them. It cannot be doubted that the security operated as an active inducement to the investment. No estoppel can arise unless he who

alleges it was induced to and did in fact act, relying upon the conduct of the party whom he seeks to estop. *Tower* v. *Haslam*, 84 Maine, 86. From the well known course of business in the commercial world there is a presumption of fact that parties who purchase railroad bonds rely upon the trust mortgage and the property contained in it as security. In the absence of any evidence to the contrary that presumption is sufficient.

Maxcy & Lewis, who purchased four-fifths of the bonds before the organization of the defendant corporation, were ignorant of the true state of the title. The remaining bonds were held by the plaintiff, and exchanged by him for stock in the new corporation which was sold to Maxcy & Lewis before bringing this suit. If he did not know the true state of the title, as the owner of the land, occupying so many prominent positions in and sustaining such intimate relations with the old corporation, he ought to have known it. He had better opportunities for ascertaining the truth than did the purchasers of the bonds to whose rights the defendant has succeeded. It is true that an examination of the records in the offices of the railroad commissioners and the county commissioners might have revealed the truth. The plaintiff however did not merely remain silent. His assisting in the execution of the mortgage was a positive affirmative act, which would naturally lead anyone to believe that he did not have title to the security which the mortgage purported to convey, and that, as to him at least, the railroad company had the usual statutory easement in those portions of his real estate which it was then occupying and using with all the visible indicia of ownership. Under these circumstances the fact that the public records revealed the true state of the title will not prevent the estoppel applying to him. The mortgage must be regarded as a representation made to those, who might contemplate purchasing the bonds, for the purpose of influencing their action, and which naturally would have that effect. Ignorance of the true state of the title, will not excuse a party who by his own representations misleads, though innocently, a purchaser. *Titus* v. *Morse*, 40 Maine, 355. When one of two innocent parties must suffer, the loss falls on him whose own acts occasion it. *Colby* v. *Norton*, 19 Maine, 412.

The doctrine of equitable estoppel should be applied with great care. It is not necessary, however, that there should be intentional moral wrong. There may be such negligence as is the equivalent of fraud. *Martin* v. *M. C. R. R. Co.*, 83 Maine, 100. In the case at bar the money, obtained from the sale of bonds, was used in the further construction and equipment of the road in which the plaintiff was largely interested. The land used by the railroad was a part of or in the immediate vicinity of his homestead, and almost daily within his vision. He was chairman of the committee to obtain rights of way, in addition to all the other prominent positions which he held in the old corporation, and was throughout most intimately connected with its promotion and management. He made no claim, in contravention of the title which the mortgage purported to convey, for more than nineteen years after its execution, and not until he had parted with all his interests in the road.

The defendant's buildings upon the demanded premises were removed after the bringing of this suit. The case fails to show what land was occupied by such buildings or by the defendant's side tracks, etc., or that any land was so used or occupied by it at the time the plaintiff executed the mortgage.

Under all the circumstances it would be so inequitable and unjust to permit the plaintiff now to deny, to the injury of the defendant, that which by his conduct he asserted for the purpose of influencing, and which did in fact influence, the action of those to whose rights the defendant has succeeded, that he must be held to be estopped from denying that the defendant has the usual statutory easement in its location of its main track across the demanded premises, which in this case appears to be a strip one and one-half rods wide on each side of the centre line of its track.

The writ contains no claim for mesne profits, and therefore there can be no recovery for them.

Judgment for the plaintiff, subject to the easement of the defendant in a strip one and one-half rods wide each side of its main track across the demanded premises.

GEORGE H. TABER et al.

vs.

WILLIAM H. DOUGLASS et als.

Kennebec. Opinion April 5, 1906.

Probate Courts. Jurisdiction. Petition for Adoption. What Such Petition Must Allege. Collateral Inquiry into Jurisdictional Facts. Decree of Adoption Adjudged Void. R. S., c. 69, § § 32, 33.

Jurisdiction of a subject matter alone is not sufficient to establish the validity of a decree of a Probate Court. If the preliminary requisites and the course of proceedings prescribed by law are not complied with, jurisdiction does not attach and the decree will be, not voidable merely, but void. A petition to that court is the foundation upon which to base its jurisdiction and such petition must allege sufficient facts to show authority and power of the court to make the decree prayed for. The record of its proceedings must show its jurisdiction.

In the case at bar, it is true that the decree of adoption, according to the printed forms prescribed therefor, contains the statement that "the written consent required by law has been given thereto." Construed as a finding of fact this is contrary to the truth imported by the entire record; and the fact that a court of probate in giving judgment, passed upon the question of jurisdiction, does not preclude courts of common law from inquiring into the jurisdictional facts collaterally and declaring the judgment of the Probate Court valid or void as they shall find these facts true or false.

It is therefore *held* that the conditions precedent to the exercise of authority to make such a decree were not fulfilled in the case at bar, and that the proceedings of the Probate Court were irregular and the decree of adoption unauthorized and void.

When both parents of a child are living, there can be no consent by guardian, next of kin or next friend, to the adoption of such child unless *both* parents have abandoned such child and ceased to provide for its support.

On report. Action to stand for trial.

Action on the case by the plaintiffs who are husband and wife to

recover damages against the defendants, William H. Douglass, Ida Douglass and Emerline Stafford, for enticing one Lettie M. Taber, a minor of the age of fifteen years, to leave the plaintiffs' home and service. The minor is not the daughter of the plaintiffs by birth but it is alleged that she was legally adopted by them by virtue of a decree of the Probate Court, Kennebec County.

The defendant, Emerline Stafford, was defaulted, but the other two defendants appeared and pleaded the general issue and denied that the minor was ever legally adopted by the plaintiffs.

The action was heard at the October term, 1905, of the Supreme Judicial Court, Kennebec County, and at the conclusion of the evidence it was agreed that the same which was in the form of an agreed statement, should be reported to the Law Court with the stipulation that if upon the evidence "this action can be maintained by these plaintiffs (or by either of them upon proper amendment of the writ) then the action is to stand for trial against the two defending defendants; otherwise judgment to be entered against the plaintiffs for the two defending defendants."

The petition for adoption and the decree of adoption are as follows:

(Petition for Adoption.)

"To the Judge of Probate for the County of Kennebec;

"The undersigned, Geo. H. Taber of Gardiner, in said County, and Minnie B. Taber, his wife, respectfully petition for leave to adopt Lettie M. Farrar, a minor child of the age of one year, of Otis C. Farrar and Lettie M. Farrar, his wife, said petitioners being of sufficient ability to bring up and educate said child properly, having reference to the degree and condition of said child's parents.

"The mother of said child has abandoned it and ceased to provide for its support, and her present place of abode is unknown; and the father of said child has given consent to the adoption herein prayed for.

GEORGE H. TABER.
MINNIE B. TABER.

"The undersigned, parent of the child above named, hereby consents that said child may be adopted by the above named petitioners.

OTIS C. FARRAR."

(Decree of Adoption.)

STATE OF MAINE.

"KENNEBEC, ss. PROBATE COURT.

"To George H. Taber of Gardiner in said County, and Minnie B. Taber, wife of said George H. Taber:

"Whereas, you have petitioned this Court for leave to adopt Lettie M. Farrar, a child of the age of one year, and for a change of her name, and the written consent required by law has been given thereto; now, therefore,

"Trusting in your ability to bring up and educate said child properly, and being satisfied of the identity and relations of the parties, and of the fitness and propriety of such adoption, I, H. S. Webster, Judge of said Court, by virtue of the power and authority vested in me, have decreed that from this day said child is your child, and that her name is changed to Lettie M. Taber which she shall hereafter bear, and which shall be her legal name.

"You therefore assume the relations of parents, to said child, and will hereafter cherish, support, educate and otherwise provide for her as though you were her natural parents, and her natural parents are divested of all legal rights in respect to her, and she is free from all legal obligations of obedience and maintenance in respect to them; and she is, for the custody of the person and all rights of obedience and maintenance and also of inheritance, to all intents, and purposes, your child the same as if born to you in lawful wedlock.

"In witness whereof, I have hereunto set my hand and caused the seal of said Court to be affixed, at Augusta, this eleventh day of November in the year of our Lord one thousand eight hundred and eighty-nine.

H. S. WEBSTER,
Judge of Probate."

"H. OWEN, Register.

All the material facts are stated in the opinion.

George W. Heselton, for plaintiffs.

Heath & Andrews, for defendants William H. Douglass and Ida Douglass.

W. C. Atkins, for defendant Emerline Stafford.

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

WHITEHOUSE, J. This is an action by the plaintiffs who are husband and wife to recover damages against the defendants for enticing one Lettie M. Taber a minor of the age of fifteen years to leave the plaintiffs' home and service. The minor is not the daughter of the plaintiffs by birth, but it is claimed that she was legally adopted by them by virtue of a decree of the Probate Court. Otis Farrer the father of the minor, died about a year after the alleged adoption. The mother is still living in Gardiner in this state. The defendant Stafford was defaulted. The other defendants plead the general issue and deny that the minor was ever legally adopted by the plaintiffs.

The case comes to the Law Court on report with the following stipulations, namely: If the court shall find that the minor was legally adopted or that the question of the legality of the adoption is not open to collateral inquiry, the action is to stand for trial against the defendants William H. and Ida Douglass; but if the court shall find that the child was not legally adopted, the case is to be sent back for trial upon the plaintiffs' contention that Lettie M. Taber was their servant at the time she is alleged to have been persuaded by the defendants to leave the plaintiffs' household.

The provisions of our statutes relating to petitions for the adoption of children are found in sections 32 and 33 of chapter 69 of the Revised Statutes.

Sec. 32. "Any unmarried inhabitant of the state, or any husband and wife jointly, may petition the judge of probate for their county, for leave to adopt a child not theirs by birth, and for a change of his name."

Sec. 33. "Before such petition is granted, written consent to such adoption must be given by the child, if of the age of fourteen years and by each of his living parents, if not hopelessly insane or intemperate; or, when a divorce has been decreed to either parent, written consent by the parent entitled to the custody of the child; or such consent by one parent, when, after such notice to the other parent as

the judge deems proper and practicable, such other parent is considered by the judge unfit to have the custody of the child. If there are no such parents, or if the parents have abandoned the child and ceased to provide for its support, consent may be given by the legal guardian; if no such guardian, then by the next of kin in the state, if no such kin, then by some person appointed by the judge to act in the proceedings as the next friend of such child; if an illegitimate child, and under the age of fourteen years, such consent may be given by the mother of such child."

In their petition to the Probate Court for leave to adopt the child in question, in this case the plaintiffs represent that she is the minor child of Otis C. Farrar and Lettie M. Farrar, his wife and that the mother of said child has abandoned it and ceased to provide for its support; that her present place of abode is unknown, and that the father of said child has given consent to the adoption herein prayed for. The father's written statement over his signature consenting to the adoption is appended to the petition.

On the 11th day of November, 1899, a decree of adoption was granted on this petition without the service of any notice upon the mother either personal or constructive. The decree contains no findings of fact but retains the language of the printed blank that "the consent required by law has been given thereto."

In determining the question presented upon this state of facts it is proper to be reminded that courts of probate are wholly creatures of the legislature and are tribunals of special and limited jurisdiction only. It is true that when its proceedings have all been regular with respect to any matter within the authority conferred upon it by law, the decrees of the Probate Court when not appealed from are conclusive upon all persons, and cannot be collaterally impeached. It is equally well settled in this State that jurisdiction of the subject matter alone is not sufficient to establish the validity of its decree. If the preliminary requisites and the course of proceedings prescribed by law are not complied with, jurisdiction does not attach and the decree will be, not voidable merely, but void. The petition to this court is the foundation upon which to base its jurisdiction and it must allege sufficient facts to show the authority and power of the

court to make the decree prayed for. The record of its proceedings must show its jurisdiction.

In *Fairfield* v. *Gullifer*, 49 Maine, 360, it was held that in order to place a citizen under guardianship the records of the Probate Court must show by distinct allegation and not by implication or inference merely, that he falls within one of the classes named in the statute for whom the guardian may be appointed.

In *Snow in Equity* v. *Russell*, 93 Maine, 362, it was held that a decree of the judge of probate licensing the sale of real estate in that case by an executor for the purpose of paying debts and excusing the executor from giving bonds before making the sale, is void; that the sale under such license, no bond in fact having been given, is equally void; and that the validity of the decree and the sale may be attacked collaterally though no appeal was taken from the decree.

In *Coolidge* v. *Allen*, 82 Maine, 23, the Probate Court appointed a guardian for a person on the ground of insanity but without an inquisition by the municipal officers of the town as required by statute and without notice to the person for whom the guardian was asked. It was held that the appointment was without authority and void. See also *Snow, Appellant*, 96 Maine, 573; *Tracy* v. *Roberts*, 88 Maine, 315; *Fowle* v. *Coe*, 63 Maine, 245; *Thompson* v. *Hall*, 77 Maine, 163.

All of the statutory provisions in sections 32 and 33 of chapter 69 above quoted, except the last clause relating to illegitimate children, were in force at the time of the alleged adoption here in question. It has been noticed that written consent to the adoption, given in one of the several methods specified in section 33 is expressly made a statutory prerequisite to the exercise of the power conferred upon the court to grant such a petition. It is a jurisdictional fact required by statute and must be distinctly alleged in the petition as the basis of the court's authority to act in the premises; and after decree, proof of the allegation must be shown by the records of the court.

In this case it is alleged and proved that written consent to the adoption was given by the father of the child alone, although the mother was also living at the time; and whether this was a sufficient compliance with the statute can readily be determined by comparing the

facts of this case with the conditions in each of the classes of cases specified in the statute.

The plaintiffs' case manifestly falls outside of the first class therein described, for the reason that the child was only a year old, and the parents were not "hopelessly insane or intemperate."

It does not fall within the second class because there had been no divorce.

The facts do not bring it within the third class, because it is neither alleged nor proved that any notice actual or constructive was ever given to the mother, or that she was "considered by the judge unfit to have the custody of the child."

It does not belong to the fourth class, for the reason that when both parents are living, there can be no consent by guardian, next of kin or next friend, unless both parents have abandoned the child and ceased to provide for its support.

It is thus manifest that the record fails to disclose such written consent in the plaintiffs' case as is required by the conditions of either of the four classes specified in the statute. The plaintiffs' petition belongs to neither of these classes, but is sui generis. It is a composite result which embraces some features of both the third and fourth classes, but fails to comply with the essential conditions of either. The allegation in the petition that "the mother of said child has abandoned it and ceased to provide for its support" was obviously suggested by the provisions for consent in the fourth class where both parents have abandoned the child. It is clearly without force or significance and entirely immaterial as applied to a case in the third class, which the plaintiffs' case resembles more than any other. It is not equivalent to an averment that the mother is considered by the judge unfit to have the custody of the child. There is no allegation that the question of the mother's fitness was ever considered by the judge, and there could be no adjudication of the question without giving to the mother such "notice as the judge deemed proper and practicable." *Holman* v. *Holman*, 80 Maine, 139; *Peacock* v. *Peacock*, 61 Maine, 211. There appears to have been no attempt to comply with these requirements of the statute.

It is true that the decree of adoption, according to the printed forms prescribed therefor, contains the statement that "the written consent required by law has been given thereto." Construed as a finding of fact this is contrary to the truth imported by the entire record; "and the fact that a court of probate in giving judgment, passed upon the question of jurisdiction, does not preclude courts of common law from inquiring into the jurisdictional facts collaterally and declaring the judgment of the Probate Court valid or void as they shall find these facts true or false." *Fowle* v. *Coe*, 63 Maine, 245; *Jochumsen* v. *Bank*, 3 Allen, 87.

The conditions precedent to the exercise of authority to make such a decree were not fulfilled in this case; the proceedings of the Probate Court were irregular and the decree of adoption unauthorized and void.

According to the stipulation of the parties the case is sent back for trial upon the averment in the plaintiffs' declaration that the minor child in question was their servant at the time of the alleged wrongful act of the defendants' in enticing her away from their custody.

Case to stand for trial.

EDITH E. WELLS *vs.* NORTHEASTERN TELEPHONE COMPANY.

Franklin. Opinion April 9, 1906.

Telephone Companies. Negligence. Guy Wires. Lightning. Evidence. Exercise of Due Care. R. S., c. 55, §§ 17, 23.

The plaintiff recovered a verdict of $804 for the destruction of her barn and its contents by fire alleged to have been caused by the negligence of the defendant company in the construction and maintenance of its telephone line past the plaintiff's premises on the west side of the highway in the town of Avon. One of the defendant's poles upon which its line wires were suspended, was erected within about five feet of the northeast corner of the plaintiff's barn, and a guy wire consisting of a piece of ordinary telephone wire was stretched from the pole to the corner of the barn. There was no lightning arrester, or other appliance connected with this guy wire or with the telephone wires in that vicinity, to divert powerful currents to the earth at the time of thunder storms. Immediately before the fire, a thunder shower came up in the vicinity of the plaintiff's buildings and there was a discharge of lightning of extraordinary violence. A board on the corner post of the northeast corner of the barn was newly split from a point a little above where the guy wire was attached downward nearly to the sill. When first seen the fire was in this corner of the barn directly beneath the point where the guy wire was connected with it, and there was no indication that the barn was struck by lightning at any other point. The plaintiff's theory in substance was that a fragment of the lightning struck the telephone wires near by and that an electric current was eventually conducted by means of the guy wire to the corner of the barn which was thus ignited. The defendant's theory was that the barn was destroyed by lightning which descended directly from the clouds and communicated the fire without the intervention of any of its telephone wires. Expert evidence in support of both theories was offered and admitted.

In view of the admitted limitations of human knowledge respecting the laws of electricity and the immeasurable potential of a lightning discharge, the opinions of electricians in regard to its possibilities in a given case cannot be adopted with the same confidence as expert opinions based upon knowledge of the more exact sciences; and in view of the manifest effects of the lightning upon the telephone poles and the corner board of the barn in the case at bar, *Held:* that the evidence warranted the jury in following the conclusion of those experts who believed that the destructive spark was conveyed to the corner of the barn by the telephone wires,

in preference to those who testified that the barn was struck by a branch of a lightning bolt discharged directly from the clouds.

If the plaintiff's theory is correct that it was not safe or suitable construction to connect the guy wire with the barn without a lightning arrester or circuit-breaker, then the evidence warranted a finding by the jury that the defendant company did not exercise reasonable and ordinary care in establishing its line at the point in question.

If the defendant's theory is correct that it is utterly impracticable to divert lightning currents from such a wire to the earth by means or any insulators or circuit-breakers hitherto devised, it cannot be said to be manifest error on the part of the jury to find that such wire should not have been attached to the barn at all, and that in making such a connection, the defendant, if possessed of scientific knowledge to sustain its theory, did not act with proper regard for the rights of the plaintiff and the safety of her property.

The defendant was not obliged by law to guarantee the safety of its system under all possible conditions and circumstances, but it was required to exercise that due and ordinary care which the present state of scientific knowledge, as well as common observation of the nature of electricity and the enormous power of lightning would suggest as reasonably necessary for the protection of life and property along its line.

On motion and exceptions by defendant. Overruled.

Action on the case to recover damages for the destruction of the plaintiff's barn and its contents by fire alleged to have been caused by the negligence of the defendant in the construction and maintenance of its telephone line past the plaintiff's premises on the west side of the highway in the town of Avon.

Lightning during a thunder shower on the evening of August 22, 1903, was the primary cause of the fire. One of the telephone poles on which was suspended the wires of the defendant, stood about five feet from the northeast corner of the plaintiff's barn and this pole was guyed to the barn by means of a piece of ordinary telephone wire. There was no lightning arrester, or other appliance connected with this guy wire or with the telephone wires in the vicinity, to divert powerful currents to the earth at the time of thunder storms. The plaintiff claimed that lightning struck the main line of the defendant's wire some distance away and by means of the guy wire was conducted into her barn thereby setting fire to the same, and also that the defendant was negligent in the construction and maintenance

of its telephone line. The defendant contended that the barn was struck by lightning which descended directly from the clouds and communicated the fire without the intervention or conduction of any of the telephone wires, and that there was no negligence in the construction and maintenance of its said line.

The action was tried at the September term, 1904, of the Supreme Judicial Court, Franklin County. Plea, the general issue. Verdict for plaintiff for $804.68. The defendant then filed a general motion to have the verdict set aside. The defendant also took exceptions to the refusal of the presiding justice to give certain requested instructions, but these exceptions were not insisted upon at the Law Court.

All the material facts are stated in the opinion.

F. W. Butler and E. E. Richards, for plaintiff.

Foster & Foster and Joseph C. Holman, for defendant.

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

WHITEHOUSE, J. The plaintiff recovered a verdict of $804 for the destruction of her barn and its contents by fire alleged to have been caused by the negligence of the defendant company in the construction and maintenance of its telephone line past the plaintiff's premises on the west side of the highway in the town of Avon. The case comes to this court on the defendant's motion to set the verdict aside as against the weight of evidence. The exceptions are not insisted upon.

The defendant's line wires appear to have been suspended upon poles in the ordinary manner, one of the poles being erected within about five feet of the northeast corner of the plaintiff's barn. There was a curve in the road at this point and to counteract the tendency of the line wire to draw this pole from its vertical position, a guy wire, consisting of a piece of ordinary telephone wire, was stretched from the pole to the corner of the barn. One end of this guy wire appears to have been wound around the pole at a point about two feet below the telephone wires, and the other end attached to the barn by means of a lag screw driven into the corner post a short distance below the eaves. There was no lightning arrester, or other

appliance connected with this guy wire or with the telephone wires in that vicinity, to divert powerful currents to the earth at the time of thunder storms. Immediately before the fire on the morning of August 22, 1903, a thunder shower came up in the vicinity of the plaintiff's buildings. The rain fall was light, but it was followed by a discharge of lightning of extraordinary violence, though but a single flash of light was observed. About 650 feet north of the barn a large elm tree was standing on the easterly side of the road with its branches overhanging the travelled way and extending nearly to the telephone wires on the westerly side. The lightning struck this tree near the top and ran down almost the entire length of it splitting off a large branch nearly to the ground and stripping off some of the bark. One part of this electric discharge then appeared to cross the street under the telephone wires while another part ran along a wire fence.

Of the eleven telephone poles in the line extending northerly from the barn about 1800 feet, four, namely, numbers one, three, four and ten, counting from north to south were evidently shattered or slivered by the action of some part of this same electric discharge, while the other seven poles did not appear to have been injured by the lightning. Nor was there any distinct evidence of such injury to the pole at the corner of the barn or to any pole south of the barn. But the board on the corner post at the north east corner of the barn was newly split from a point a little above the lag screw, to which the guy wire was attached, downward nearly to the sill. When first seen the fire was in this corner of the barn directly beneath the point where the guy wire was connected with it, and there was no indication that the barn was struck by lightning at any other point.

Upon this state of facts it was the theory of the plaintiff that a fragment of the lightning bolt which shattered the elm tree, struck the telephone wires in close proximity to the overhanging branches; that an electric current was conducted by these wires to the most northerly pole that was found to be slivered, and in the opposite direction, past the most southerly pole that was splintered, to the pole at the corner of the barn; and that a current then passed into

the guy wire and thence by the wire to the corner of the barn which was thus ignited.

On the other hand the defendant company claims that of the three different general forms in which lightning may be discharged from the clouds to the earth, namely, the nearly direct line, the zigzag or angular course and the form of the inverted tree, the discharge in this case assumed the form of the branches of an inverted tree; that some of these branches struck the elm tree and the four telephone posts, independently of each other; that one of these fragments in like manner struck the corner of the barn and thus directly caused the fire; and that no electric current was conducted in either direction by the telephone wires and that none passed over the guy wire to the barn.

The defendant's theory is that the plaintiff's barn was destroyed by lightning which descended directly from the clouds and communicated the fire without the intervention or conduction of any of its telephone wires; and the company accordingly contends in the first place that nothing in the construction or maintenance of its telephone line past the plaintiff's premises can be deemed the proximate cause of the plaintiff's loss.

In support of the plaintiff's theory, attention is called not only to the manifestations of the lightning stroke actually observed at the time in question and the facts already stated in regard to the shattered poles of the telephone line and the riven board at the corner of the barn where the guy wire was attached and the fire was first seen; but also to the testimony of three electricians who gave evidence as experts upon the questions involved. Mr. Mallett, for twelve years an instructor in electrical science and a civil engineer does not controvert the proposition that lightning may be discharged to the earth in the form of the branches of an inverted tree, and is of opinion that when the lightning struck the elm tree in this case there might have been a secondary discharge which struck the telephone wires or poles and then followed the wires and passed to the earth by the best conductor it could find; but in his judgment a discharge in the form of the branches of a tree, or in any other form, would not be so widely diffused as to strike objects more than

two hundred feet distant from the principal charge. He also states that it is in accordance with his actual observation in a similar instance cited by him, that lightning will follow telephone wires or a wire fence, and shatter some of the poles or posts, and jump over and leave untouched others in the same line.

Mr. Whitney, electrical engineer for twenty years, corroborates these statements and refers to his own observation of poles in a telephone line, shattered by lightning which left the wires, though insulated in the usual manner, and ran down the poles below the brackets on which the wires were strung. The substance of the explanation given seemed to be that when a telephone pole was wet it was a very good conductor, and in case of lightning the quantity of electricity which may be discharged upon the wires is so greatly in excess of their carrying capacity that a part of it will leave the wires, and follow the poles to the earth.

Mr. Berry who has been engaged in the electric light business for seventeen years, a portion of the time as inspector of wires, and had made a special study of electrical construction, also explains in answer to interrogatories that in case of a very heavy discharge of lightning upon three telephone wires, the proportional part of it which those wires would be able to carry off would be very small for the reason that the potential of lightning, though never calculated, is supposed to be "up in the millions of volts," that in such a case the tendency of the electricity would be to split and go in both directions, and if it was wet it would jump from one pole to the other, the poles acting as lightning arresters: that it would jump from the wires or brackets to the pole and thence pass to the ground; that it would be liable to go down all of the poles, but if a pole was particularly dry and the wires were further away, it might not jump down to the pole. He further testified as follows: "Electricity goes by the best conductor, and as long as that conductor is insulated properly the current will be conveyed on that wire to its destination. . . . . "When we deal with lightning, that is something there is no rule for, and it will go down a tree or any other object, and will diffuse over different objects; but the amount that the tree will carry or the amount that any wire will carry is hardly in our province to know . . . .

I have never known a discharge of lightning by different branches to extend to any points more than 100 feet distant."

On the other hand two electric engineers for the defense give testimony in support of theories directly contrary to those advanced by the plaintiff's experts. Mr. Mather, manager of the Portland Light and Power Company, who has been connected with the operation of electricity and of lightning wires and railroad wires for fifteen years, in the first place explains the tendency of lightning apparently coming from a single bolt to divide into branches as it strikes the earth, or objects on the earth, and states as the result of his observation that in one instance six poles, all on the same line and placed about 125 feet apart were struck by the same stroke of lightning. He testifies that if lightning struck the elm tree, it would not leave the overhanging branches and pass to the telephone line on the opposite side of the road, for the reason that it would naturally take the path of least resistance along the branches to the trunk of the tree and down the trunk to the earth. He failed to find any evidence that lightning had passed down the pole to the guy wire at the corner of the barn, and in his opinion the barn was struck by a branch of the lightning discharge which struck the large tree and the several poles mentioned, and was not ignited by any current which was conveyed by the telephone wires. The fresh crack in the board at the corner of the barn to which the guy wire was attached, in the absence of any similar mark on the pole, in his judgment has no necessary tendency to show that the electric current came in over that wire.

Mr. Fickett, the city electrician of Portland, who had been engaged for twelve years in work pertaining to electricity, corroborates Mr. Mather, and compares the spreading of a discharge of lightning as it nears the earth to the bursting of a falling rocket that has been projected into the air. In his experience lightning does not ordinarily leave an insulated wire and pass down a pole on which the wire is supported, and in his opinion the barn and the poles and the elm tree were all struck by branches of the same bolt of lightning.

In view of the admitted limitations of human knowledge respecting the laws of electricity and the immeasurable potential of a lightning discharge, the opinions of electricians in regard to its possibilities in a given case cannot be adopted with the same confidence as expert opinions based upon knowledge of the more exact sciences; and in view of the manifest effects of the lightning upon the telephone poles and the corner board of the barn in this case, it is the opinion of the court that the evidence warranted the jury in following the conclusions of those experts who believed that the destructive spark was conveyed to the corner of the barn by the telephone wires, in preference to those who testify that the barn was struck by a branch of a lightning bolt discharged directly from the clouds.

In *Southern Bell Tel. Co.* vs. *McTyer*, 137 Ala. 601, 97 Am. St. Rep. 62, the Court said: "These may be said to be familiar facts in physics and therefore within the common knowledge of mankind and within the judicial knowledge of Courts; that atmospheric electricity or lightning is frequently discharged from clouds and passes to the earth; that metal wires strung in the air are good conductors of electricity, much better than the air; that electricity so discharged in the vicinity of such wires is liable and apt to pass into them and along them to their ends and then through the best conductors at hand into the earth. It may also be said to be common knowledge that when two wires are strung near to each other within a foot or two on poles through the air after the manner of telephone and telegraph wires, there is a likelihood or liability that lightning in its descent from the clouds will strike and follow both of them to their ends unless diverted by other more attractive conductors and must necessarily then pass from them to the earth through the best conductor then in its general pathway." *Jackson* v. *Wis. Tel. Co.*, 88 Wis. 243. But it is contended that even if the plaintiff's theory on this branch of the case is correct, that fact is wholly insufficient to establish any liability on the part of the defendant. It is still insisted that there was no negligence or other fault on the part of the defendant which can legally be deemed the proximate cause of the fire.

It is alleged in the plaintiffs declaration that the defendant "carelessly, negligently and defectively constructed and maintained its said

telephone line in this particular. A telephone pole was placed in the ground within a few feet of the corner of the plaintiff's barn and the pole with the main wire thereon fastened or stayed to said barn by running a common telephone wire from the top of said pole to said barn without insulation or the insertion of lightning arresters or anything whatever to prevent the passage of electricity and lightning from said pole to said barn."

It is suggested in the plaintiff's argument, that the defendant invaded the plaintiff's premises and attached the guy wire to her barn without consent of her predecessor in title, who was the owner at that time, and without consent of the plaintiff since that time. (See R. S., chapter 55, section 23.) It is therefore contended that the defendant is liable for all damages resulting from such unauthorized acts irrespective of the question of negligence. (*Derry* v. *Flitner*, 118 Mass. 133.)

It is not in controversy, however, that when the line was originally constructed past the plaintiff's premises by the Dirigo Telephone Company, the defendant's predecessor, no pole was erected at the corner of the barn, but the main wire was directly connected with the barn by means of an insulated oaken bracket spiked to the corner post, and that this was done by the express consent of Mr. White, the owner of the premises at that time. But when the line was re-constructed by the defendant company the pole was erected near the barn, and the guy wire attached to the corner of it as heretofore explained, and Mr. White, who still owned the property, says he told the man who was working on the wire that he "thought it wasn't right." It appears, however, that the connection of the wire with the barn as made was acquiesced in by Mr. White, without further question, for nearly four years thereafter, and it is not suggested that any objection has ever been made by this plaintiff during the year of her ownership before the fire.

It also appears that the defendant constructed its line past the plaintiff's premises without first obtaining a written permit from the selectmen of the town as required by section seventeen of chapter fifty-five of the Revised Statutes. But this fact obviously did not contribute as one of the real and proximate causes of the plaintiff's

loss. *Cumberland Co.* v. *Tow Boat Co.*, 90 Maine, 95. It could not have influenced any of the laws of electricity or meteorology involved in the decision of the case.

In view of these considerations and the fact that in the declaration the plaintiff claims to recover on the ground of negligence, and not upon the assertion of an absolute liability of the defendant for the consequences of a tortious act, the trial of the case proceeded upon the former theory, and two questions were properly submitted to the jury, first, the question already fully considered whether the fire was caused by electricity passing along and over the telephone wires and the guy wire to the barn, and secondly, whether there was any negligence in the manner of constructing and maintaining its line at the point in question, and especially in connecting the guy wire to the barn without the attachment of lightning arresters or other appliances calculated to prevent a current of electricity of such intensity as to cause fire, from entering the barn by means of such wire.

It was incumbent upon the plaintiff then, to show in the second place, that in connecting and maintaining a guy wire between the telephone pole and the plaintiff's barn without lightning arresters or circuit-breakers, the defendant company did not use that degree of care, prudence and foresight demanded by the exigencies of the situation. The company was not obliged by law to guarantee the safety of its system under all possible conditions and circumstances, but it was required to exercise that due and ordinary care which the present state of scientific knowledge, as well as common observation of the nature of electricity and the enormous power of lightning would suggest as reasonably necessary for the protection of life and property along its line.

The plaintiff claims that there was a manifest failure of duty in this respect on the part of the defendant, while the defendant as strenuously insists that the construction was in all respects suitable and adequate, and that the loss was not occasioned by any fault of the company.

Upon this question, the testimony of the experts is as sharply conflicting as upon the first proposition. Mr. Whitney and Mr. Berry

the two electricians who testify for the plaintiff upon this branch of the case, give emphatic expression to the opinion that it is not a safe or proper construction to connect a telephone line to a building by means of a guy wire, as was done in this case; that such a method is not to be approved at all, but if adopted, it would not be reasonably safe or suitable construction unless provided with lightning arresters circuit-breakers or "strained insulators."

On the other hand Mather and Fickettt are equally positive in their statements that the method followed by the defendant is a safe and proper construction and the one generally adopted thoroughout the country for the low tension wires required in telephone business; that the insulators referred to by plaintiff's witnesses, or a lightning arrester attached to the guy wire, would be wholly ineffectual and useless against the tremendous force of a lightning current. Mather further states that he had found by experiment that it was necessary to insert twelve of "these insulators" one after the other in a long chain in order to insulate from each other two ends of a wire that was charged with an electrical pressure of ten thousand volts.

Some of the testimony, however, would seem to rest upon a misapprehension of the exact nature and purpose of a lightning arrester. It is fairly to be inferred from all the evidence that it is a device which might more appropriately be termed a lightning diverter, since the office of it is not to arrest the lightning, but to divert it from the wiring by offering a comparatively easy course to the earth. In this alternative path a short air space is left between two plates introduced directly between the line and the earth. This air space is an effectual insulator for the normal current over the telephone wire, but the violent surges of a lightning current are said to leap over the air gap and pass to ground.

It is not in controversy, it is true, that the electrical explosion in question on the morning of August 22, 1903, was one of extraordinary though not of unprecedented violence; and it was the obvious duty of the defendant company to adopt methods of construction with reasonable regard to the protection of life and property against the ravages of lightning, and to anticipate, as far as practicable by the

exercise of due care and prudence, not only the probable effects of ordinary lightning discharges, but of such extraordinary thunder storms as according to the common observation of men, are known to occur not necessarily once every year, but once in several years and at no regular intervals. *Woodward* v. *Aborn*, 35 Maine, 271; *Smith* v. *Faxon*, 156 Mass. 598.

Thus if the plaintiff's theory is correct that it was not safe or suitable construction to connect the guy wire with the barn without a lightning arrester or circuit-breaker, the evidence warranted a finding by the jury that the defendant company did not exercise reasonable and ordinary care in establishing its line at the point in question.

Again if the defendant's theory is correct that it is utterly impracticable to divert lightning currents from such a wire to the earth by means of any insulators or circuit-breakers hitherto devised, it cannot be said to be manifest error on the part of the jury to find that such a wire should not have been attached to the barn at all, and that in making such a connection, the defendant, if possessed of scientific knowledge to sustain its theory, did not act with proper regard for the rights of the plaintiff and the safety of her property.

The conclusion accordingly is that the entry must be,

Motion and exceptions overruled.

In Equity.

ELVIRA L. KIMBALL

vs.

JOHN H. BLANCHARD, Executor and Trustee.

Piscataquis. Opinion April 14, 1906.

Trust. Active. Passive. Termination. Discretion of Trustee. Review by Court.

In this bill in equity, the complainant, one of the beneficiaries of a trust created by the will of her mother, seeks a decree of this court directing the trustee to pay her out of the trust fund a certain sum of money, which she had previously demanded of him, and thereafter to pay her such further and other sums, and at such times, as she, in her judgment, might deem necessary for her comfortable support and maintenance.

The clause in the will whereby the trust was created is as follows: "Second. I do hereby give, bequeath and devise unto John H. Blanchard, in trust, all of my estate, real, personal and mixed, wherever found and however situated. Said trust is for the benefit of my daughter, Elvira L. Kimball, wife of Daniel Kimball. I do hereby request my said trustee to convert into cash all my estate, and to invest the same where it will be secure, and keep same invested. . . . . I do hereby direct my trustee to pay to my daughter, said Elvira L. Kimball, such sums from time to time as she may need for her comfortable support and maintenance so long as she lives. I desire my trustee to take into consideration (in) making said payment, that it is the duty and obligation of her husband to support and maintain her, but if for any cause her husband does not provide suitable support and maintenance for her, then I request my said trustee shall see that the same is provided out of the funds in his hands as trustee. It is my desire that all of said property if necessary shall be used for the benefit of my daughter as herein set out."

By the next clause of the will the testatrix devised and bequeathed to the children of the complainant whatever might remain of this trust fund at the time of the death of their mother.

Held: That by the language of this will above quoted the testatrix vested in the trustee the discretion of determining upon the amounts and the times of the payments to be made to the complainant, and that the exercise of that discretion by him is not subject to revision by this court, so long as he has exercised that discretion in good faith according to his best judgment and uninfluenced by improper motives, and that this discretion has been properly exercised by the trustee.

While courts will sometimes decree the termination of a passive trust before the expiration of the time named, or one in which the purposes of the trust have been accomplished, or where no good reason is shown why the trust should continue, and where all the persons interested are sui juris and desire that the trust be terminated, such termination will not be decreed where these conditions do not exist. The decree sought in this case is in practical effect the termination of the trust, which is an active trust, the purposes of which have not been accomplished, and where there are others than the complainant who are interested in the trust fund.

The appeal must therefore be sustained. The bill will be dismissed, but without costs. The defendant may charge the reasonable and necessary expenses of this litigation in his account as trustee, to be passed upon by the Probate Court. The case is remanded for a decree in accordance with the opinion.

In equity. On appeal by defendant. Sustained.

Bill in equity brought by the plaintiff, one of the beneficiaries of a trust created by the last will and testament of Mary N. Lord, late of Guilford, deceased, the mother of the plaintiff, against the defendant who is the trustee under said last will and testament, praying that the trustee might be directed to pay to her the sum of three hundred dollars which she had demanded of the trustee, and thereafter pay to her from time to time such other and further sums as the plaintiff in her judgment might deem necessary for her comfortable support and maintenance.

The cause was heard on bill, answer and proofs at the September term, 1904, of the Supreme Judicial Court, Piscataquis County. After the hearing, the justice of the first instance "ordered adjudged and decreed, that the plaintiff's bill be sustained without costs; and that said defendant be directed to pay to said plaintiff from the estate of Mary N. Lord, the sum of three hundred dollars within sixty days from the date thereof, and that thereafter, he pay her such further sums, from time to time, from said estate, as the plaintiff in her judgment may need for her comfortable support and maintenance."

From this decree, the defendant appealed to the Law Court as provided by section 22 of chapter 79 of the Revised Statutes.

The case fully appears in the opinion.

J. S. Williams, for plaintiff.

Hudson & Hudson, for defendant.

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

WISWELL, C. J. This bill in equity, brought by one of the beneficiaries of a trust against the trustee, in which the complainant seeks a decree of this court directing the trustee to pay her out of the trust fund a certain sum of money, which she had demanded of the trustee, and thereafter to pay her such further and other sums, "as from time to time your petitioner in her judgment needs for her comfortable support and maintenance," requires a construction of the will by which the trust was created.

The testatrix, the mother of the complainant, died October 13, 1903. By her will, made July 9, 1900, and duly admitted to probate after her death, she made the following disposition of her property: "Second. I do hereby give, bequeath and devise unto John H. Blanchard, in trust, all of my estate, real, personal and mixed, wherever found and however situated. Said trust is for the benefit of my daughter, Elivra L. Kimball, wife of Daniel Kimball. I do hereby request my said trustee to convert into cash all my estate, and to invest the same where it will be secure and keep same invested. . . . . I do hereby direct my trustee to pay to my daughter, said Elvira L. Kimball, such sums from time to time as she may need for her comfortable support and maintenance so long as she lives. I desire my trustee to take into consideration (in) making said payment that it is the duty and obligation of her husband to support and maintain her, but if for any cause her husband does not provide suitable support and maintenance for her, then I request my said trustee shall see that the same is provided out of the funds in his hands as trustee. It is my desire that all of said property if necessary shall be used for the benefit of my daughter as herein set out."

So much as is important here of the next clause of the will is as follows: "Third. After the death of my daughter, said Elvira L. Kimball, whatever may remain on the settlement of the account by my said trustee, I give, bequeath and devise to the children of the said Elvira L. Kimball in equal shares." This clause also contains

provisions in regard to the disposition of the property in case any of her daughter's children "shall have deceased prior to the termination of said trust."

At the time that this will was made the complainant was about forty-four years of age; she had three children, two of whom were of sufficient age to support themselves, and the third, a boy, was about four years of age, at that time. The daughter was then living with her husband, but in September, 1901, a little more than a year after the date of the will, and something more than two years before the death of the testatrix, she was divorced from her husband. The whole estate left by the testatrix, according to the inventory, amounted to $1448.85, consisting of goods and chattels $86.25 and rights and credits, $1362.60. The trustee accepted the trust created by this will and entered upon the administration thereof. Immediately after the death of the testatrix he advanced to the complainant a small sum of money for her immediate requirements, later turned over to her the goods and chattels left by the testatrix, advanced other small sums to her, and in April, 1904 commenced paying her the sum of $12 per month, which advancements were continued until after the commencement of this litigation. At the time of the hearing he had of the trust fund, in his possession, the sum of $992.07.

Upon a hearing before a single justice a decree was made sustaining the bill, ordering the payment to her by the defendant of the sum of $300 out of the estate in his hands, an amount which the complainant had previously demanded of the trustee, and further ordered that the trustee thereafter, "pay her such further sums, from time to time, from said estate, as the plaintiff in her judgment may need for her comfortable support and maintenance." From this decree an appeal was taken by the defendant. The decree was evidently based upon the theory that, under the proper construction of the provisions above quoted in the will, the discretion of determining as to the amounts that might be necessary for the comfortable support and maintenance of the daughter was vested in her; that the duties of the trustee were merely passive, and that he was only required to

pay over to the complainant such portions of the estate as she, at any time, might demand.

We do not think that this is in accordance with the evident intention of the testatrix in creating this trust. In our opinion many expressions of the testatrix, contained in the will, and the provisions of the will, show an entirely contrary intention. The trustee was directed, "to convert into cash all my estate, and to invest the same where it would be secure, and keep same invested." In making payments to the daughter for her comfortable support and maintenance during her lifetime, the trustee was directed to take into consideration the duty and obligation of the complainant's husband to support and maintain her, but if for any reason the husband failed to do this, "then I request my said trustee shall see the same is provided out of the funds in his hands as trustee." More than this a devise over was made to the children of this daughter of whatever might remain of the estate at the death of the daughter.

It seems to us evident that, for reasons satisfactory to the testatrix, she did not desire to give her property outright to her daughter, even for life, or to create a naked trust in her favor which could be terminated at the will of the daughter whenever she might prefer to have the whole of the fund in her possession and control. That she did desire, and carried this desire into effect, to create a trust fund which would be helpful in affording some assistance to the daughter during the remainder of her life, and that if it became necessary, for her reasonably comfortable support and maintenance, the whole of the fund might be used for that purpose, but that the determination of this question as to how much was necessary, and as to when and how large payments should be made, was left to the discretion of the trustee, who, of course, would be required to take into consideration the condition of the complainant from time to time, as well as the small amount of the fund in his possession, to the end that this small sum would not be immediately exhausted and dissipated, but should be made to last as long as reasonably possible to carry out the purposes of the testatrix in creating the trust.

If this were not the intention of the testatrix we can conceive of no reason why she should have used the expressions above referred to.

By this will she made it the duty of the trustee, not the complainant, to take into consideration, in making payments to the daughter, the duty and obligation of a husband to support his wife. And she also made it the duty of the trustee, not the complainant, in case the husband failed in this duty, to see that the daughter's support was provided for out of the trust fund. These expressions are entirely inconsistent with an intention upon the part of the testatrix that the beneficiary should have the right to exercise her judgment and discretion as to the amounts she should demand and receive out of the trust fund, to such an extent even, that she might at any time require the payment to her of whatever might remain of the fund, to be, perhaps, immediately used and exhausted.

Much reliance is placed by the counsel for the complainant upon the case of *Cole* v. *Littlefield*, 35 Maine, 439. But the facts of that case are so different from those of the case at bar that the case can not be considered an authority for the construction of the will sought by the complainant. In that case the will directed the trustee "to pay over to his said wife said income from said estate as she requires, her receipt being his voucher." In the absence of more specific direction by the testator upon this question as to whose discretion should control, this language might well be given much weight. In that case the court said upon this question: "No authority is by the will conferred upon the trustee to do it. No discretion is confided to him respecting the support of the widow, or the support and education of the children. He is protected by the receipt of the widow, as his voucher, for the amount to be paid her from the income. He is directed to pay over to the widow 'the income from said estate as she requires.' He could not be charged as trustee with any breach of trust, should he wholly neglect to attend to the expenditure of the income paid over to her for the purposes named." But the will in this case contains no language from which an intention can be inferred to vest the complainant with this right of discretion. Upon the contrary as we have seen, the language of the testatrix and the direction given by her are absolutely inconsistent with any intention other than that this discretion should be exercised by the trustee. Again, in the case cited, the wife herself was made a

trustee, she was to hold the income in trust, in part, for the support and education of her children, and would be held accountable for any mismanagement of this trust, a fact somewhat relied upon in the case.

The case of *Kilburn* v. *Hosmer*, 10 Cush. 146, is very much more similar to the one at bar. There a testator devised to trustees the sum of $1500 to hold for the life of the testator's daughter, to be applied to her support and maintenance and the comfortable support, education and maintenance of her family, and at her decease the estate, or "whatever remains of it," was to be distributed among her children. Among other directions as to the management of the trust, it was made the duty of the trustees to "study the comfort and happiness of the testator's children," there being a similar provision for the benefit of another daughter. The court held that the discretion as to the expenditure of the funds was vested, by the terms of the will, in the trustees, and that it was for them to judge of the amount necessary for the comfortable support of the cestuis que trusts. The court relied, to some extent, upon the direction to the trustees "to study the comfort and happiness of the testator's children." This language can certainly have no greater effect in disclosing an intention of the testator as to who should exercise the discretion of determining the amounts necessary for the support of the beneficiary, than do the various expressions of the will in the case at bar that we have referred to.

In *Danahy* v. *Noonan*, 176 Mass. 467, a testator made the following disposition of his estate: "All my property, real and personal, to my mother Mary O'Brien, for the education and support of my daughter, Mary A. O'Brien. In a bill in equity brought by the daughter, then Mary A. Danahy, praying for a termination of the trust, the court said: "The trust is an active trust, requiring the exercise of discretion on the part of the trustee. Therefore, it is not to be terminated at the will of the cestui que trust."

And this suggests another reason why the prayer of the bill should not be granted. A decree in compliance with this prayer and in fact the decree entered, to the effect that this trustee should pay to the beneficiary the sum demanded, and hereafter whatever sums she, in the exercise of her judgment, should demand, is to all practical pur-

poses a determination of the trust. But an active trust is not to be terminated at the will of the cestui que trust. While courts will sometimes decree the termination of a passive trust, before the expiration of the time named, or one in which the purposes of the trust have been accomplished, or where no good reason is shown why the trust should continue, and where all the persons interested in it are sui juris, and desire that the trust be terminated, as in *Tilton* v. *Davidson*, 98 Maine, 55, and *Sears* v. *Choate*, 146 Mass. 395, we are not aware of any case where such a termination has been decreed where these conditions do not exist. *Danahy* v. *Noonan*, supra ; *Claflin* v. *Claflin* 149 Mass. 19 ; *Young* v. *Snow*, 167 Mass. 287.

This is an active trust, requiring the performance by the trustee of active and substantial duties in respect to the management of the trust fund for the beneficiaries. The complainant is not the only beneficiary, there are others who are interested in this trust property, the children of the complainant, who take under the will whatever may remain of the property at the death of their mother. The purposes of the trust have not been accomplished, and therefore for this reason a decree should not be entered which would have the effect of terminating the trust at the will of one of the beneficiaries.

The discretion to determine upon the amount of the payments to be made to the complainant, having been vested by the testatrix in the trustee, as we have seen, the exercise of that discretion by him is not subject to the revision of this court, so long as the trustee has exercised that discretion in good faith, according to his best judgment and uninfluenced by improper motives. *Read* v. *Patterson*, 44 N. J. Eq. 211 ; *Congregational Society* v. *Trustees*, 5 Cush. 454. That this has been done by the trustee is averred in his answer, and is shown by the evidence. The complainant has some little property of her own, a part of which she has been able to accumulate since her mother's death. The payment to her of $12 per month out of this fund, three or four times the amount of the income that can be obtained from this small, and all the time diminishing, principal, will soon exhaust the fund, probably long before she ceases to need assistance.

The appeal must therefore be sustained. The bill will be dis-

missed but without costs. The defendant may charge the reasonable and necessary expenses of this litigation in his account as trustee, to be passed upon by the Probate Court. The case is remanded for a decree in accordance with this opinion.

So ordered.

LOUISE F. CLARK, Admx., *vs.* WILLIAM C. HOLWAY.

Washington. Opinion April 14, 1906.

Promissory Notes. Failure of Consideration. Same may be Shown Under General Issue. Presiding Justice May Order Judgment for Defendant, When.

In this action of assumpsit upon a promissory note, the defendant filed a brief statement under his plea of the general issue, in which he set out facts, with reasonable certainty, which, if true, showed an utter failure of consideration for the note sued, but which concluded as follows, "So that the defendant claims that there was due him from the plaintiff's intestate at the time of the bringing of the plaintiff's action, and is still due him, the sum of $807.69 which the defendant presents in set off to the claims of the plaintiff." The presiding Justice, by whom the case was heard without the intervention of a jury, ruled that the plaintiff could not recover by reason of this failure of consideration, and ordered judgment for the defendant.

Held: that it was not an error for the presiding Justice to order judgment for the defendant upon the ground of a failure of consideration, when the facts set up in the defendant's brief statement, and proved or admitted showed that there was such a failure, whatever the defense may have been called by counsel in the brief statement.

It was not necessary for the defendant to have filed any brief statement in this case, since in an action of assumpsit, or of special assumpsit upon a promissory note, the want or failure of consideration may be taken advantage of under the general issue. Failure of consideration is not a special matter of defense nor a matter of confession and avoidance, which, before our statute had to be specially pleaded, or, since the statute set up in a brief statement of special matter of defense.

On exceptions by plaintiff. Overruled.

Assumpsit on a promissory note given by the defendant to the firm of Clark, Gardner & Pattangall, and reading as follows:

"$400.00 Machias, Me., Aug. 19, 1899.

"Six months after date, I promise to pay to the order of Clark, Gardner & Pattangall four hundred dollars at any Bank in Machias, value received.

WM. C. HOLWAY."

The facts relating to this note and the proceedings in connection with the same, as shown by the bill of exceptions, are as follows:

"The note is one of three notes of similar tenor, of same date, and for like amount, given by defendant to the payees in partial payment of logs and lumber purchased by him of them, the aggregate amount of the transaction being $6700.00. The three notes were, on the day of their date, distributed among the individual partners, each taking one of the notes as his individual property. The two notes transferred to Gardiner and Pattangall were paid at maturity, but Clark held his until his death and this is the note now in suit.

"The actual quantity of the logs and lumber being undetermined at the time of the sale, an estimate was made by the parties and payment made based on said estimate, the vendor firm giving defendant a written guaranty that the quantity would hold out to the estimate so made, and agreeing to repay him for any deficit that might be found therein.

"The writ is dated Sept. 20, A. D. 1901, and the action was entered at the ensuing October term of this court for Washington County; at the January 1902 term, William M. Nash was appointed auditor, and upon motion of plaintiff's counsel, defendant was ordered to file his plea and specifications of defense by March 8, A. D. 1902. At said term, defendant filed a stipulation that he would not claim to recover of plaintiff under the aforesaid guaranty as set out in his specifications, more than one-third of the amount of any deficit that might be found in aforesaid estimate. The order of court was substantially complied with by defendant filing plea of the general issue and specifications of defense on March 18, A. D. 1902. The case was thence continued from term to term until October 1905 term, when the auditor's report was filed. The auditor found that defendant was indebted to plaintiff for the full amount of the note and

interest, the amount being $449.93, but found that the quantity of the logs and lumber purchased of the firm by defendant fell short of the estimate, the shortage amounting in value to $2039.40.

"At said October 1905 term, hearing was had by the presiding Justice without the intervention of a jury, and the court ruled that plaintiff could not recover because of failure of consideration of the note in suit, and found for defendant on that ground. The question of failure of consideration was not raised by the defense, or suggested in any way in the trial of the case. To the ruling of the presiding Justice, the plaintiff seasonably excepted."

The brief statement filed by the defendant was as follows: "And for brief statement defendant further says that the plaintiff's action is based upon a promissory note given by the defendant to the plaintiff's intestate, as part payment for certain personal property which the plaintiff's intestate sold to the defendant on August 18, 1899; that said property consisted in part of certain lots of logs which were estimated in said sale as follows: hemlock logs estimated in amount at 75 M feet, valued at six dollars per M feet; spruce logs estimated in amount at 227 M feet, valued at eight dollars per M feet; pine logs estimated in amount at 200 M feet, valued at 7.50 per M feet, making a total value of logs thus sold of $3766.00: That plaintiff's intestate guaranteed that said estimates were correct, and by an indenture entered into by him, on the said 18th day of August A. D. 1899, agreed to pay to the defendant an amount sufficient to satisfy him for one-third of any deficiency that might exist if the logs thus sold failed to equal in amount the aforesaid estimate: And the defendant further says that instead of receiving from the plaintiff 75 M feet of lumber, he in fact received 36,349 feet of hemlock, and that instead of receiving 227 M feet of spruce, he in fact received 74,146 feet of spruce, and that instead of receiving 200 M feet of pine, he in fact received 68,220 feet of pine, all of which logs thus received at the valuation fixed by the agreement aforesaid were of the total value of $1342.91, leaving a deficiency to be accounted for of $2423.09, for one-third of which the plaintiff's intestate became liable so that the defendant claims that there was due him from the plaintiff's intestate at the time of bringing of the plaintiff's action

and is still due him, the sum of $807.69 which the defendant presents in set off to the claims of the plaintiff."

C. B. & E. C. Donworth, for plaintiff.

William R. Pattangall, for defendant.

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

WISWELL, C. J. This is an action upon a promissory note. The defendant filed a plea of the general issue with a brief statement wherein he set out facts, with reasonable certainty, which, if true, showed an utter failure of consideration for the note. The case had been sent to an auditor who had found and reported the facts set up by the defendant in his brief statement and as to which facts there was no controversy. The case was heard by the presiding justice, without the intervention of a jury, who ruled that the plaintiff could not recover because of this failure of consideration for the note sued and found for the defendant on that ground. The plaintiff took exceptions to this ruling because, "the question of failure of consideration was not raised by the defense, or suggested in any way in the trial of the case." In support of the exception it is argued that the brief statement does not set up a failure of consideration, but another defense, since it concludes as follows, "so that the defendant claims that there was due him from the plaintiff's intestate at the time of the bringing of the plaintiff's action and is still due him, the sum of $807.69 which the defendant presents in set-off to the claims of the plaintiff."

But it was not necessary in this case for the defendant to file a brief statement, since in an action of assumpsit the want or failure of the consideration for a contract may be taken advantage of under the general issue. Failure of consideration is not a special matter of defense, nor a matter of confession and avoidance, which, before our statute had to be specially pleaded, or, since the statute, set up in a brief statement of special matter of defense. The general denial of the plea of non assumpsit in actions of assumpsit not only denies the promise but as well the existence of a consideration for

the promise. That there was a consideration is a necessary allegation of a plaintiff's declaration in an action of assumpsit, and the burden of proving a consideration is upon the plaintiff, although in actions upon promissory notes a plaintiff may rely upon the presumption of a consideration, until evidence to the contrary has been introduced, when, upon the whole evidence, the burden of proof in this respect is upon him.

This is in accordance with authorities as well as with reason. In Chitty on Pleadings, 16th Am. Ed. 489, it is said: "In assumpsit, before the pleading rules, Hil. T. 4 W. 4, almost every matter might be given in evidence under the general issue non assumpsit, on the ground, as was said, that as the action is founded on the contract, and the injury is the non-performance of it, evidence which disaffirms the continuing obligation of the contract at the time when the action was commenced, goes to the gist of the action." And again, on page 493, it is said, "in modern times, and until the pleading rules above referred to came into operation, the plea of non-assumpsit was considered not only as putting in issue every allegation in the declaration, as well the promise as the inducement, consideration, and all averments in fact, but also as enabling the defendant to give in evidence every description of defense which showed that the promise was void or voidable, or that it had been performed." See also *Dixie* v. *Abbott*, 7 Cush. 640.

By the pleading rules adopted at Hilary Term 4 Wm. 4, this practice was somewhat modified so that all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be void or voidable in point of law, on the ground of fraud or otherwise, had to be specially pleaded. Examples given under this rule were infancy, coverture, release, payment, performance, illegality of consideration and various other defenses. But while illegality of consideration had to be specially pleaded, these rules were silent as to pleading the want of consideration, except in the case of accommodation bills and notes. In speaking of this question, it is said by Chitty, page 509, that: "The instance given in the above rules, that in an action on a warranty, the plea of non-assumpsit will operate as a denial of the fact of a

warranty upon the alleged consideration, seems to import that non assumpsit puts in issue, even in a special contract, as well the consideration as the promise." That this was the construction of the rule by the English court is shown by the case of *Broomfield* v. *Smith*, 1 Mees. & Welsb. 542.

But even if it were otherwise, and if the defense of a failure of consideration was one which formerly had to be specially pleaded, or, under our statute, set up in a brief statement of special matter of defense, we think that the defendant's brief statement in this case was sufficient for that purpose. The great object of the statute which provided for filing a brief statement of special matters of defense where a special plea was before required, was to do away with the technicalities and the strictness formerly required in special pleas in bar. To be sure the facts relied upon and necessary for the defense must be set out with certainty to a common intent, *Washburn* v. *Mosely*, 22 Maine, 160, by which is meant that the facts which constitute the cause of action or the ground of defense, must be so clearly and distinctly stated, "that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give judgment." The facts set up and relied upon in this brief statement were stated with sufficient certainty to satisfy all of these requirements, and the conclusion of the brief statement, wherein it was stated that the sum due the defendant was presented in setoff to the claim of the plaintiff does not, in our opinion, deprive the brief statement of its value as a statement of facts relied upon in defense to the action. It is evident we think that it was not the intention of the defendant or his counsel to file this claim as a statutory setoff to the note sued, since it was not filed within the time allowed by the statute for filing claims in setoff, it was rather the intention of the pleader to set out and to show that he relied upon these facts as a defense to the plaintiff's cause of action. The statement of facts showed that the defendant was not relying upon an independent claim or cause of action as a setoff to the note in suit, but that he did rely upon the facts connected with the transaction of the giving of the note as a defense thereto, because on account of these facts the note itself was

void. The brief statement was amply sufficient to give the plaintiff notice of the nature of the defense, as well as of the facts relied upon as constituting that defense, whatever the defense may have been called therein.

The plaintiff's objection that it was error for the presiding justice to order judgment for the defendant upon the ground of a failure of consideration, when the facts set up and relied upon showed that there was such a failure, because this defense, by that name, was not set up by counsel for defendant, is not tenable. If the facts stated and admitted, or found by the presiding justice, constituted an entire failure of consideration, it was his duty to order judgment for the defendant upon that ground, however the defense may have been denominated by counsel in a brief statement or elsewhere.

Exceptions overruled.

CHARLES C. STUART, Petitioner,

vs.

CLYDE H. SMITH, Sheriff, et als.

Kennebec. Opinion April 14, 1906.

Habeas Corpus. Prisoner Discharged. Exceptions Do Not Lie. Statute 1905, c. 131, Statute 1905, c. 134. R. S., c. 79, § 55; c. 101.

Exceptions do not lie to the discharge of a prisoner upon habeas corpus, whether the person discharged had been previously restrained of his liberty in civil or criminal proceedings.

On exceptions by defendant. Dismissed.

Petition for writ of habeas corpus. The petition omitting formal parts, is as follows:

"Respectfully represents Charles C. Stuart of St. Albans, in the County of Somerset and State of Maine, that he is unlawfully deprived of his personal liberty, and held in custody under restraint and

imprisoned in our jail in Skowhegan in said County of Somerset, by Clyde H. Smith, keeper of said jail.

"That on the ninth day of November, A. D. 1905, one H. H. Patten of Bangor, in the County of Penobscot, acting as attorney of record for one Henry F. Andrews of said Bangor, owner of an execution against your petitioner, for the sum of three hundred and four dollars and twenty cents debt or damage, and nine dollars and seventy-nine cents costs of suit thereon, which said execution issued from the Supreme Judicial Court within and for the County of Penobscot on the seventeenth day of October, A. D. 1905, made application in writing to George M. Chapman of Fairfield, a disclosure commissioner within and for said County of Somerset, praying that he issue a subpœna to your petitioner, commanding him to appear before said commissioner at such time and place as he might appoint, to make, on oath, a full and true disclosure of all his business and property affairs, in accordance with the provisions of chapter 114 of the Revised Statutes of Maine, and acts additional thereto and amendatory thereof, a copy of which application is hereto annexed and marked "Exhibit A."

"That said George M. Chapman thereupon, in his capacity as disclosure commissioner aforesaid, issued a subpœna to your petitioner, commanding him to appear before the said George M. Chapman on the fifteenth day of November, A. D. 1905, at the office of said George M. Chapman in said Fairfield in the County of Somerset, at ten o'clock in the forenoon, to make, on oath, a full and true disclosure of all his business and property affairs, in accordance with the provisions of chapter 114 of the Revised Statutes of Maine, and acts additional thereto and amendatory thereof, a copy of which said subpœna is hereto annexed and marked "Exhibit B."

"That your petitioner, believing the said George M. Chapman had jurisdiction in the premises, and that he was by law bound to obey the subpœna aforesaid presented himself for examination before the said Chapman at the time and place appointed, and submitted himself for examination but failed to obtain the benefit of the oath prescribed in said chapter 114; whereupon said Chapman issued a capias for his arrest, a copy of which is hereunto annexed and marked

"Exhibit C," upon which precept your petitioner was arrested on the fifteenth day of November, A. D. 1905, by William W. Nye, a deputy sheriff within and for said County of Somerset, who, thereupon, on said fifteenth day of November, committed your petitioner to the county jail in Skowhegan in said County of Somerset, where he was received and is now detained by Clyde H. Smith, keeper of said jail, by virtue of said precept.

"That said capias so issued by said George M. Chapman is utterly null and void, and issued by him without warrant or authority of law, and entirely outside his jurisdiction, for the reason following, to wit:

"1. The said town of Fairfield, where your petitioner was summoned to appear as aforesaid, is not the shire town of said County of Somerset.

"2. Your petitioner is not a resident of said town of Fairfield, and was not a resident thereof on the date of said petition.

"3. Neither the said Henry F. Andrews nor his said attorney, H. H. Patten, is or was on the date of said petition a resident of said town of Fairfield, or of the County of Somerset.

"4. Inasmuch as your petitioner could not be legally cited for disclosure under the laws of this state on said execution and petition to any place other than the town of his residence or the shire town of said County of Somerset, the pretended examination at the office of said George M. Chapman in said Fairfield on the fifteenth day of November aforesaid was without authority of law, and wholly null and void.

"That said Clyde H. Smith, keeper of the jail aforesaid, refuses to allow your petitioner his liberty and release him from imprisonment, but still claims to hold him in said jail by virtue of his arrest on said capias.

"Wherefore your petitioner prays that a writ of habeas corpus be issued out of this court, and that he may be taken before this Honorable Court forthwith, and hence discharged."

On this petition, a writ was duly issued and the petitioner came before a Justice of the Supreme Judicial Court in vacation, and asked

to be discharged for the reasons set forth in the petition. "Petitioner's right to be discharged depended on the construction of section 23, chapter 114 of the Revised Statutes of Maine and acts additional thereto and amendatory thereof."

The Justice hearing the matter ruled that chapter 131 of the Public Laws of 1905, was the law applicable to the case in question and discharged the petitioner, to which ruling the defendants excepted.

The only question considered by the Law Court was whether or not exceptions lie to the discharge of a prisioner upon habeas corpus.

The case appears in the opinion.

Gould & Lawrence, for plaintiff.

H. H. Patten, for defendants.

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

WISWELL, C. J. The petitioner, having been committed to jail upon a capias issued by a disclosure commissioner, applied to a justice of this court, in vacation, for a writ of habeas corpus upon the ground that the disclosure commissioner who issued the capias had no jurisdiction under the statute, as amended by Chapters 131 and 134 of the Public Laws of 1905, which acts, approved upon the same day, appear to be entirely inconsistent with each other, and that consequently he was illegally deprived of his liberty. The writ was ordered to issue, and upon its return and after a hearing, the justice ordered the petitioner to be discharged from imprisonment. This order being based upon the conclusion that the disclosure commissioner had no jurisdiction in the premises under the statute as amended. Whereupon the creditor alleged exceptions to this ruling.

But the correctness of this ruling cannot be here considered. These exceptions are not properly before us, because of the well settled principle in this, and in numerous other states of this Union, that exceptions do not lie to the discharge of a prisoner upon habeas corpus. This was early decided in Massachusetts in an opinion by Chief Justice Shaw in *Wyeth* v. *Richardson*, 10 Gray, 240. The statutes in relation to exceptions and habeas corpus proceedings of

that state at that time being in substance and effect the same as are our statutes in relation to these subject matters. That case was followed by this court in *Knowlton, Petitioner*, v. *Baker*, 72 Maine, 202, wherein it was expressly decided that exceptions do not lie to the discharge of a prisoner on habeas corpus. The report of that case does not show whether the prisoner was held upon civil or criminal proceedings, but this is immaterial since the reason of the rule is as equally applicable to the one case as the other.

The purpose of this celebrated writ of habeas corpus, which has been denominated "the great writ of liberty," is not only to secure the right of personal liberty to one who has been illegally deprived thereof, but also to insure a speedy hearing and determination of the questions involved and as to the right of the petitioner to be released from imprisonment. To allow exceptions to the order for a discharge of the prisoner, by any judge who is given by statute the power to order the issuance of the writ and to act thereon, would be to seriously impair the efficiency of a process which has been relied upon by English speaking people for many centuries as the bulwark of their liberties, and would be inconsistent with the history and theory of the writ. It is better that occasional errors by a judge having jurisdiction should go uncorrected than that the speedy release of a person illegally deprived of his liberty should be prevented, or delayed by the length of time that must necessarily elapse in many cases before exceptions to an order for the discharge of the petitioner could be presented, argued and determined by the proper tribunal.

Various provisions of our statutes in relation to habeas corpus proceedings, R. S., chapter 101, show a legislative intention in accordance with the history and theory of the writ. "On return of the writ, the court or justice, without delay, shall proceed to examine the causes of imprisonment or restraint." "The court or justice, may, in a summary way, examine the cause of imprisonment or restraint; hear evidence produced on either side, and if no legal cause is shown for such imprisonment or restraint, the court or justice shall discharge him." "No person, enlarged by habeas corpus, shall be again imprisoned or restrained for the same cause," with certain exceptions not applicable here.

The provisions of R. S., c. 79, sec. 55, in relation to exceptions: "When the court is held by one justice, a party aggrieved by any of his opinions, directions or judgments, in any civil or criminal proceedings, may, during the term, present written exceptions in a summary manner," etc., are applicable to another class of cases and not to proceedings of this nature, as decided in *Wyeth* v. *Richardson*, supra.

Exceptions dismissed.

PERXEDE LIBERTY *vs.* HOWARD P. HAINES, Administrator.

York. Opinion April 19, 1906.

Assigned Claims. Suit Thereon. Writ to be Endorsed by Assignee. Statute Mandatory. Evidence. Extrajudicial Admissions. Finding of Facts by Presiding Justice not Reviewable. R. S., c. 84, § 144.

R. S., chapter 84, section 144, which provides that the name and place of residence of an assignee, if known, shall, at any time during the pendency of the suit, be endorsed by the request of the defendant on a writ or process, or further proceedings thereon shall be stayed, is mandatory.

Merely placing a letter upon the files of the court does not make it evidence. To have that effect it must be formally offered and introduced.

While an extrajudicial admission may be withdrawn before it is acted upon, it is still to be received as evidence of the fact admitted; and its withdrawal goes only to its weight.

In the case at bar the only evidence of the admission of an assignment is found in the statement of counsel to the court withdrawing the admission. Considering that statement as a whole, the fact that an assignment had been made is not the only inference that can be drawn from it; and the finding of the presiding justice upon the issue of fact presented cannot be reviewed.

On exceptions by defendant. Overruled.

Assumpsit on an agreement alleged to have been made by the defendant's intestate, Samuel Haines, late of Saco, with the plaintiff, and brought at the September term, 1904, of the Supreme Judicial Court, York County.

On the 25th of January, 1905, while the action was pending, the plaintiff's attorneys, Cleaves, Waterhouse & Emery, wrote the defendant's attorneys, Symonds, Snow, Cook & Hutchinson, a letter which letter the defendants' attorneys claimed and contended was in substance a statement that the plaintiff's claim upon which this action was brought, had been assigned by the plaintiff. Thereupon at the May term, 1905, of said court, the defendant filed a motion "that the name and place of residence of such assignee be endorsed on the writ in said action, or that further proceedings therein shall be stayed under and in pursuance of the provisions of section 144 of chapter 84 of the Revised Statutes." After the hearing on this motion, the presiding Justice overruled the same "and refused to direct either that the name and place of residence of an assignee be endorsed on the writ or process in said action, or that further proceedings thereon be stayed," and thereupon the defendant excepted.

The case sufficiently appears in the opinion.

Cleaves, Waterhouse & Emery and Foster & Foster, for plaintiff.

Symonds, Snow, Cook & Hutchinson and Allen & Abbott, for defendant.

SITTING: EMERY, STROUT, SAVAGE, POWERS, SPEAR, JJ., EMERY, J., concurring in the result only.

POWERS, J. The defendant filed a motion stating that he had been informed by the plaintiff's counsel, that the demand sued had been assigned by the plaintiff, or passed beyond her control, so that she no longer had the disposition or the management thereof; and asking that the name and place of residence of such assignee be endorsed upon the writ or that further proceedings therein be stayed. Upon hearing the motion was overruled and to this ruling the defendant excepts.

R. S., chapter 84, section 144, is mandatory. "The name and place of residence of an assignee, if known, shall, at any time during the pendency of the suit, be endorsed by request of the defendant on a writ of process, commenced in the name of the assignor, or further proceedings thereon shall be stayed." If the fact of the assignment

was established, the defendant was of right entitled to have his motion granted. It was not discretionary with the presiding justice. The motion raised an issue of fact, and its denial involved a finding of fact, that the defendant had failed to prove the assignment. If there was evidence both ways this finding is not reviewable upon exceptions. *Curtis* v. *Downes*, 56 Maine, 24; *Coolidge* v. *Smith*, 129 Mass. 556. The effect, however, of facts proved by uncontroverted evidence is a question of law. *Todd* v. *Whitney*, 27 Maine, 480; *Witham* v. *Portland*, 72 Maine, 539; so also when only one inference can be drawn from the evidence.

The case does not show that the defendant offered any evidence in support of his motion. The exceptions state that on the second day of the term he filed with his motion a letter from the plaintiff's attorneys, which it is claimed shows that such an assignment had been made. In his motion the defendant states that he "has been informed in substance by the counsel for the plaintiff that the plaintiff's claim and demand therein against the defendant have been assigned by said plaintiff or passed beyond her own control, so that she no longer has the disposition or management thereof. The motion does not state whether the means of his information was an oral or written communication and there is in it no reference to the letter which was filed with it. The letter is printed and made part of the exceptions. It contains such statements of fact as would have been sufficient to charge the defendant with notice of an assignment. These extrajudicial admissions, contained in it, were made by the plaintiff's attorney in the management of the litigation and for the purpose of influencing the proceedings in the cause, and were therefore admissible in evidence against the plaintiff. Wigmore Ev. section 1063. The letter was not offered in evidence by the defendant. Merely placing it upon the court files did not make it evidence. If the defendant relied upon it, to support his contention upon the question of assignment, it should have been formally offered and introduced.

All the evidence of an assignment was the admission of plaintiff's counsel at the hearing that he had written the letter, and in the same breath explaining his reasons for so doing, stating that the letter was written without the knowledge of his client, and emphatically denying

that there ever had been any assignment. In brief, the only admission of an assignment, and the only way in which the letter came before the court, was in the statement of the plaintiff's counsel made at the hearing on the motion. As a part of that statement and admission the letter was before the court for consideration, but in determining the effect and weight of this admission, the whole statement, and not merely the letter, must be considered. While an extrajudicial admission may be withdrawn before it is acted upon, it is still to be received as evidence of the fact, and its withdrawal only goes to its weight. Wigmore Ev. section 1067. In this case the only evidence before the court of the admission was found in the statement withdrawing it. Considering that statement as a whole, the fact that an assignment had been made is not the only inference to be drawn from it, and the finding of the presiding justice cannot here be reviewed.

Exceptions overruled.

ANDREW FREDERICKSON

vs.

CENTRAL WHARF TOWBOAT COMPANY.

Sagadahoc. Opinion June 26, 1906.

Negligence. Contributory Negligence. Assumption of Risk.

1. Where the evidence does not show that the thing which caused the injury to the plaintiff was under the management or exclusive control of the defendant corporation, negligence is not to be presumed from the accident itself.
2. The fact that a plaintiff is zealous in the performance of his duty does not excuse him from taking precautions for his own safety.
3. The owners of a caisson contracted with a towboat company to tow it from the Kennebec River to the Portsmouth Navy Yard, and provided it with a chock at the bow with which to fasten and adjust a hawser for towing, approved by the plaintiff who was an experienced rigger and seaman and who was directed by them to take charge of the tow, *held*, that the owners of the tugs were not responsible for an injury caused by the insufficiency of the appliance, or the management of that end of the hawser.
4. The plaintiff by taking charge of the caisson while it was being towed assumed the risks incident to his employment.
5. It was negligence for the plaintiff to stand unnecessarily within the bight of the line attached to the tow.
6. It was not negligence for those in charge of the tugs to do what was necessary to regulate the course of the tow in the channel, even if it subjected the appliance to which the hawser was attached to unusual strain; and the captain had a right to exercise his judgment in adopting the method of proceeding with one tug before the other, with the hawser attached to the bow of the caisson.

On motion and exceptions by defendant. Sustained.

Action on the case to recover damages for personal injuries sustained by the plaintiff by reason of the alleged negligence of the defendant company while towing a caisson from the Kennebec River to the Portsmouth Navy Yard. The plaintiff had charge of the

caisson and was on board of the same at the time of the injury complained of.

The action was tried at the April term, 1905, of the Supreme Judicial Court, Sagadahoc County. Plea, the general issue. Verdict for plaintiff for $2165.41. Defendant then filed a general motion for a new trial. The defendant also seasonably requested that certain instructions be given to the jury but the presiding Justice declined to give the same and thereupon the defendant excepted.

The case appears in the opinion.

Frank E. Southard, for plaintiff.

Benjamin Thompson, for defendant.

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

PEABODY, J. The case is before the Law Court on exceptions and motion by the defendant.

This is an action on the case to recover for personal injuries sustained by the plaintiff while on board and in charge of a caisson which the defendant's steam tugs were towing from the Kennebec River to the Portsmouth Navy Yard. The plaintiff at the time of his injury was in the employ of the Bath Iron Works, and was directed by that company to take charge of the caisson while it was being towed. It was an unwieldy structure about 100 feet long, 50 feet deep and from 8 to 18 feet wide, provided with ballast to keep it upright while afloat and a temporary deck and temporary appliances with which to fasten and adjust the hawser for towing, but no means whereby it could be managed or steered. It had been constructed and prepared for the voyage by the Bath Iron Works and the chock or wooden appliance at the bow through which the hawser ran was fitted to it with the approval of the plaintiff, who was consulted by his employers as an experienced rigger and seaman.

The caisson was towed to the mouth of the Kennebec River by two Bath tugs, but finding it unmanageable when they proceeded into the rougher water beyond they put back and abandoned the attempt. Under these circumstances the defendant company was engaged to tow

the caisson, its duty being to furnish two tugs and a hawser and to do the towing. The defendant had no knowledge of the strength of the appliances on the tow for adjusting the hawser and had nothing to do with the management of that end of the hawser. For this the owners of the tow were responsible. *Pederson* v. *John D. Spreckles Bros. Co.*, 81 Fed. R. 205.

After trying several methods of towing it was found that when proceeding by the side of the caisson the tug was in danger of being crushed, and with one tug ahead and the other attached to the after end of the tow, for the purpose of steering it, the forward tug was obliged either to pay out its hawser continually or back with the danger of fouling its propeller, and both these modes of towing had to be abandoned. The only way to manage the tow without danger of disabling the tugs was by proceeding one tug before the other with the hawser attached at the bow of the caisson. Good progress could be made in this way, but the tow could not be prevented from veering, sometimes turning nearly at right angles with the tugs, and from its character it thus subjected the hawser and the connecting appliances to a great strain. In one of these instances the plaintiff was endeavoring to protect the hawser by means of a board inserted between it and the chock on which it was bearing and was standing in the bight of the hawser formed by the veering of the craft from its course. One of the tugs had cast off and the other was proceeding at half speed owing to their position in the Portsmouth River which they had entered, and at a time when there was less strain upon the chock than that to which it had frequently been subjected when in the rough water outside, it gave way and the plaintiff was swept overboard by the hawser and sustained severe injuries.

The verdict was for the plaintiff for $2165.41. In giving this verdict the jury must have found that the defendant company was negligent either in subjecting the chock to the sudden strain or in adopting the method above described for towing the caisson, but there is nothing in the case to warrant either of these views. Whatever was done by the tug immediately prior to the accident for the purpose of regulating the course of the tow, even if it subjected the

chock to an unusual strain, was admitted by the plaintiff to have been the only thing to do under the circumstances, it being necessary to keep the caisson in the channel ; while in view of the clear explanation given by the captain, and which was not rebutted by any other evidence, there can be no occasion to question his judgment, or at least under the circumstances his undoubted right to exercise his judgment, in adopting the method of towing above described.

It is clear that the accident is attributable to the unwieldy and unusual character of the structure which was being towed, a circumstance for which the defendants are not responsible. The plaintiff, in taking charge of this caisson, assumed the risks incident to his employment. There is also reason for holding that he was guilty of contributory negligence in standing unnecessarily within the bight of the line, the danger of which must have been apparent to him by his experience and knowledge of the conditions. The fact that he was zealous in the performance of his duty did not excuse him from taking precautions for his own safety which were obviously dictated by prudence. In re *Ramsay*, 95 Fed. R. 299; *Nelson* v. *Steam Dredge No* 1, 134 Fed. R. 161; *Nelson* v. *Sanford Mills*, 89 Maine, 219.

There is no essential conflict of evidence. The instructions requested were equivalent to a request that a verdict be directed for the defendant, and for the reasons expressed they should have been given to the jury.

Exceptions sustained.
Motion sustained.

EUGENE F. HIBBARD

vs.

WILLIAM NEWMAN AND MAINE CENTRAL RAILROAD COMPANY, Trustee.

Piscataquis. Opinion June 26, 1906.

Plea in Abatement. Requisites. Demurrer. Trustee Process. Trustee an Adverse Party. How Question of Jurisdiction Must be Raised. Mixing Pleading with Disclosure. Same not Allowable. R. S., c. 88, §§ 5, 14.

A plea in abatement being a dilatory plea is required to be technically exact so as to preclude all presumption or argument against the party pleading.

Trustee process is created by statute, and while it is regulated by statutory requirements, yet its procedure must conform to the rules of civil pleading. The trustee in relation to the plaintiff is an adverse party in the suit and is entitled to make his defense as the principal defendant may, either upon issues of law or of fact. He may plead in abatement want of jurisdiction, or by his disclosure he may in effect plead in bar to the maintenance of the action against him.

In a trustee process jurisdiction depends upon the residence of the trustee at the time the action is brought, and the question of jurisdiction must be raised by a plea in abatement, or by motion to abate when the essential facts of the defect appear by inspection.

When an action is brought in a county in which it is alleged the trustee did not reside at the time of service, a plea in abatement is bad on demurrer if it fails to allege non-residence at the time the action was commenced.

In the case at bar, the plea made on the return day of the writ describes with precision the defendant's legal residence at the date of the plea, but does not allege his residence at the time when the action was brought and does not negative the residence of the trustee in the county where the action was brought. *Held:* that the demurrer to the plea must be sustained.

Also in the case at bar the trustee sought to incorporate in his disclosure matters in the nature of a plea in abatement affecting the jurisdiction of the court. This is not admissible unless the defect is apparent in the writ

or return. If there is no jurisdiction the plaintiff ought not to be debarred from maintaining the procees in another county, but if the discharge is based upon the facts disclosed it should appear that the subject matter is *res adjudicata.*

On exceptions by principal defendant. Overruled.

Assumpsit on account annexed to recover the sum of $16.80. The action was commenced by a trustee writ issued by the Dover Municipal Court, in Piscataquis County, dated Sept. 22, 1904. On the return day of the writ the principal defendant filed a plea in abatement to the writ, the material part of which said plea is stated in the opinion. The plaintiff demurred to the plea and the demurrer was sustained and the plea adjudged bad.

Also on the return day of the writ the trustee filed its disclosure making general denial that it had in its hands and possession goods, effects or credits of the principal defendant, and in answer to interrogatories made further disclosure in the nature of a plea in abatement affecting the jurisdiction of the court, the material part of which said disclosure appears in the opinion. To this disclosure the plaintiff filed an answer in the nature of a demurrer, the material part of which also appears in the opinion. At the time of the service of the writ upon the trustee there was due from it to the principal defendant $31.50 as wages. The judge of the Municipal Court ruled that the trustee must raise the question of jurisdiction by plea in abatement, and not by way of answer in its disclosure, and charged the trustee for the amount disclosed less its costs.

To the aforesaid rulings sustaining the demurrer to the plea in abatement, and that the trustee must raise the question of jurisdiction by plea in abatement and not by way of answer in its disclosure, the principal defendant excepted, and in accordance with the provisions of section 17 of chapter 507 of the Private and Special Laws of 1899, these exceptions were duly entered in the Law Court for determination.

All the material facts appear in the opinion.

Hudson & Hudson, for plaintiff.

L. B. Waldron, for principal defendant.

N. & H. B. Cleaves & S. C. Perry, for trustee.

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

PEABODY, J. This action was commenced by a trustee writ issued by the Municipal Court of Dover in Piscataquis County, dated September 22, 1904. On the return day, the 3rd Tuesday of November, 1904, the principal defendant filed a plea in abatement to the writ and declaration alleging therein that "at the time of the purchase and service of the said writ, and long before and ever since, he, the said defendant, William Newman, resided in the town of Dexter in Penobscot County, and not in Piscataquis County where said writ is returnable. That said Maine Central Railroad Company alleged trustee in said writ is a domestic corporation created and existing under the laws of Maine, has its established and usual place of business in Cumberland County (and not in Foxcroft in Piscataquis County as alleged) where it held its last annual meeting and usually holds its meetings, and that at the time of the purchase and service of said writ, and long before and ever since, there has existed and still exists in Portland in said Cumberland County, a Municipal Court for said Portland with a jurisdiction sufficient in this case. Wherefore said plaintiff, if he had any good cause of action against the said defendant and against the Maine Central Railroad Company as alleged trustee therein, ought to have commenced the same before such Municipal Court of Portland and not before this Dover Municipal Court." To this plea the defendant filed a demurrer "because insufficient in law" which was sustained by the court.

Also on the return day of the writ the trustee filed its disclosure making general denial that it had in its hands and possession goods, effects or credits of the said principal defendant, and on its examination in answer to interrogatories further disclosed that "The said Maine Central Railroad Company is and was at the time of the service of the writ in this case upon it a domestic corporation being created and existing under the laws of said State of Maine, with its business office at Portland in the County of Cumberland where its meetings are held and where its last annual meeting was held, and

that service was made upon its clerk at said Portland; and it denies that this court has jurisdiction over it in this proceeding. At the time of the service of the writ upon said alleged trustee there was due to William Newman the sum of thirty-one dollars and fifty cents ($31.50) as wages for his personal services in the employment of said alleged trustee." To this disclosure the plaintiff filed an answer in the nature of a demurrer that it is insufficient in law because it is argumentative, leaving it for argument and inference that it does not have a usual place of business at said Foxcroft because it stated that at the time of the service of the writ it was a domestic corporation being created and existing under the laws of the State of Maine with its business office in Portland in the County of Cumberland, etc., and does not state that such were facts at the time of the purchase of the writ, and because it sets up by way of disclosure lack of jurisdiction in said Piscataquis County instead of setting up such defense by way of plea of abatement. The judge ruled that the trustee should take advantage of jurisdiction by plea in abatement and not by way of answer in its disclosure, and charged the trustee for the amount disclosed less its costs.

The case comes before the Law Court on the exceptions of the principal defendant, the trustee not having filed exceptions. The questions raised by the exceptions are, first, whether the plea in abatement is sufficient in law, second, whether the want of jurisdiction is available to the trustee by disclosure.

Pleas in abatement being dilatory pleas are required to be technically exact so as to preclude all presumption or argument against the party pleading. *Bellamy* v. *Oliver*, 65 Maine, 108; *Getchell* v. *Boyd*, 44 Maine, 482; *Tweed* v. *Libbey*, 37 Maine, 49; *Adams* v. *Hodsdon*, 33 Maine, 225; *Burnham* v. *Howard*, 31 Maine, 569; *Biddeford Savings Bank* v. *Mosher*, 79 Maine, 242.

In the trustee process jurisdiction depends upon the residence of the trustee at the time the action is brought. R. S., chapter 88, section 5. The question of jurisdiction in such proceedings, as in other civil actions, is to be raised by pleas in abatement. When an action was brought in a county in which it was alleged the trustee did not reside at the time of service, a plea in abatement was held bad on

demurrer because it failed to allege non-residence at the time the action was commenced. *Biddeford Savings Bank* v. *Mosher*, supra.

The plea in this case made on the return day of the writ states the residence of the trustee in the language quoted in its second paragraph. This describes with precision the defendant's legal residence in the present tense, and thus its application is to the instrument in which it is made; and it neither directly nor by necessary inference relates to the time when the action was brought. It does not negative the residence of the trustee in Piscataquis County as alleged in the writ. The demurrer to the plea in abatement should be sustained.

The trustee process is created by statute. *Hanson* v. *Butler*, 48 Maine, 81; *Jarvis* v. *Mitchell & trustee*, 99 Mass. 530. While it is regulated by statutory requirements its procedure must conform to the rules of civil pleading. The trustee in relation to the plaintiff is an adverse party in the suit and is entitled to make his defense, as the principal defendant may, either upon issues of law or of fact; *Boynton* v. *Fly*, 12 Maine, 17; *Dennison* v. *Benner*, 36 Maine, 227. He may plead in abatement want of jurisdiction; *Greenwood* v. *Fales*, 6 Maine, 405; *Scudder et al.* v. *Davis & trustee*, 33 Maine, 575; *Mansur* v. *Coffin*, 54 Maine, 314; *Thayer* v. *Ray & trustees*, 34 Mass. 166; *Hooper* v. *Jellison & trustees*, 39 Mass. 250; *Lewis* v. *Denney & trustees*, 58 Mass. 588. Or in effect by his disclosure he may plead in bar to the maintenance of the action against him. There is nothing in the nature of the process which authorizes a departure from technical pleading if the trustee raises for himself an issue of law. The disclosure is the statutory answer which presents the issues of fact upon which the liability of the trustee depends in reference to the business relations with the principal defendant; R. S., chapter 88, section 14; and upon them the court can properly decide only whether the alleged trustee had goods, effects or credits of the principal in his possession of such nature and under such conditions as made them available to the plaintiff.

In this case the trustee seeks to incorporate in his disclosure matters in the nature of a plea in abatement affecting the jurisdiction of the court. This is not admissible unless perhaps where the defect is

apparent in the writ or return. The record in such a case would not show whether a discharge of the trustee was granted because the court had no jurisdiction, or because the trustee had in his possession no property of the principal defendant subject to the trustee process. If there is no jurisdiction the plaintiff ought not to be debarred from maintaining the process in another county, but if the discharge is based upon the facts disclosed it should appear that the subject matter is *res adjudicata*. Our conclusion is that the trustee can only raise the question of jurisdiction by plea in abatement, or by motion to abate when the essential facts of the defect appear by inspection.

But even if admissible as part of the disclosure the matters alleged in the nature of a plea in abatement are insufficient, because they do not show where the trustee had its established place of business at the date of the writ.

Exceptions overruled.

In Equity.

LEWIS ANDERSON et als. *vs.* R. FRANCIS PARKER et als.

Somerset. Opinion July 7, 1906.

Skowhegan and Bloomfield. Phrase "As Now Constituted" in P. & L. Laws, 1861, c. 24, Construed. Town Meetings. Same and Votes Passed, held Legal. Private and Special Laws, 1861, c. 24.

The present town of Skowhegan was incorporated in 1861, by the Private and Special Laws of 1861, chap. 24, by the union of the old towns of Skowhegan and Bloomfield, the former comprising what is now the north side of the river, the latter the south side, including an island.

The Act of 1861 provided that "whenever the new town of Skowhegan shall vote to build a town house, it shall be located on Skowhegan Island unless a majority of each town, as now constituted, shall otherwise decide."

Held: that the phrase "as now constituted" was intended to apply not to the inhabitants, but to the geographical limits of the two old towns.

In 1866, five years after the passage of said Act, the two old towns in town meeting legally called, acting separately in accordance with said Act, voted as follows: "Voted by those that constituted the town of Bloomfield at the time the town was united with the town of Skowhegan, that we consent to have a Town Hall in a place other than on Skowhegan Island." "Voted by those constituting the town of Skowhegan at the time it was united to Bloomfield that we consent to have a Town Hall in a place other than on Skowhegan Island."

Held: that under the warrant calling the town meeting of 1866 and the aforesaid votes in pursuance thereof, the town meeting of 1866 and the votes taken in pursuance of the warrants issued therefor were legal, that the statute of 1861 under which they acted, then became a dead letter, and that the old towns are forever barred from having any voice as separate towns, upon the location of any future Town House to be erected in the town of Skowhegan, that the town of Skowhegan, as constituted in August, 1905, when their special town meeting was held, had then and has now full authority to act in the matter of locating and erecting a Town House or Town Hall under any special or general statute then or now existing, with entire independence of chapter 24 of the Private and Special Laws of 1861.

In equity. On report. Bill dismissed.

Bill in equity brought by ten taxable inhabitants of the town of Skowhegan, Somerset County, resident within the geographical limits of the old town of Bloomfield — now a part of the town of Skowhegan — under the provisions of paragraph XI of section 6 of chapter 79 of the Revised Statutes, against the municipal officers and inhabitants of the town of Skowhegan to test the legality of a vote passed by the town of Skowhegan at its annual March meeting, 1906, authorizing the purchase by the selectmen of a lot owned by Richard W. Brown of said Skowhegan, on the north side of the Kennebec River in said Skowhegan, for the purpose of erecting a municipal building at some future time, and to restrain the selectmen from carrying into effect a contract with said Brown made in accordance with said vote for the purchase of said lot.

This cause was heard at the March term, 1906, of the Supreme Judicial Court, Somerset County. After the evidence had been taken out, it was agreed to report the case to the Law Court for decision on an agreed statement of facts.

All the material facts fully appear in the opinion.

Gould & Lawrence, for plaintiffs.

Butler & Butler and Forrest Goodwin, for defendants.

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

SPEAR, J. This case comes up on the following agreed statement of facts.

Bill in equity to test the legality of a vote passed by the town of Skowhegan at the annual March meeting of 1906, authorizing the purchase by the selectmen of a lot owned by Richard W. Brown of said Skowhegan, on the north side of the Kennebec River in said Skowhegan, for the purpose of erecting a municipal building at some future time, and to restrain the selectmen from carrying into effect a contract with said Brown made in accordance with said vote for the purchase of said lot.

Bill, amendment, and answer to be made a part of the case.

The present town of Skowhegan was incorporated in 1861, by the Private and Special Laws of 1861, ch. 24, by the union of the old towns of Skowhegan and Bloomfield, the former comprising what is now the north side of the river, and the latter the south side, including the island. The act of incorporation was accepted in compliance with its provisions by both the old towns of Skowhegan and Bloomfield, at their respective annual town meetings in 1861.

The old town of Skowhegan, at the time of the act of union owned a town house on Water Street in said town. The town of Bloomfield owned no town house. The old Skowhegan town house sufficed for the purposes of the new town until 1866, and it is agreed that no town house has since been built nor any vote passed looking to the construction of one, until the present controversy arose, except as may be inferred from the following facts:

In 1866 Skowhegan Hall Association, a local private corporation was contemplating the erection of a block, to contain stores, offices and a public hall.

The warrant calling the annual meeting of the voters of the town of Skowhegan that year contained the following articles:

1st. To choose a moderator to govern said meeting.

2nd. To see if the town will vote to exempt from taxes the buildings proposed to be erected by the Skowhegan Hall Association and also to convey to said corporation the present Town Hall and lot in consideration of having a Town Hall in said building and pass all votes necessary respecting the same.

3d. To see if the towns of Skowhegan and Bloomfield, as constituted before the act uniting them was passed, will vote to have their Town House in said hall and pass all votes necessary respecting the same."

The warrant directed the constable to warn the inhabitants of the town of Skowhegan, (this of course was the new town) and was properly posted and returned.

"Under these articles the following votes were passed.

1st. Choose A. W. Wiles moderator who was duly sworn by clerk.

2nd. Voted that the town convey the present Town Hall building and lot to the Skowhegan Hall Association, and also exempt the building proposed to be erected by said corporation from taxes in consideration that said corporation shall grant to the town a perpetual lease of the hall proposed in said building for all town purposes and also a room suitable for a town office free of rent, except as above provided and shall sufficiently guarantee that said hall shall be conveniently fitted up and kept in good repair while the building shall stand.

Voted that the selectmen be a committee to contract with said corporation in order to carry out the purposes of the foregoing vote with power to convey and contract for exemption from taxes as above named and do all other things necessary and proper to accomplish the said purpose.

3d. Voted by those that constituted the town of Bloomfield at the time the Town was united with the town of Skowhegan, that we consent to have a Town Hall in a place other than on Skowhegan Island.

Voted by those constituting the town of Skowhegan at the time it was united with Bloomfield that we consent to have a Town Hall in a place other than on Skowhegan Island."

So much of the act of 1861 as applies to the present case is found in the following quotation. "Whenever the new town of Skowhegan shall vote to build a Town House, it shall be located on Skowhegan Island, *unless a majority of each town as now constituted*, shall otherwise decide."

The phrase, "as now constituted" was intended to apply, not to the inhabitants, but to the geographical limits of the two old towns. That is, if new territory had been added before a vote upon this question was taken, the voters living thereon could have had no voice in deciding it. This act, however, required that a majority vote of those living upon the territory of each of the old towns should, in some way, be ascertained before the location of the town house therein alluded to, could be moved. But the act of 1861 failed to prescribe any method of warning the inhabitants, dwelling upon the territory of these two old towns, respectively, for separate town meetings, in which

the contemplated votes might be taken. Nor do the Revised Statutes, generally, provide for the calling of any such meeting. Neither did the old towns, having lost their separate organizations in the formation of the new town, retain any power within themselves to act upon this or any municipal matter. The legislature, therefore, having omitted to provide any method of ascertaining a majority vote of the inhabitants of these old towns, in separate meetings, must be presumed to have left the manner of thus determining such vote to the exercise of a fair and reasonable discretion on the part of the old towns, acting together, in their municipal capacity, as citizens of the new town. No other way was open. This was also the early interpretation adopted by the towns themselves as manifested by what they did. For, in a little over five years after the passage of the act of union, the voters within the geographical limits of the old towns, acting in their corporate capacity as the new town of Skowhegan, recognized this presumption and issued a warrant for a town meeting to be holden on the 24th day of March, 1866, to act upon the several articles therein contained. And they did act upon them in the precise manner contemplated by the statute, so far as the vote upon the vital question of changing the location of the town house was concerned. The record shows that those who constituted the town of Bloomfield at the time the two towns were united, took a vote by themselves, upon this question, as prescribed by the statute, and that the old town of Skowhegan voted in the same way. Thus they voluntarily and understandingly and, so far as appears, without a dissenting voice, acted upon this vital question.

In view of the above statute, the interpretation given to it by the people themselves soon after its passage, and the manner of acting under the call, we are unable to discover any good reason for declaring the method of calling the town meeting 1866 illegal, or the votes passed therein invalid.

But the complainants go further and say that, even if the call of this town meeting should be held to be legal, article 2, above quoted, did not relate to a change of the location of the town house but to the disposal of certain town property and "of having a town hall in said building;" that is, the building proposed to be erected by the

Skowhegan Hall Association; and that article 3 was to see if they would "vote to have their town house in said hall."

The statute under which this warrant was issued should be construed liberally. It was not intended to restrict the action of the people but to facilitate it. It applies only to this particular case, and must be construed with reference to the facts and circumstances connected with it, so far as ascertainable. When once legally acted upon it became functus officio. The very purpose of the statute shows that its authors contemplated that, at some future day, the location of the proposed town house, which at this time may have been central, should be changed. The legislature did not intend to limit the action or the people to a particular kind of structure which might be called a "town house," so much as to secure the location of some central place for the assembly of the town meeting. That they intended any distinction between the terms "town house" and "town hall" is very improbable.

Such distinction if it exists at all is very technical. The chief, and apparently the only consideration animating the phraseology of this act, was not the *name* of the structure to be erected, but the *location* of it. They made no provision whatever for the kind of building to be used. It is evident that they employed the word "town house" in the broadest sense, for the purpose of specifying the place where the people should assemble to transact the business of the town in its regular and special town meetings. If the act had employed any other phrase to designate such place its meaning would be unchanged. The people have but little concern as to where the town officers transact the town business, whether at their homes or elsewhere. Their chief interest centers in the location of the place where the people, from the various parts of the town, are obliged to assemble in order to attend the town meeting. They care but little what the structure in which they assemble is, or how it looks, provided it is so located as to best accommodate the greatest number. Upon this paramount feature, location, the people acted in 1866 with unanimous voice. And, while they did not technically follow the language of the statute authorizing them to act, they did it substantially, voluntarily, understandingly, and we think sufficiently.

The complainants further say that the vote does not comply with the statute for the following reasons: first, the language used is "consent" not "decide;" second, the vote is to "have" not to "build;" third, the thing to be had is a "town hall," not a "town house." To be sure the vote above passed is expressed in the terms "we consent," but an analysis of all the votes shows that they pretty effectually decided. It will be observed that the vote under the second article was on condition "that said corporation shall grant the town a perpetual lease of the hall proposed in such building for the town purposes." Therefore they consented to have this town hall forever "in a place other than on Skowhegan Island." If this was not a decision, it was at least decisive. It forever removed the location of the town house from Skowhegan Island.

Again they say that the vote is "to have" and not "to build." To have is a most comprehensive term. It would include not only the meaning of the phrase "to build" but any other method which might have been proposed for the establishment of a town house or town hall for the transaction of the town business. The use of the phrase "to have" shows too, that they used the proper words to carry into effect their intention, "to have" and not "to build." We have already alluded to the fact that no distinction was intended by this act between the use of the phrases "town house" and "town hall."

The case also shows that all the people of these two old towns acquiesced in the action of the town meeting of 1866 for forty years, with apparent satisfaction, until the arrangement under which they had lived so long was terminated by fire.

To allow the narrow and technical construction of the above statute which the complainants now invoke is not only not required by a fair interpretation of the language, itself, but would thwart the manifest intentions of these two old towns intelligently and voluntarily expressed, lived up to for more than forty years, and work a necessary hardship upon the people of the present town without accomplishing any corresponding good.

There is another ground upon which we think the complainants are now precluded from claiming any rights under the statute in

question. The above act was undoubtedly passed for the benefit of the town of Bloomfield, as it was geographically situated before the union. As under the present issue the provision of the act affected them, alone, and with respect to the location of a future town house, only, they could unquestionably waive this special favor by any legal action on their part disclosing an intention to do so. Therefore the complainants have relinquished all the rights, to which they now claim to be entitled under the statute, by express waiver thereof.

Our final conclusion is that the town meeting of 1866 and the votes taken in pursuance of the warrant issued therefor, were legal; that the statute of 1861 under which they acted, then became a dead letter, and that the two old towns are forever barred in having any voice as separate towns, upon the location of any future town house to be erected in the town of Skowhegan; that the town of Skowhegan, as constituted in August, 1905, when their special town meeting was held, had then, and has now, full authority to act in the matter of locating and erecting a town house or town hall under any special or general statute then or now existing, with entire independence of chapter 24 of the Private and Special Laws of 1861.

In view of the above decision it becomes unnecessary to discuss the question of contract raised by the complainants in their brief.

The entry must be,

Bill dismissed with costs.

Case remanded to the court below for a decree in accordance with this opinion.

In Equity.

SUMNER S. RICHARDS, et al., Trustees,

vs.

GEORGE E. MORRISON, et als.

York. Opinion July 11, 1906.

Will. Construction. Life Estate. Power of Sale. Gift Over.

A testator by the sixth article of his will provided as follows: "To my wife, Henrietta E. Woodman, I give and devise my house, stable and lot of land now occupied by me, situated on Main street in said Saco, (describing the same by metes and bounds) to her to hold during her lifetime. I also give and bequeath to my said wife all my household furniture in said house, including piano, pictures, library and all other household effects not above enumerated, together with my horses, carriages and all other personal property in my said stable. I further give and bequeath and devise to my said wife during her lifetime the free use of water for the aforesaid buildings and lot of land from the Saco Aqueduct Company; I further give and bequeath to my said wife twenty-five shares of the stock of the Laconia Manufacturing Company, of Biddeford, Maine. It is my will that my wife have the entire use and income, during her lifetime, of all the above mentioned property real and personal; and, in addition thereto, I do empower her to sell and convey by her own grant or deed any of said property, real and personal, as she may in the exercise of her own discretion choose to sell or convey, for her sole use and benefit, and without any license from Probate Court."

The testator further provided as follows: "I do hereby give, bequeath and devise whatever of the estate, real and personal, hereinbefore given and devised to my wife, shall remain unused, unexpended and not sold or conveyed by her as aforesaid at her decease, to my son and daughter and their lawful heirs, to hold to them subject to the provisions, limitations and restrictions hereinbefore expressed."

The wife received the twenty-five shares of stock of the Laconia Company and had them transferred to herself. Later there was a consolidation between the Pepperell Manufacturing Company and the Laconia Company, and the stock of the two companies was called in and cancelled and stock of the Pepperell Company issued therefor, of which the wife received forty-five shares, which she held at her decease.

The question was whether under the will, the wife took absolute title to the Laconia stock, or only a life estate, and whether the forty-five shares of Pepperell stock belonged to her estate or to the estate of the testator. *Held:* that the wife took only a life estate in the Laconia stock, and had only a life estate in the Pepperell stock, and that upon her death that stock which she then held became a part of the estate of the testator as a part of the trust estate created by his will.

The same testator by the ninth article of his will gave the residue of his estate to trustees for certain uses. The only one involved in this case is that which directed the trustees "pending the settlement of my estate and until final division" to pay to his wife ten twenty-sevenths portion of the income "during her lifetime or until final settlement of my estate" for her sole use and benefit, and, after disposing of the balance of income to other parties, he provided that "upon final settlement of my estate or distribution thereof my trustees shall convey and deliver to my wife ten twenty-sevenths parts of this my residuary estate, and she may herself select such portion from any parcels of my residuary estate at the appraised value thereof. It is my will that my wife have the entire use and income, during her lifetime, of all said portion of my residuary estate; and, in addition thereto I do authorize and empower her to sell and convey by her own grant or deed any of said estate, real or personal, which she may in the exercise of her own discretion, elect to sell and convey for her sole use and benefit without license of Probate Court." Then followed a gift over to other parties of what "at her death shall remain unused, unexpended or unsold and unconveyed by her." In the distribution the wife received various stocks and bonds, and among them were 1,000 Trenton Passenger Railroad bonds, 2,000 City of Superior and 500 Brunswick and Chillicothe bonds which she held at her decease.

The question submitted was whether these bonds which the wife held at her death belong to the estate of the testator to be held by his trustees, or whether they were the absolute property of the wife and belong to her estate. *Held:* that these bonds belong to the estate of the testator and not to the estate of the wife.

In equity. On report. Decree according to opinion.

Bill in equity brought by the plaintiffs Sumner S. Richards and James O. Bradbury, trustees under the last will and testament of Horace Woodman, late of Saco, deceased, against George E. Morrison as administrator of the estate of Henrietta E. Woodman,—wife of said Horace Woodman,—late of Saco, deceased, and Joseph Alton Woodman, Louisa M. Tinkham, both of Saco, and Arthur. W. Andrews and Simon B. Adams, both of Biddeford, and James H. Miles guardian of Caroline P. Adams of Saco, and Caroline P. Adams of Saco, asking for the construction of the sixth and ninth

items or clauses of the last will and testament of the said Horace Woodman.

At the hearing in the court of the first instance, an agreed statement of facts was submitted, and it was then agreed that the cause should be reported to the Law Court and that upon bill, answers, and the agreed statement of facts, the Law Court "is to construe the will of Horace Woodman with especial reference to the 6th and 9th clauses, and is to advise the parties in regard to their rights thereunder."

All the material facts appear in the opinion.

Foster & Foster and James O. Bradbury, for plaintiffs.

Cleaves, Waterhouse & Emery, for all the defendants except Simon B. Adams.

John M. Goodwin and John A. Snow, for Simon B. Adams.

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

STROUT, J. This is a bill in equity asking the construction of articles 6 and 9 in the will of Horace Woodman.

Article 6 is as follows: "To my wife, Henrietta E. Woodman, I give and devise my house, stable and lot of land now occupied by me, situated on Main street in said Saco, (boundaries given but omitted here) to her to hold during her lifetime.

"I also give and bequeath to my said wife all my household furniture in said house, including piano, pictures, library and all other household effects not above enumerated, together with my horses, carriages and all other personal property in my said stable. I further give and bequeath and devise to my said wife during her lifetime, the free use of water for the aforesaid buildings and lot of land, from the Saco Aqueduct Company; I further give and bequeath to my wife twenty-five shares of the stock of the Laconia Manufacturing Company of Biddeford, Maine. It is my will that my wife have the entire use and income, during her lifetime, of all the above mentioned property, real and personal; and, in addition thereto, I do empower her to sell and convey by her own grant or deed, any of said property, real and personal, as she may in the

exercise of her own discretion choose to sell or convey, for her sole use and benefit, and without any license from Probate Court.

"I do hereby give, bequeath and devise whatever of the estate, real and personal, hereinbefore given and devised to my wife, shall remain unused, unexpended and not sold or conveyed by her as aforesaid at her decease, to my son and daughter, and their lawful heirs, to hold to them subject to the provisions, limitations and restrictions hereinafter expressed."

Mrs. Woodman received the twenty-five shares of stock of the Laconia Company, and had them transferred to herself. Later there was a consolidation between the Pepperell Manufacturing Company and the Laconia Company, and the stock of the two companies was called in and cancelled, and stock of the Pepperell Company was issued therefor, of which Mrs. Woodman received forty-five shares which she held at her decease. This exchange of stock cannot be regarded as a sale by her. The Pepperell stock she received was in lieu of the Laconia stock, and was held by her in the same and no greater right than she had held the Laconia stock.

The question is whether under the will Mrs. Woodman took absolute title to the Laconia stock, or only a life estate. It will be noticed that in the first paragraph the testator gave his wife the house and stable "to hold during her life," thus expressly creating a life estate. In the next paragraph he gives her the household furniture, horses, and all personal property in the stable,—but omits any mention of life. All of this personal property was subject to deterioration by use, and provisions in the stable for the horses, as there probably was, would be consumed by use. As to such, the gift of the use, if expressed for life, necessarily confers absolute title. *Stuart* v. *Walker*, 72 Maine, 151. Then follows a gift to the wife "during her lifetime," of the free use of water for the buildings. Following this is the gift to the wife of the Laconia stock, in absolute terms, and with no mention of life. If the sixth article ended here, there could be no doubt that the gifts of the furniture, etc., and of the stock were absolute and conferred full title upon the wife; but in the same paragraph, the testator added, that it was his will that his wife should have the entire use and income "during her lifetime" of all

the before mentioned property. He then gave her a power of sale of any of the property "for her sole use and benefit," with a devise over of whatever of the estate, real or personal, should "remain unused, unexpended, and not sold or conveyed by her." All these provisions are contained in the same paragraph, and must be construed together. Thus reading the clause we think it appears that the testator intended only a life estate in all the devised property, with power of sale.

It is a sound rule of law that the intention of the testator is to be carried out, if not inconsistent with legal principles. No rule of law interferes to prevent the intention of the testator in this case taking effect.

The ninth article in Woodman's will gives the residue of his estate to trustees in trust for certain uses. The only one involved here is that which directs the trustees "pending the settlement of my (his) estate and until final division," to pay to his wife ten twenty-sevenths portion of the income "during her lifetime, or until final settlement of my (his) estate," for her sole use and benefit, and after disposing of the balance of income to other parties he provides that "Upon final settlement of my estate or distribution thereof, my trustees shall convey and deliver to my wife ten twenty-sevenths parts of this my residuary estate, and she may herself select such portion from any parcels of my residuary estate at the appraised value thereof. It is my will that my wife have the entire use and income, during her lifetime, of all said portion of my residuary estate; and in addition thereto, I do authorize and empower her to sell and convey by her own grant or deed any of said estate, real or personal, which she may in the exercise of her own discretion elect to sell and convey for her sole use and benefit, without license of Probate Court." Then follows a gift over to other parties of what "at her death shall remain unused, unexpended or unsold and unconveyed by her." It appears that in the distribution of the estate Mrs. Woodman selected and received various stocks and bonds, amounting in all to $15,051.85. Among them were 1,000 Trenton Passenger Railroad bonds, 2,000 City of Superior bonds, 500 Brunswick and Chillicothe bonds, which she retained and held at her decease.

The question submitted is, whether these bonds which she held at

her death now belong to the estate of the testator to be held by his trustees, or whether they were the absolute property of Mrs. Woodman and belong to her estate.

The testator in express terms provided that pending the settlement of his estate or until final division thereof, ten twenty-sevenths of the income of the trust estate should be paid to the wife "during her life-time," if the estate was not sooner settled, "to her sole use and benefit." Nothing more than a life estate was intended or created. Upon final settlement or distribution of his estate the trust as to the ten twenty-sevenths was to end, and the same fraction of the corpus of the trust estate was to be delivered to her, from which she would derive substantially the same income as she had previously received from the trustees, of whom she was one. The implication is very strong that he intended her to receive an equal income for life; as he says she is to have the "entire use and income during her lifetime of all said portion" of the residuary estate; and to provide against possible contingencies he adds a power of sale for a limited purpose, to wit, "for her sole use and benefit" of any part of the property. She is not authorized to bestow it by gift or dispose of it by will. The phrase "for her sole use and benefit" evidently means for her comfortable support, in sickness or health, of which she was to be the judge. Hence it does not fall within that class of cases where an implied life estate is enlarged to a full title by an absolute power of sale and disposal for any purpose or in any manner the donee may desire. Apparently she exercised this power, as all of the ten twenty-sevenths of the property was consumed except the three items of stock and bonds above referred to. It is very clear that under the ninth clause of the will Mrs. Woodman took a life estate only in the ten twenty-sevenths, with power of sale for the purpose stated, and that upon her decease what of it remained goes to the plaintiffs as trustees, to be held and disposed of by them according to the trust provisions in the will. See *Stuart* v. *Walker*, supra; *Collins* v. *Wickwire*, 162 Mass. 144.

The first question submitted to us is, — Whether the said forty-five shares of the stock of the Pepperell Manufacturing Company issued in lieu of the twenty-five shares of stock of the Laconia Manufactur-

ing Company belongs to the estate of Horace Woodman, as a part of the trust estate, or whether they belong to the estate of Henrietta E. Woodman, to be administered by her administrator.

To this we answer that the stock belongs to the estate of Horace Woodman, to be administered as part of his estate.

The second question is — Whether the bonds and stock enumerated in Schedule B, annexed to the bill, belong to the estate of Horace Woodman, as part of the trust estate to be controlled and administered by the trustees.

To this we answer that the unused and unexpended portion thereof, to wit, 1000 Trenton Passenger Central bonds, 2000 City of Superior bonds, and 500 Brunswick and Chillicothe bonds belong to the estate of Horace Woodman, and are now a part of the trust estate to be administered by said trustees.

Decree accordingly.

STATE OF MAINE

vs.

INTOXICATING LIQUORS AND LAWRENCE PEMBROKE, Claimant.

Oxford. Opinion July 10, 1906.

Intoxicating Liquors. Seizure of Same While in Transit Between States. Interstate Commerce. Constitutional Law. Transit Ends, When. C. O. D. Package. Duty of Common Carrier to Deliver at Destination. Constitution of U. S., Art. I, Sect. VIII, Clause 3. U. S. Statute 1890, c. 728. R. S., 1883, c. 27, § 31. R. S., c. 29, § 39.

Certain consignors entered into a contract with an express company for the transportation of a box of intoxicating liquors from Covington, Kentucky, to No. 4 Byron street, Rumford Falls, Maine. It was a C. O. D. shipment, and it was the unquestioned duty of the express company either to make a personal delivery of the package to the consignee, or to leave it at his residence or place of business designated as No. 4 Byron Street. The liquors were intended for unlawful sale in Maine. While these liquors were in the office of the express company at Rumford Falls, they were seized by a deputy sheriff by virtue of a search and seizure warrant duly issued by a court of competent jurisdiction and taken away.

Held: that the transportation of the liquor from the office of the express company at Rumford Falls to No. 4 Byron Street, was a part of a continuous interstate shipment from Kentucky to the street and number designated at Rumford Falls, and the package was protected from the operation of the laws of Maine until the act of transportation was consummated by the delivery of the package at its place of ultimate destination in this state. The seizure was made before the transportation was terminated and was an interruption of an interstate shipment. It was therefore premature and unauthorized.

While intoxicating liquor continues to be recognized by federal authority as a legitimate subject of interstate commerce, section 31 of chapter 29 of the Revised Statutes of 1883 as amended in section 39 of chapter 29 of the Revised Statutes of 1903, so far as it applies to interstate commerce transportation, must be deemed incompatible with the interstate commerce clause of the Federal Constitution.

On report. Judgment for claimant.

Search and seizure process under the provisions of section 49 of chapter 29 of the Revised Statutes, begun in the Rumford Falls Municipal Court, Oxford County. The complaint, omitting the formal parts, was as follows:

"Harris L. Elliot, of Rumford, in the County of Oxford, competent to be a witness in civil suits, on the 23rd day of January A. D. 1904, in behalf of said state, on oath complains that he believes that on the 23rd day of January, in said year at said Rumford intoxicating liquors were, and still are kept and deposited by Lawrence Pembroke, of Rumford, in said County, in a box marked Lawrence Pembroke, Rumford Falls, Me.,—C. O. D. $15, now in the American Express Office and its appurtenances, situated in said Rumford, the said Pembroke not being then and there authorized by law to sell intoxicating liquors within said state, and that said liquors then and there were and now are intended for sale by the said Pembroke within said state in violation of law, against the peace of said state, and contrary to the form of the statute in such case made and provided.

"Wherefore, the said complainant prays, that due process be issued to search the premises and the person herein-before mentioned, where said intoxicating liquors are believed to be deposited, and if there found, that said liquors and vessels be seized and safely kept until final action and decision be had thereon, and that the said Pembroke

be forthwith apprehended and held to answer to this complaint and to do and receive such sentence as may be awarded against him.

Upon this complaint a search and seizure warrant of the same date as the complaint was issued by said court and placed in the hands of the complainant who was a deputy sheriff, for service. By virtue of this warrant, the deputy sheriff, on the same day, searched the American Express office at Rumford Falls, "and there found and seized the following described intoxicating liquors, to wit: One box marked Lawrence Pembroke, Rumford Falls, Me., C. O. D. $15, containing 20 quart bottles full of whiskey" and "five half pint bottles full of whiskey."

Under the provisions of section 50 of chapter 49 of the Revised Statutes, the officer then filed a libel against these liquors and the vessels in which they were contained, in the aforesaid court, and a time for a hearing thereon was fixed by said court and notice thereof given as provided by the aforesaid section 50.

On the return day of the libel, the consignee, Lawrence Pembroke, filed in said court a claim for these liquors in accordance with the provisions of section 51 of chapter 49 of the Revised Statutes, alleging "that they were not so kept and deposited for unlawful sale as alleged in the libel." Thereupon a hearing was had and the judge of said court found that the liquors were intended for illegal sale and were liable to seizure and accordingly condemned the same and ordered them to "be turned over to the sheriff of Oxford County, they being found to contain more than twenty per cent of alcohol."

From this judgment condemning these liquors the claimant appealed to the Supreme Judicial Court to be held at Paris on the second Tuesday of March, 1904. At said March term of the Supreme Judicial Court an agreed statement of facts was filed and the case was then reported to the Law Court for decision.

The agreed statement of facts fully appears in the opinion.

Ellery C. Park, County Attorney, for the state.

Bisbee & Parker, for claimant.

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

WHITEHOUSE, J. This case comes to the Law Court upon the following agreed statement of facts:

"On January 23rd, 1904, one box of intoxicating liquors consigned, C. O. D. express prepaid, by Crigler & Crigler, Covington Kentucky to Lawrence Pembroke, 4 Byron Street, Rumford Falls, Maine, was seized from the office of the American Express Company at Rumford Falls by H. L. Elliott, a deputy sheriff for Oxford County, and the liquors were thereafter duly libelled.

"Pembroke filed a claim for the liquors at the return day of the libel, but upon the facts then presented the judge of the Rumford Falls Municipal Court found that the liquors were intended for illegal sale and were liable to seizure and the same were condemned, from which judgment the claimant appealed to the Supreme Judicial Court.

"It is agreed for the purpose of this case that the liquors were intended for illegal sale within this state by the consignee. It is further agreed that the box of liquors arrived at Rumford Falls on the 11.35 A. M. train January 23rd, 1904, and were immediately taken by the express company to its office at Rumford Falls, and were there seized by a deputy sheriff for Oxford County, about 1.30 P. M. on the same day.

"It was the custom of the express company at Rumford Falls to deliver express packages at the residence of the consignee, provided his address was given or he was known to the express company and lived within the limits of Rumford Falls village. 4 Byron Street is within the limits of the village.

"Most of the express was not delivered until after the afternoon train went out at 2.40 P. M., and this box was intended to be delivered at that time.

"If upon the foregoing statement the Law Court decides that the liquors were liable to seizure and condemnation, the judgment of the lower court shall be affirmed, otherwise judgment is to be rendered for the claimant and the liquor ordered returned."

It sufficiently appears from the foregoing statement of facts that

pursuant to an order from the claimant, the consignors entered into a contract with the express company for the transportation of the box of liquors in question from Covington Kentucky to number 4 Byron Street, Rumford Falls, Maine. It was the unquestioned duty of the express company either to make a personal delivery of the package to Lawrence Pembroke, or to leave it at his residence or place of business designated as No. 4 Byron Street.

The custom generally prevailing in the early history of common carriers, of depositing in a warehouse at the place of destination, all packages transported by them, either with or without notice to the consignee of such deposit, proved to be inadequate to meet the public demand for greater safety and dispatch in the transportation and delivery of valuable parcels. Hence arose the necessity for improved methods involving an obligation on the part of the carrier to make delivery of such parcels to the consignee in person. "This necessity was supplied by what are known in this country as express companies, which undertake to carry goods of this class and to make a personal delivery of them to the consignee; and to this public profession they are held by the law with great strictness." Hutchinson on Carriers, section 379, and authorities cited. In *Packard* v. *Earle et al.* 113 Mass. 280, the defendants were express carriers over the line of the Boston & Providence Railroad from Providence to Boston, and in that capacity, received the plaintiff's trunk for transportation, marked, "Henry M. Packard, West Mansfield." In accordance with the uniform course of business of the defendants at that station, the trunk was delivered to the station agent at that place. It was deposited with him in the morning and notice of its arrival given to the plaintiff in the afternoon; but before he had an opportunity to remove it, the station was forcibly entered and the trunk stolen. Although in that instance the place of delivery was not designated by street and number, the defendants were held liable for the loss of the trunk. In the opinion the court say: "It was the duty of the defendants, as common carriers, to deliver the trunk to the plaintiff personally, or at his residence at West Mansfield, and until such delivery their liability as carriers continued. See also *Sullivan* v. *Thompson et als.*, 99 Mass. 258; Am. & Eng. Enc. of Law, Vol. 12,

p. 550; and Cyc. of Law and Proc. Vol. 6, p. 466. But it should be unnecessary to cite authorities in support of a proposition so obvious and elementary.

Furthermore the package in this case appears to have been sent C. O. D. It would consequently have been impracticable, under ordinary circumstances, for the express company to perform the obligation thus assumed to collect the purchase price for the consignors without personal delivery to the consignee, or to his authorized agent at the place designated in the way-bill. The package arrived at Rumford Falls, on the 11.35 A. M. train and was immediately taken by the express company to its office at that place. The company was ready and willing to complete the transportation by delivering the box at No. 4 Byron Street on the arrival of the 2.40 P. M. train, according to its usual course of business. The express charges had been paid for a continuous shipment over the entire line from Covington Kentucky to the residence of the consignee at No. 4 Byron Street, Rumford Falls, Maine, and the express company in fact intended to deliver the box at the street and number designated, according to its established custom, on the arrival of the afternoon train, but was prevented from so doing by the seizure of the package made at the express office within an hour and a half after its arrival there.

The method of transmission was not specified except that the package was to be forwarded by express, and it is obviously immaterial that the means of transportation to be employed in making the delivery at either terminal point may have been by wagons or drays in lieu of railroad cars. The consignee was entitled to have his package delivered at No. 4 Byron Street, and the company had a right to select the means of transportation and to make the delivery in accordance with its established usage. And it is common knowledge that the time intervening between the actual arrival of the package at the office of the company and the usual time when it was intended to be delivered, was no greater than the delay ordinarily incident to the delivery of express matter in the usual course of business in similar places.

The conclusion is therefore irresistible that the transportation in this case had not been terminated and that the seizure of the liquor

in question was made while the package was in transit and before its delivery to the consignee according to the express terms of the shipment.

It is accordingly contended in behalf of the claimant that the seizure of the package under the circumstances stated was clearly in violation of the third clause of section eight of the first article of the Constitution of the United States, conferring upon Congress the power "to regulate commerce with foreign nations and among the several states."

In *State* v. *Intox. Liquors, Grand Trunk Ry. Claimant*, 94 Maine, 335, the liquor was taken from the car of the railway company while it was standing on the siding at Auburn before it had reached its destination in Lewiston. It was sought to justify the seizure thus made while the liquor was in transit and before its delivery to the consignee, by virtue of the provisions of chapter 728 of the act of Congress of August 8, 1890, known as the Wilson Act, and by that clause of section 31 of chapter 27 of the Revised Statutes of Maine of 1883 which declares that "No person shall knowingly bring into the state or knowingly transport from place to place in the state, any intoxicating liquors with intent to sell the same in the state in violation of law," and that "all such liquors . . . . may be seized in transit." But the construction of the Wilson Act was brought directly in question in the case of *Rhodes* v. *Iowa*, 170 U. S. 412, and it is declared in the majority opinion that "interpreting the statute by the light of all its provisions, it was not intended to, and did not cause the power of the state to attach to an interstate commerce shipment whilst the merchandise was in transit under such shipment and until its arrival at the point of destination and delivery there to the consignee." In the same opinion, in commenting upon *Bowman* v. *Chicago & N. Railway*, 125 U. S. 465, the court further say: "It was decided that the transportation of merchandise from one state into and across another was interstate commerce, and was protected from the operation of state laws from the moment of shipment whilst in transit and up to the ending of the journey by the delivery of the goods to the consignee at the place to which they were consigned." It is true that the distinction between the deposit of the package in a

warehouse to await the action of the consignee, and the actual delivery of it to the consignee in person, or the difference between a shipment by freight and a shipment by express was not brought directly in question and was not necessarily involved in the decision of either *Bowman* v. *Railway*, 125 U. S. or *Rhodes* v. *Iowa*, 170 U. S., supra; but as pointed out by this court in *State* v. *Intoxicating Liquors*, 95 Maine, 140, it was distinctly held in *Rhodes* v. *Iowa*, that the moving of the package in question in that case from the platform to the freight house was a part of interstate commerce shipment, and that the transportation was not completed until the package had been moved to and deposited within the freight house. *Rhodes* v. *Iowa* has accordingly been recognized as authority for the doctrine that a package thus shipped from one state into and across another, was protected by the interstate commerce clause of the constitution until the act of shipment was completed according to the terms of the contract of transportation between the parties.

It was accordingly held by this court in *State* v. *Intox. Liquors*, Grand Trunk Ry., Claimant, 94 Maine, supra, upon the authority of *Rhodes* v. *Iowa*, that section 31 of chapter 27 of the Revised Statutes of Maine 1883, declaring that "No person shall knowingly bring into the State . . . . any intoxicating liquors with intent to sell the same in the state in violation of law," must be deemed repugnant to the interstate commerce clause of the Federal Constitution, and that the seizure in that case was made while the liquor continued to be an interstate shipment before the transportation of it had terminated and before it had become subject to the operation of the law of this state.

The facts in the case at bar are essentially different from those in *State* v. *Intox. Liquors*, 95 Maine, 140, and the cases are clearly distinguishable. In that case the liquors were shipped from Boston, Mass., by railroad lines to Machias, Maine, consigned to the shippers. They arrived at 9 o'clock in the morning and were deposited in the railroad company's freight house, where they were seized at 4 o'clock P. M. the next day. "The transportation had been completed," said the court. "Nothing further remained to be done by the railroad company. The liquors had arrived at their final place of

destination. They were not again to be removed by the railroad company. The continuity of transportation from the place of shipment to the place of consignment had not been interrupted, and the liquor had been moved to the place provided by the carrier for the purpose to await the action of the shipper."

"It is true, that no notice had been given of their arrival; there was nobody there to whom notice could have been given."

But in *American Express Co.* v. *Iowa*, 196, U. S., 133, the question of a shipment by express C. O. D., was necessarily involved and directly determined. In that case the plaintiff received four packages of intoxicating liquor at Rock Island, Illinois, to be carried to Tama, Iowa, and there delivered to four different persons, one of the packages being consigned to each. The shipment was C. O. D., three dollars to be collected for the price of each package and thirty-five cents additional for the express charges on each. Upon the arrival of the packages at Tama they were seized in the hands of the express agent by virtue of an information charging that they contained intoxicating liquors intended for unlawful sale. Without passing upon the question whether the property in a C. O. D. shipment is at the risk of the buyer or seller, and without deciding when the sale is completed, the Federal Court held that the packages in question, received by an express company in Illinois to be carried to the State of Iowa and there delivered to the consignees C. O. D. for the price of the package and the expressage, were interstate commerce, under the protection of the commerce clause of the Federal Constitution, and that prior to their actual delivery to the consignees, they could not be confiscated under the prohibitory liquor laws of Iowa.

In the case at bar the transportation of the liquor in question from the office of the express company at Rumford Falls to No. 4 Byron Street, was a part of a continuous interstate shipment from Kentucky to the street and number designated at Rumford Falls, and the package was protected from the operation of the laws of Maine until the act of transportation was consummated by the delivery of the package at its place of ultimate destination in this state. The seizure was made before the transportation was terminated, and was an interruption of an interstate shipment. It was therefore premature and unauthorized.

While therefore intoxicating liquor continues to be recognized by federal authority as a legitimate subject of interstate commerce, section 31 of chapter 27 of the Revised Statutes of 1883 above quoted, as amended in section 39 of chapter 29 of the Revised Statutes of 1903, so far as it applies to interstate commerce transportation, must still be deemed incompatible with the interstate commerce clause of the Federal Constitution.

The entry must therefore be,

Judgment for the claimant.

Order for a return of the liquors to issue.

In Equity.

GEORGE T. MERRILL, Trustee, *vs.* JOHN W. HUSSEY et als.

Penobscot. Opinion July 10, 1906.

Minors. Wages Earned by Minor. Such Wages Not Property of Parent, When. Future Earnings of Minors Not Assets of Father's Estate. Claim of Minors Against Bankrupt Parent Valid. Conveyance of Real Estate by Bankrupt Parent Four Months Before Bankruptcy Valid to Extent of Minors' Claims. Voluntary Gift. Trust.

1. If a father permits his son to make his own contracts of hiring and to receive his own wages, with the understanding that the son is to retain them as his own, the wages earned under such a contract become the property of the son, and not of the father.
2. Future earnings of minor children are not assets of the father's estate to which creditors have any right to look, so as to prevent their relinquishment by the father, though insolvent, to the children, if he so wills.
3. A father took money belonging to his two minor sons, without their consent, and used it in making partial payments of the purchase price of a farm, the title to which he took in his own name. He gave his own notes for the balance of the price, but paid no money of his own. He subsequently sold his interest in this farm for more than the amount of the sons' money paid in. He purchased another farm and paid in $450 of the money received on sale of the first, and had the title conveyed to his wife and one

son, then of age, with the consent of the other son, still a minor: *Held:* that a resulting trust did not arise for the benefit of the sons in the first farm, but that the sons had a valid claim against the father for the amount of money so taken. And when the conveyance was made to the wife and son in recognition and settlement of the claims of the sons, as the court finds was done in this case, such conveyance made more than four months before proceedings in bankruptcy were instituted against the father was valid against the trustee in bankruptcy of the father's estate, to the extent of the sons' claims against the father. But the surplus of the money received for the sale of the first farm, and paid into the second, must be regarded, as to creditors, as a voluntary gift or transfer, pro tanto, which creditors may reach. And for this surplus, the wife and son should be adjudged to hold the second farm in trust for the trustee in bankruptcy. The court finds that the surplus amounted to $112.95 and interest from November 10, 1903. The defendants may discharge the trust by the payment of this amount to the plaintiff within such reasonable time as may be fixed by a sitting Justice below. If the defendants fail to pay within such time, a master will be appointed to make sale of the second farm, subject to mortgage. As Charles Hussey, the minor son, has paid part of the mortgage indebtedness it is equitable that he first be recompensed for such payment and interest out of the proceeds of the sale. After payment to him of such sum as the court shall find to be due, such proportion of the remaining proceeds will be paid to the plaintiff as $112.95 with accrued interest bears to $450.00 and the balance to the defendants Nettie and Bertram Hussey.

In equity. On report. Bill sustained. Decree according to opinion.

Bill in equity brought by the plaintiff as trustee in bankruptcy of the estate of John W. Hussey of Milo, against the said John W. Hussey, Nettie Hussey, wife, and Bertram Hussey, son, of said John W. Hussey, attacking the title of said Nettie Hussey and Bertram Hussey in certain real estate in Milo, on the alleged ground that said John W. Hussey, while insolvent, purchased the property and paid the consideration, but caused the title to be conveyed to his said wife and son in fraud of his creditors.

Heard before the Justice of the first instance on bill, answer and proof. At the conclusion of the evidence, it was agreed that the case should be reported to the Law Court for determination and it was so reported.

All the material facts sufficiently appear in the opinion.

Bertram L. Smith, for plaintiff.

W. A. Johnson, for defendants.

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

SAVAGE, J. In this proceeding, the plaintiff, as trustee in bankruptcy of the estate of John W. Hussey, attacks the title of Nettie Hussey, wife, and Bertram Hussey, son, of John W. Hussey, in certain real estate in Milo, on the alleged ground that John W. Hussey, while insolvent, purchased the property and paid the consideration, but caused the title to be conveyed to his wife and son in fraud of his creditors.

It appears that in 1901, John W. Hussey purchased a farm in Mt. Chase for $900. He paid $100 down in cash, and gave his notes, secured by mortgage, for the balance. The notes were payable $100, each succeeding year, with interest. In 1902 he paid the first note and the interest. In 1903 he paid the second note, but not the interest. In October, 1903, he sold the equity of redemption in the Mt. Chase farm, and received about $500 in cash. Of this, he paid $450 towards the purchase price of the Milo place, but the deed was made to his wife and his son, Bertram. John W. Hussey was then insolvent. It is claimed, and not disputed, that substantially all of the money which first and last was paid towards the Mt. Chase farm was the earnings of his two minor sons, Bertram and Charles, who were, at the time of the purchase, respectively about 19 and 17 years of age. It is claimed by the defendants that this money was the property of the minor sons, and not of the father. This is denied by the plaintiff. And here arises the first question for determination.

The evidence shows that these minors, though not emancipated in terms, and, though still making their home under the parental roof, made their own contracts for the services by which the money was earned, with the knowledge and consent of their father, and received their own wages, and that they had been permitted so to do from the time they first were old enough to work out. In this instance, they brought their wages home and put it in a wallet which belonged to one of them. The wallet they left in the custody of their mother, who seems to have been authorized by them to take money from it

when needed for family expenses. The money which was paid for the Mt. Chase farm was taken for that purpose by the father from this wallet, with the permission of the mother, but without the knowledge or previous consent of the sons. Under these circumstances, whose money was it?

The general rule is that the father, whose duty it is to support his minor son, is entitled to his wages. But the father may relinquish this right. He does so when he emancipates him. And it scarcely needs the citation of authorities to show that when emancipated, the minor son may receive and hold his own wages, not only as against the father himself, but as against the father's creditors. It is well settled that future earnings of minor children are not assets of the father's estate to which creditors have any right to look, so as to prevent their relinquishment by the father, though insolvent, to the children, if he so wills. Such relinquishment is not fraudulent as to creditors of the father. *Lord* v. *Poor*, 23 Maine 569; *Atwood* v. *Holcomb*, 39 Conn. 270; *Johnson* v. *Silsbee*, 49 N. H. 543; *Schuster* v. *Bauman Jewelry Co.*, 23 Am. St. Rep. 327; *Beaver* v. *Bare*, 104 Pa. St. 58; 49 Am. Rep. 567; *Penn* v. *Whitehead*, 17 Grat. 503; 94 Am. Dec. 478, and many other cases. In this case there seems to have been no general emancipation from custody and control and the right to receive wages. But the father permitted his minor sons to make their own contracts for services, and to receive their own wages, and, we think, with the intention that they should hold them as their own. It is settled law in this state, that a minor may acquire and hold property in his own name, as when the property is the fruit of the minor's earnings, if it be obtained with the consent of the father that it shall belong to the minor. *Boobier* v. *Boobier*, 39 Maine, 406. A minor, with the consent of his father, may go out to service and receive and hold his own earnings. *Boynton* v. *Clay*, 58 Maine, 236.

And such is the law elsewhere. In *Whiting* v. *Earle*, 3 Pick. 201, the court, speaking of a transfer by a father to his minor son of the right to receive his own wages, said: "We go so far as to say that where a minor son makes a contract for his services on his own account, and the father knows of it and makes no objection, there is

an implied assent that the son shall have his earnings." This is quoted with approval by this court in *Boynton* v. *Clay*, supra. In *Manchester* v. *Smith*, 12 Pick. 113, the court by Chief Justice Shaw, after stating the general principle that a father is entitled to his minor son's earnings, unless he has been emancipated, added: "But if the son does in fact act and make contracts for himself with the knowledge of the father, this is evidence of his consent to permit his son to contract for his own employment and take his own earnings; and when such consent has been given, neither the father himself, nor his creditors, can interpose, after the wages in such an employment have been earned, to take the amount from the son," citing *Jenney* v. *Alden*, 12 Mass. 375. See also *Atwood* v. *Holcomb*, 39 Conn. 270; *Armstrong* v. *McDonald*, 10 Barb. 300.

And without a general emancipation, the father may relinquish his right pro tanto, or in a particular instance. If he authorizes his minor son to go into a particular service and have his earnings, the son becomes to a certain extent independent, with power to act in his own right, and, having performed the services, with the right to recover the compensation, in his own name, to his own use. *Corey* v. *Corey*, 19 Pick. 29; *Tillotston* v. *McCrillis*, 11 Vt. 477; *Johnson* v. *Silsbee*, 49 N. H. 543; *Beaver* v. *Bare*, 104 Pa. St. 58; 49 Am. Rep. 567.

It should be noticed that this is not a case in which is involved the validity of a gift by the father of a claim for wages already earned by labor which his minor sons have performed without any previous understanding that the avails should go to the minor's own use; nor a case where the arrangement between the father and sons was merely colorable, designed by the parties to cover the earnings of the sons for the father's use and benefit, and so in fraud of his creditors. *Johnson* v. *Silsbee*, supra.

In the light of the foregoing authorities, and of good reason, we have no hesitation in saying, upon the evidence submitted, that all the money which was paid towards the Mt. Chase farm was the property of the minor sons, Bertram and Charles, and not that of the father.

Hereupon the defendants say that by the transactions stated a

resulting trust arose in the Mt. Chase farm for the benefit of Bertram and Charles, to the full extent of the equity of redemption; that when that equity was sold the full proceeds equitably belonged to them, and that, by the investment of these proceeds in the Milo property by the trustee in the name of the wife and one of the sons, no fraud was, or could be, practiced upon the creditors. If the defendants' legal premise is sound, their conclusion naturally follows. On the other hand, if no trust arose, it is evident that the father, by taking their money as he did was guilty of a conversion for which they had a right of action; or if they chose to waive the tort, he was their debtor and they his creditors. In either event they had a valid claim against him. But, in such case, the proceeds of the sale of the Mt. Chase farm was the property of the father. If, then, the Milo property was paid for by these proceeds, but was deeded to the wife and one son, then of age, with the consent of the other son, yet a minor, in recognition and settlement of the claim of the sons, and the transaction was so accepted by the sons, the transaction was not in fraud of creditors, but constituted merely a preference by the father debtor of his creditor sons over his other creditors, which was valid at common law, and having occurred more than four months before his proceedings in bankruptcy were begun, was not invalidated thereby. The fact that the son who consented that his share representing his claim should be conveyed to his mother was still a minor does not concern the creditors or give them any greater rights.

It makes a difference, however, whether the sons be regarded as the beneficiaries of a resulting trust in the Mt. Chase farm, or simply as creditors of their father. On the one hand, if there was a resulting trust by reason of the fact that some or all of the consideration paid was their money, they had an equitable title to the farm, subject to the mortgage, and the profit made by selling the farm for more than was paid for it would belong equitably to them in proportion to their interest. On the other hand, if they were creditors merely, they were entitled at most only to the repayment of the money taken, with interest. And any sum in excess of that amount that came to them or was paid in for the Milo property would be

pro tanto a voluntary transfer on the part of the father, which his creditors could reach in equity. The same result would follow if the money of the sons should be regarded as impressed by a constructive trust in the father's hands, and so followed into the Milo property. *Bresnihan* v. *Sheehan*, 125 Mass. 11.

We think the case does not show a resulting trust. A resulting trust arises by implication of law where the purchase money is paid by one person out of his own money, and the land is conveyed to another. *Herlihy* v. *Coney*, 99 Maine, 469. It rests upon the supposed intention of the person paying, a supposition which is rebuttable. *Baker* v. *Vining*, 30 Maine, 121; *Perry* v. *Perry*, 65 Maine, 399. See implied trusts, Am. & Eng. Ency. of Law, Vol. 15, p. 1136. It arises because the payer is virtually and equitably the purchaser. The payer must "pay," or "furnish," or "advance" the consideration. These various expressions, used interchangeably in the cases, all imply that the payer does something, and that he has the intention in so doing, to acquire at least an equitable interest in the land. The payment by the cestui must have been made for the conveyance of the title. 15 Am. & Eng. Ency. of Law, 1143. In this case the father was the real purchaser. The sons had no intention to pay the consideration out of their own money, for they knew nothing about the payment at the time. They did not pay the money or furnish it. There was no act on their part. Their father took the money without their knowledge or consent. Under such circumstances a resulting trust does not arise, though it may be that a constructive trust might, of which later. Moreover, two of the payments relied upon were made upon the father's notes which were given in part consideration of the purchase. If, after an estate has been conveyed on the credit of the grantee, in whole or in part, a third person makes the deferred payments, a resulting trust will not thereby arise in his favor. The payment must be a part of the original transaction. *Buck* v. *Pike*, 11 Maine, 9; *Farnham* v. *Clements*, 51 Maine, 426; *Gerry* v. *Stimson*, 60 Maine, 186.

We do not need to inquire whether a constructive trust, or a trust ex maleficio, arose from the unauthorized conversion by the father of the money of his sons. Whatever might be the precise legal status

of the money, it is evident that the sons had a valid claim against the father for the amount of their money taken by him, and interest, and we think the evidence shows that the sons assented to the conveyance of the Milo property to their mother and one of them, as a settlement of their claim. If the father in causing the conveyance to be so made, designed also to hinder, delay or defraud his other creditors, it is not made to appear that the mother and sons participated in the fraudulent intent. The sons apparently claimed all the proceeds of the Mt. Chase farm which went into the Milo property to be theirs. But we think that they were entitled only to the amount of their money which was taken by the father, with interest, and the surplus, which was paid into the Milo property, as against the father's creditors, must be regarded as a voluntary transfer or gift, pro tanto, which his creditors may reach.

At the time of the transfer, Nov. 10, 1903, the father paid in $450. The valid claims of the sons then amounted to $337.05, as we compute them. The gift then was $112.95. And as the wife and son have had all the rents and profits of the place, interest on the amount of the gift may be charged.

The plaintiff is entitled to appropriate relief, though not to the specific mode of relief prayed for. The bill will be sustained with costs. The defendants Nettie and Bertram Hussey will be adjudged to hold the Milo property in trust for the plaintiff, as trustee in bankruptcy, for the sum of $112.95 and interest from November 10, 1903, to the time of final payment. The defendants are entitled to discharge the trust by paying this amount to the plaintiff. If they fail to do so within such reasonable time as may be fixed by a single Justice below, a master will be appointed to make sale of the Milo property, subject to mortgage. As Charles Hussey has paid a part of the mortgage indebtedness, it is equitable that he first be recompensed for such payment and interest out of the proceeds. After the payment to him of such sum as the court shall adjudge to be due, such proportion of the remaining proceeds will be paid to the plaintiff as $112.95 with accrued interest, bears to $450, and the balance to the defendants Nettie and Bertram Hussey.

Decree below accordingly.

ALICE V. JONES *vs.* SARAH C. JONES et al.

Penobscot. Opinion July 10, 1906.

Practice. Bill of Exceptions. What Same Must Set Forth. Authorized Inferences. Unauthorized Finding. Bills and Notes. Delivery to Agent. Death of Maker Before Delivery of Note by Agent to Payee. Agent's Authority to Deliver Thereby Revoked. Delivery on Happening of Contingency. Burden of Proof. Evidence.

1. An excepting party, if he would obtain any benefit from his exceptions, must set forth enough in the *bill of exceptions* to enable the court to determine that the points raised are material and that the rulings excepted to are both erroneous and prejudicial. It is not enough that the court can find that the rulings were material or erroneous or harmful, by studying the report of the evidence in support of a motion for a new trial, when it accompanies a bill of exceptions, unless it is made a part thereof.
2. Assuming, but not deciding, in this case, that the jury were warranted in finding that the signatures of the defendants' decedent upon the back of the notes in suit were genuine, and that the plaintiff, as she claims, was induced to surrender them and forgive the indebtedness by the falsehood and fraud of the defendants, the court is of the opinion that they were authorized to infer further only that the notes were given for a sufficient consideration; that the defendants' decedent as one of the makers delivered the notes to the plaintiff's husband, who was also a maker, to be delivered to the plaintiff; that the husband was the maker's agent, and not the plaintiff's; that the agent did not deliver the note to the plaintiff during the lifetime of the maker; and that the plaintiff was not aware of the existence of the notes until a short time before the death of the maker. Upon these inferences, the jury was not authorized to find that the notes had been delivered, so as to become liabilities of the maker.
3. A promissory note generally does not become a liability until delivery. If the maker, having delivered a note to an agent for delivery to the payee, dies before delivery by the agent, the agent's authority is thereby revoked, and a subsequent delivery by him is ineffectual to create a liability.
4. It is true, however, that when a note is left with a third person to be delivered to the payee on the happening of a contingency the first delivery is complete and irrevocable. In this case, the evidence fails to show that the notes were left with the agent to be delivered on the happening of a contingency. The burden to show it was on the plaintiff.

5. An instruction to the jury without limitation or qualification that if the notes had been delivered as completed instrument by the maker to the agent for delivery to the plaintiff, that delivery might be perfected even after the death of the maker, is deemed to be exceptionable error.
6. Applying the foregoing conclusions, it follows that if the verdict for the plaintiff was based upon the counts on the notes, as it might well have been under the instructions, it was clearly wrong, for want of proof of delivery. On the other hand, if based upon the count for money had and received, it is clearly excessive, for part of the amount included in the verdict is barred by the statute of limitations, and as to part of the remainder, there is no sufficient proof in the record that the money was received by the defendant's decedent or to his use.

On motion and exceptions by defendants. Sustained.

Assumpsit brought by the plaintiff against the defendants, Sarah C. Jones and Alice Maud Shaw in their capacity as executrices of the last will and testament of Silas D. Jones, late of Bangor, deceased.

There were four counts in the declaration, one upon a promissory note for $1500, dated Bangor, February 17, 1896, payable on demand, and purporting to be signed on the face by Silas D. Jones & Sons and on the back by Silas D. Jones. The second count was on a promissory note for $500, dated Bangor, February 8, 1902, payable on demand, purporting to be signed on the face by Silas D. Jones & Sons and on the back by Silas D. Jones. The third count was on a promissory note for $500, dated Bangor, April 14, 1900, payable on demand, purporting to be signed on the face by Silas D. Jones' Sons and on the back by Silas D. Jones. The fourth count was for money had and received.

Plea, the general issue with the following brief statement:

"And for a brief statement of special matter of defense to be used under the general issue pleaded the said defendants further say as to the first count in the plaintiff's declaration, it being the account upon the alleged note for fifteen hundred ($1500) dollars, the defendants plead the statute of limitations and aver that their intestate did not at any time within six years next before his death promise in manner and form as the plaintiff in said first count in said writ has alleged against him.

"The defendants further say, that after the making of the said

several alleged promises and after the accruing of the several alleged causes of action in the plaintiff's declaration mentioned, but before the commencement of said action to wit: on the eighth day of July, A. D. 1904; the plaintiff suggested to and agreed with and promised the defendant, Sarah C. Jones, that if she, the said Sarah C. Jones, would not change her last will and testament by the terms of which Storer W. Jones, the plaintiff's husband was to share equally with the remaining children of the said Sarah C. Jones, it being then and there the intention of the said Sarah C. Jones, to change her will, that in consideration thereof she, the said plaintiff, would accept her said promise in full satisfaction and discharge of said promises referred to, and of all claims and demands which she had against the estate of said Silas D. Jones, and that she would destroy or cause to be destroyed said alleged notes declared on in the plaintiff's declaration; and the defendants aver that said Sarah C. Jones then and there did promise the said plaintiff that she would not change her last will and testament, which promise she has ever since kept inviolate, and that thereafterwards, on the 11th day of July, A. D. 1904, the plaintiff did cause said alleged notes declared upon in the plaintiff's declaration to be destroyed in pursuance of her said promise and the terms of her said agreement entered into with the said Sarah C. Jones on the eighth day of July, A. D. 1904, as aforesaid."

The defendants also seasonably made affidavit denying the signatures of the notes and execution of the same, and gave reasonable notice to the plaintiff of their denial or intended denial of such signatures and execution in accordance with Rule X of "Rules of the Supreme Judicial Court."

The action was tried at the October term, 1905, of the Supreme Judicial Court, Penobscot County. Verdict for plaintiff for $2689.14. Defendants then filed a general motion for a new trial, and also took exceptions to rulings admitting certain testimony during the trial, and to certain instructions given to the jury.

The case sufficiently appears in the opinion.

Louis C. Stearns, T. D. Bailey and J. F. Gould, for plaintiff.

P. H. Gillin and Martin & Cook, for defendants.

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

SAVAGE, J. Action to recover on three promissory notes, one dated Feb. 17, 1896, for $1500; one dated April 14, 1900, for $500; and one dated Feb. 8, 1901, for $500, all purporting to be signed on the face by Silas D. Jones & Sons, and on the back by Silas D. Jones, individually, and payable to the plaintiff. There is also a count for money had and received. The action is against the estate of Silas D. Jones, of whose will the defendants are the executrices. The defendants deny the execution of the notes, and particularly that the individual signature of Silas D. Jones is genuine; they pleaded the statute of limitations as to the $1500 note; they claim that the notes never became effective for want of delivery during the lifetime of Silas D. Jones and they assert that the plaintiff, having come into possession of the notes after the death of Silas D. Jones, voluntarily forgave the indebtedness, surrendered the notes to the executrices and consented to their destruction, in consideration of the promise of Sarah C. Jones that she would not thereafter change the provisions of her will in favor of the plaintiff's husband, who was the son of Sarah C. Jones.

Nevertheless, the jury returned a verdict for the plaintiff for the full amount claimed. And the case now comes before us on the defendants' motion and exceptions. Of the many exceptions, only one,— that relating to the delivery of the notes,— is open to consideration. Many times the court has reiterated the rule that an excepting party, if he would obtain any benefit from his exceptions, must set forth enough *in the bill of exceptions* to enable the court to determine that the points raised are material and that the rulings excepted to are both erroneous and prejudicial. The bill of exceptions must show what the issue was, and how the excepting party was aggrieved. Error must appear affirmatively. *Dennen* v. *Haskell*, 45 Maine, 430; *Hovey* v. *Hobson*, 55 Maine, 256; *Merrill* v. *Merrill*, 67 Maine, 70; *Fairfield* v. *Old Town*, 73 Maine, 573; *Johnson* v. *Day*, 78 Maine, 224; *Nutter* v. *Taylor*, 78 Maine, 424; *Smith* v. *Smith*, 93 Maine, 253, and many other cases. The bill of exceptions in this case, except in one instance to be considered later, is

barren of statements to show that the matters complained of were material, or erroneous or harmful. It is not enough that the court can find all of these characteristics by studying the report of the evidence in support of the motion for a new trial, when it accompanies a bill of exceptions. The bill must be strong enough to stand alone. The court, in considering the exceptions, cannot travel outside of the bill itself. In this respect the court cannot consider the report of the evidence nor the charge of the presiding Justice, unless they are made a part of the bill of exceptions. They are not so made in this case.

It will not be necessary to consider all of the questions argued by counsel. If we assume that the signature of Silas D. Jones upon the notes was genuine, and that the surrender of the notes by the plaintiff was procured by falsehood and fraud, as she now claims, there is still an insuperable difficulty in sustaining the verdict. There was sufficient evidence to warrant the jury in finding that Silas D. Jones negotiated loans at a savings bank on the days and for the respective amounts for which the notes in suit were given; that the first loan was obtained upon the note of Storer W. Jones, plaintiff's husband, and the second and third loans upon the notes of the plaintiff and her husband, all secured by the plaintiff's mortgages of her own real estate; that the first two loans were procured for the use of the firm of Silas Jones & Sons, of which Silas D. Jones was a member, and the third for the use of Silas D. Jones' Sons, after Silas D. Jones had retired from the original firm; and that Storer W. Jones was a member of both firms. Upon the assumptions above stated, the jury might properly find, also, that the notes in suit were intended by the makers to be collateral security for the liability of the plaintiff incurred by giving her notes and mortgages. This is what the plaintiff claims. We think too that a verdict based upon the inference that the notes were given as a direct liability in consideration of money procured by the plaintiff for the firm could not in that respect have been disturbed. In such case it would have been expected that the plaintiff was to pay the bank loans, and the signers of the notes in suit to pay them to the plaintiff.

But the defendants contend that, whatever may have been the inception of these notes, they were not delivered to the plaintiff in the lifetime of Silas D. Jones; that so far as the individual liability of Silas D. Jones was concerned, they were left by him in the hands of Storer W. Jones, who as a member of the firm was also one of the makers, to be delivered to the plaintiff; that Storer was the agent for that purpose of Silas, and that Storer's authority to make delivery was revoked by the death of Silas, before delivery. It is not in dispute that Silas D. Jones died August 9, 1903, and that the notes were not delivered into the possession of the plaintiff until the following September. And it is admitted that the plaintiff was in entire ignorance of the existence of the notes until a week or two before the death of Silas, when she says she first learned of it from her husband. And it does not appear that there had ever been any agreement or understanding on her part that notes should be given to her on account of the bank loans.

It is of course well settled that a promissory note does not become a liability until delivery. It is likewise true that when the maker places the note in the hands of a third person merely for delivery to the payee, such third person is the agent of the maker, and not of the payee. And if the maker dies before delivery by the agent, the agent's authority is thereby revoked and a subsequent delivery by him is ineffectual to create a liability. The plaintiff does not dispute the principles thus stated, but she attempts to meet and parry them by another well established doctrine, and that is, that when a deed or other instrument, whose validity depends upon delivery, is left with a third person to be delivered to the grantee, or in case of a note, the payee, on the happening of a contingency, the first delivery is complete, and irrevocable by death or otherwise. See *Hammond* v. *Hunt*, No. 6003, Federal Cases. Sometimes this doctrine is explained by saying that the depositary, in such case, holds in trust for the payee until the happening of the contingency, and that a delivery to the trustee is upon general principles as effectual as a delivery to the cestui would be. The contention of the plaintiff is that the notes were made "as collateral security for the mortgages placed by her upon her property for the benefit of the firm," and that the delivery

of the notes to the payee "was to be conditional upon the happening of a contingency," which contingency was the failure of the makers of the notes "to take care of the mortgages placed for their benefit by the plaintiff upon the property." And assuming this contention to be supported by proof, and showing the contingency had happened, her counsel argue upon the principle of law above stated, that the authority of Storer W. Jones to deliver the notes was not revoked by the death of Silas D. Jones, and that upon such delivery after his death, the notes became liabilities of his estate; and, further, that although the $1500 note was then upon its face more than six years overdue, yet it was not barred by the statute of limitations, because that statute did not begin to run until the note first became a liability, namely, at delivery to the plaintiff.

If in face of the apparent want of delivery in the lifetime of Silas, the plaintiff, would obtain the benefit of the rule she relies upon, it is incumbent upon her to show that when Silas D. Jones left the notes in the hands of Storer for delivery to her, that delivery was intended to be conditional upon the happening of a contingency. Unfortunately for her theory we are unable to find the proof which sustains her burden. The only contingency suggested was the failure of the makers of these notes to take care of the bank loans, and pay the interest when due. But why does the plaintiff say that the depositary held these notes to be delivered only upon the happening of this particular contingency? Apparently because this one fits her case. There is no evidence that Silas D. Jones left these notes in the hands of his son to be delivered only upon the happening of any contingency. We know nothing of his particular intention or purpose, or directions further than that it may be inferred that he intended the notes to be delivered. We know nothing whatever about these notes until they are found in the possession of Storer, shortly before the death of Silas. We can only conjecture, and conjecture is not proof. *McTaggart* v. *M. C. R. R. Co.*, 100 Maine, 223. If we might conjecture, we should say that if the notes were intended as security for the liability the plaintiff had incurred, it would be more reasonable to think that the security was intended to become effective from the time her liability attached, than upon the happen-

ing of some future contingency. The plaintiff was liable all the time. Why should she not have been secured all the time? We do not think any legitimate inference can be drawn from the record that the delivery of these notes was to be conditioned upon the happening of a contingency. And therefore the plaintiff must fail as to this contention.

But the plaintiff claims further that there was a constructive delivery of the notes before the death of the maker. She says her husband informed her that he had these notes in his possession a short time before his father's death. We do not need to discuss the effect of a constructive delivery to create a liability upon the notes, for we are unable to persuade ourselves that the mere fact that her husband told her that such notes were in existence, and nothing more, can be regarded as a constructive delivery of them to her.

We conclude therefore that the plaintiff was not entitled to retain a verdict based upon the notes. We turn now to the count for money had and received. If the plaintiff, by mortgage or otherwise, procured money and furnished it to Silas D. Jones for the use of a firm of which he was a member, and there is evidence that she did, then he as a member of the firm became bound in equity and good conscience either to pay her or pay her debt. If he did not do the one, he ought to do the other. And we think she might recover for money had and received.

But there are difficulties here, also. In the first place the claim for the $1500 arose when the firm became indebted to her to that amount in 1896, and that claim became barred by the statute of limitations, even before the death of Mr. Jones. In the next place, the evidence in the case, such as it is, raises the inference, we think, that the third loan was procured for, and received by the firm of Silas D. Jones' Sons, and not for the firm of Silas D. Jones & Sons, Silas D. Jones having gone out of the firm several months before the loan was procured. The verdict for the full amount of the loans, and interest was excessive, therefore, even if based upon the count for money had and received.

And in the absence of special findings by the jury, the last difficulty is that we have no means of knowing whether they founded

their verdict upon the notes, in which case it was wholly wrong, or upon the count for money had and received, in which case it might be only excessive. From the amount of the verdict we incline to think that it was based upon the notes themselves. Under the instruction of the court, upon the undisputed evidence, the jury might well find a perfected and valid delivery of all the notes.

Although the motion to set aside the verdict must be sustained, it is expedient to examine the defendants' one exception that is open to consideration. The jury were instructed to the effect that if the notes had been delivered as completed instruments by Silas D. Jones to Storer, (one of the members of the firm) to deliver to his wife, "that delivery might be perfected, even after the death of Silas." While such an instruction, as we have seen, might be correct under some circumstances, and a delivery to an agent for future delivery to the payee upon the happening of a contingency might be effective, yet, we think, as applied to the evidence in this case, the rule given without limitation or qualification must be deemed to be exceptionable error.

Motion and exceptions sustained.

HERLDING W. CARSON *vs.* DAVID A. CALHOUN.

Cumberland. Opinion July 10, 1906.

Contracts. Lord's Day. Pleadings. Money Counts Limited by Specification. R. S., c. 125, § 25.

Revised Statutes, chapter 125, section 25, reads as follows: "Whoever, on the Lord's Day, keeps open shop, workhouse, warehouse or place of business, travels, or does any work, labor or business on that day, except works of necessity or charity; uses any sport, game or recreation; or is present at any dancing, public diversion, show or entertainment, encouraging the same, shall be punished by fine not exceeding ten dollars."

The plaintiff performed certain plumbing work in a certain hotel, on the Lord's Day. This work was not a work of "necessity or charity." *Held:* that the plaintiff cannot recover for his labor so performed in violation of the aforesaid statute.

In addition to the "account annexed," the plaintiff's writ contained the general money counts with the following specification: "Under the money counts the plaintiff will claim to recover the sums named in the first count of his writ being money earned by said plaintiff for labor performed by said plaintiff at White Oak Spring Hotel at Poland, Maine." *Held:* that the claim of the plaintiff is restricted and his right to recover limited by his specification, and under the pleadings he cannot avail himself of evidence of money had and received.

On exceptions by plaintiff. Overruled.

Assumpsit on account annexed to recover the sum of fifteen dollars for labor as a plumber performed by the plaintiff for the defendant, and which said labor was performed on the Lord's Day, and was not a work of "necessity or charity." The writ also contained the common money counts added as an amendment, with the following specification: "Under the money counts the plaintiff will claim to recover the sums named in the first count of his writ being money earned by said plaintiff for labor performed by said plaintiff at White Oak Spring Hotel at Poland, Maine." Plea, the general issue.

The action originated in the Municipal Court of Portland, and from thence was taken on appeal to the Superior Court, Cumberland

County. Tried at the December term, 1904, of said Superior Court. After the plaintiff's evidence was all in, the defendant moved for a nonsuit on the ground that the plaintiff had failed to make out a case in law, and the motion was granted, and thereupon the plaintiff excepted.

The case fully appears in the opinion.

Connellan & Connellan, for plaintiff.

Anthoine & Talbot, for defendant.

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

PEABODY, J. This was an action of assumpsit on account annexed to recover for plumbing work performed on the Lord's Day. The account in the writ is as follows:

"Portland, Maine.

David A. Calhoun

To Herlding W. Carson, Plumber, Dr.

Sunday work performed at double time.

White Oak Hill Spring Hotel, Poland, Maine.

Sunday		
Aug. 4, 1901,	. . . . .	$ 5.00
" 11, "	. . . . .	5.00
" 18, "	. . . . .	5.00
		$15.00"

By amendment the money counts were annexed to the writ with the following specification:

"*Specification:* Under the money counts the plaintiff will claim to recover the sums named in the first count of his writ being money earned by said plaintiff for labor performed by said plaintiff at White Oak Spring Hotel at Poland, Maine."

The plaintiff thus invokes the aid of the court to assist him in recovering for labor performed in violation of the statute R. S., chap. 125, sec. 25. The unlawful acts were not only made the basis of

the suit but were also proved by the testimony of the plaintiff himself. On motion of the defendant the presiding judge ruled that the action was not maintainable and ordered a nonsuit, and the case comes before this court upon the plaintiff's exceptions to this ruling.

The plaintiff seeks to maintain his exceptions on the ground that evidence was introduced tending to show that the defendant had received money on account of the labor which was the subject of this action. The case, however, does not come within the exception of R. S., chap. 84, sec. 131, which applies to contracts express or implied made upon the Lord's Day. In the case at bar the objection is not to the time of making the contract, but concerns the actual performance of labor which was forbidden by statute. Whatever remedies the plaintiff may have by other actions at law or in equity, the court can recognize no valid contract or implied promise based on the work done on the Lord's Day set forth in this declaration. It is a well established principle that in cases of this kind the law leaves the parties where their illegal contract left them, and will render asistance to neither. *Bridges* v. *Bridges,* 93 Maine, 557, and cases cited. *Greenough* v. *Balch,* 7 Maine, 461. *Bank* v. *Robinson,* 42 Maine, 589. *White* v *Buss,* 3 Cush. 448. *Thompson* v. *Williams,* 58 N. H. 248. Keener on Quasi-Contracts, 270.

The claim of the plaintiff is restricted and his right to recover limited by his specification, and under the pleadings he cannot avail himself of evidence of money had and received. *Gooding* v. *Morgan,* 37 Maine, 419. *Babcock* v. *Thompson,* 3 Pick. 446. *Smith* v. *Kirby,* 10 Met. 150.

Exceptions overruled.

JOHN F. PROCTOR *vs.* MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion July 14, 1906.

Adverse Possession. No Continuous Occupation for Twenty Years. No Written Claim for Improvements Filed. Same Deemed Waived, When. Compensation Allowed for Beneficial Improvements Only. Increased Value of Land by Reason of Improvements. Value of Land Without Improvements. R. S., c. 106, §§ 24, 26, 27, 28, 29, 30, 31.

1. The tenant having set up a claim of title by adverse possession against the demandant's record title, the court is of opinion that, assuming that all the other essentials of adverse occupation have been proved, the tenant has failed to show occupation for any continuous period of twenty years. Accordingly the defense fails and the demandant is entitled to judgment.
2. Although the record before the court does not disclose whether the tenant filed in the court below a written claim for compensation for improvements, or whether the demandant filed a request in writing for an estimation for what would have been the value of the premises, at the time of the trial, if no improvements had been made, yet the parties had the right to waive these provisions of statute. And when both parties introduced evidence on the subject and the question was argued, the court, when the case comes upon report, will assume that they were waived, nothing to the contrary appearing.
3. Nothing can be deemed an "improvement" for which compensation may be allowed, which does not benefit the land, and increase its value to the true owner. Under this rule the tenant's claim in this case for ties, rails and equipment must be disregarded.
4. The court is of opinion that the filling on the demandant's flats by the tenant, did add somewhat to the value of the flats, and that the tenant is entitled to be allowed for the increased value.
5. Taking all the conditions into account the court is of opinion that the increased value of the premises by reason of the embankment built by the tenant should be estimated at four hundred dollars, and that the value of the premises, at the present time, without the embankment should be estimated at two hundred dollars.
6. The demandant will have judgment for so much of the demanded premises as consists of flats which were embraced in the Deborah Mills grant, the boundaries to be determined from the plan used at the trial. But the issuing of a writ of possession will be governed by the provisions of R. S., ch. 106, sects. 26-31 inclusive.

On report. Judgment for demandant.

Real action brought by the plaintiff to recover possession of certain flats situate in Portland, occupied by the defendant corporation with its roadbed and tracks. The flats adjoined the upland of two Colonial grants, the southerly known as the Deborah Mills grant, and the northerly as the James Dueneven grant.

The writ is dated September 10, 1898, and was entered at the October term, 1898, of the Supreme Judicial Court, Cumberland County. The action was first tried at the April term, 1899 of said court. Plea, the general issue. "After both parties had introduced their evidence relative to the record title of each to the lots described in demandant's declaration, the case, by agreement of parties, was withdrawn from the jury and reported."

"By the terms of the report the court was to decide the question as to which of the parties has the better record title to the demanded lots. If the court should decide that question in favor of the defendant, judgment for defendant to follow; if in favor of demandant, the case to be remanded to nisi prius, to be tried upon the defendant's claim of title by adverse possession."

The Law Court decided that the defendant had the better record title to the flats adjoining the James Dueneven grant, and that the plaintiff had the better record title to the flats adjoining the upland of the Deborah Mills grant.

In accordance with the stipulation of the parties, the case was then remanded to nisi prius to be tried upon the defendant's claim of title to the flats on the Deborah Mills grant, by adverse possession. (See 96 Maine, 458.)

The action was then tried at the April term, 1904, of said S. J. Court, upon the defendant's claim of title to the flats on the Deborah Mills grant by adverse possession. The verdict was for the defendant. The plaintiff then filed a motion for a new trial and also took exceptions to certain rulings made by the presiding Justice during the trial, and the case again went to the Law Court. The exceptions were sustained, but the motion was not considered, and the case came back to nisi prius for a new trial. (See 100 Maine, 27.)

The action again came on for trial at the October term, 1905, of said S. J. Court. After all the evidence had been taken out it was agreed to report the same to the Law Court with the following stipulations; "The foregoing testimony together with that printed on the motion for new trial and exceptions at the trial term, 1904, is hereby reported for the consideration of the Law Court and upon so much thereof as is legally admissible and pertinent the court are to render such judgment as the law and evidence require."

The points and facts involved in the case as last sent to the Law Court are fully stated in the opinion.

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

Symonds, Snow, Cook & Hutchinson, for defendant.

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

SAVAGE, J. This case has been before the Law Court twice before this time, 96 Maine, 458; 100 Maine, 27. It now comes on report for "such judgment as the law and evidence require." The only questions now presented are whether the tenant has title, by adverse possession, to so much of the demanded premises as were flats embraced in the grant made by the town of Falmouth to Deborah Mills in 1721, and if not, whether the tenant is entitled to compensation for improvments made by it on the premises. All other questions involved in the case were settled in *Proctor* v. *M. C. R. R. Co.*, 96 Maine, 458. It was then determined, under the terms of the stipulation, that the demandant had a better record title to the Deborah Mills flats, but that the tenant was entitled to judgment for the remainder of the demanded premises.

It is well settled that 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 the flats covered by the deed. *Brackett* v. *Persons Unknown*, 53 Maine, 228; *Richardson* v. *Watts*, 94 Maine, 476; *Whitmore* v. *Brown*, 100 Maine, 410. But in this case the grantee in the deed did not gain title to the upland by

adverse possession; he took it by his deed. Therefore he acquired no title to the flats by constructive occupation. He could gain title to them only by actual adverse occupation, and then not beyond the line of such occupation. *Thornton* v. *Foss*, 26 Maine, 402; *Proctor* v. *M. C. R. R. Co.*, 100 Maine, 27; *Whitmore* v. *Brown*, 100 Maine, 410.

The tenant upon which is the burden of showing open, notorious, adverse, exclusive, and uninterrupted or continuous possession for some period of twenty years or more, relies chiefly upon acts done by its predecessor in title, Frederick W. Clark, or under his direction, in cutting salt grass from year to year upon or in front of the disputed premises. While the particulars as to time and place are in dispute, there is evidence tending to show, though it is not made certain, that Clark or his men acting under his orders did cut salt grass from year to year at different periods, upon the disputed premises. The grass grew mostly in patches, and the amount cut was small. But we do not think it is necessary to decide this question. Nor is it necessary to decide whether Clark's acts of occupation, wherever they were, were of such a character as would lay the foundation for a claim of adverse occupation. Assuming that all the other essentials of adverse occupation have been proved, we think the tenant has failed to show occupation for any continuous period of twenty years. The testimony of some of the witnesses as to dates is not clear. But we think that the most that it can fairly be claimed has been shown is that Clark cut the salt grass on the flats yearly from 1850 to 1865, again from 1870 to 1872, and perhaps afterwards at an uncertain date or dates between 1872 and 1885. The tenant purchased in 1885, but there is no evidence of acts of occupation by it until 1888. After that time its occupation was continuous to the date of the writ in 1898, and since. There is no evidence of occupation from 1865 to 1870. There is no evidence of occupation from 1872 to 1885 sufficiently definite as to dates to warrant a finding that it was continuous. And there is no evidence of occupation from 1885 to 1888. The tenant in endeavoring to fill these gaps or some of them, relies upon the testimony of Clark's son-in-law, McKenney. Mr. McKenney testified that he

worked for Clark from 1852 to 1856 and cut the salt grass, that from 1857 to 1865 he was away and did not see any grass cut, that he went West in 1866 to live, that he has returned every year or two and spent two or three months in the summer, except that in 1871 and 1872 he remained eighteen months and carried on Clark's brick yard. Being asked whether on his returns there was to his knowledge any change whatever in Clark's manner of dealing with the property, he answered "no." It is manifest that evidence of this character cannot be made to supply the want of definite proof of occupation. It is as indefinite and uncertain as anything could well be. Neither the question nor the context shows that the mind of the witness was directed to the flats. The "property" about which he was asked may well have been understood by him to refer to the brick yard. It does not appear that he knew the manner of Clark's dealing with any property from 1857 to 1868, when he first returned from the West. If this witness knew anything about Clark's occupation of the flats, it is fairly to be inferred that he would have been asked about it.

There is much evidence in the case about Clark's adverse claims to the flats, and some at times relating to which there is no proof of occupation. But an adverse claim is not evidence of adverse occupation. *Carter* v. *Clark*, 92 Maine, 225. Both are essential elements in support of a claim of title by adverse possession, but they are distinct from each other, and each must be proved.

The case failing to show that the tenant and those under whom it claims, have occupied the flats in question uninterruptedly for any one period of twenty years, the defense fails and the demandant is entitled to judgment.

The tenant was in open, notorious, exclusive, continuous and adverse possession of the premises for about ten years next prior to the date of the demandant's writ, and now makes claim for the value of improvements made thereon during the first three or four years of its occupation. The case before us does not show that the tenant has filed a written claim for compensation for such improvements as provided by R. S., ch. 106, sect. 24. Nor that the demandant has filed a request in writing under the same section for an estimation of what

would have been the value of the premises, at the time of trial, if no improvements had been made. But such a claim for the value of improvements is of an equitable character, and if it were necessary and justice required it, the court would remand the case to nisi prius that the proper claim and request might be filed, and a statutory determination thereof be made.

In this case, however, it does not seem to be necessary to remand the case. It is before us on report. When cases are reported to the Law Court, the pleadings, unless made otherwise by the terms of the report, are of minor consequence, except as a guide to the issues to be determined. And no doubt it was competent for the parties to waive a compliance with the statutory provisions. The case shows that evidence was introduced by both sides on the question of improvements, and that question has been argued on the merits before us. We assume therefore that the parties by reporting the case contemplated that the court would decide this question, rather than remand the case for a further trial.

The "improvements" for which the tenant claims compensation consist of a "fill" or embankment about five hundred feet long, about twenty-six feet wide at the top, and fifty-four at the bottom, and from seven to eleven feet high, containing about 6,666 cubic yards, and the ties, rails and other railway equipment which was laid thereon. The statute provides that an estimation shall be made of the increased value of the premises, by reason of the improvements, but that no allowance shall be made except for such improvements as "were judicious and proper under the circumstances." R. S., ch. 106, sect. 24. And nothing can be deemed an "improvement" which does not benefit the land, nor increase its value to the true owner. It matters not how much a so called improvement may have benefited the adverse occupier. The real question is, has it been judicious and proper and pecuniarily beneficial, as regards the owner? Under this rule the tenant's claim for ties, rails and other equipment must be disregarded. But as it appears, as we think, that the flats themselves were not available for any substantial or practical use prior to the tenant's occupation, and could only be made usable by filling above tide water, the filling was "judicious and proper," and if it added to the

value of the demandant's flats, the tenant is entitled to be allowed for it, to the extent that the value of the premises was thereby increased. We think it cannot be said that the filling by the tenant of these flats, so near such a railroad center as the Union Station in Portland is, has been of no benefit to the demandant. The flats themselves were of little value, except to hold for future developments in that locality. The tenant has done what the demandant would have been obliged to do, in part, at least, to make his flats usable. The demandant might not have found it necessary to make so deep a fill, as the one the tenant made. The land might have been made usable at much less expense than the tenant incurred. But that the land had some more value to use or to sell, after the embankment was made by the tenant, taking into account conditions existing at the date of the writ, we have no doubt. It is not easy, however, to determine how much. We have before us two widely varying estimates of the cost of the filling, by two admittedly competent engineers. But the cost of the fill, though properly admissible, may furnish only a slight evidence of the increased value that the embankment gives to the premises. It is by no means the criterion. The tenant has now no right to keep its tracks upon this embankment. We cannot know that upon any future relocation of its tracks made necessary by this decision, it will take the demanded premises as its right of way, by eminent domain or otherwise. If it has to condemn and pay for a right of way, it may find it expedient to locate elsewhere. A change of a very few feet would render the embankment of no particular present use or value to the demandant. Of course the land can be used for that purpose, if it shall be so taken and the fact that it is so available must have some effect upon its present value, and upon its increased value to the demandant by reason of the embankment. There is now no other prospective use, we think, which materially affects its value. It is claimed by the demandant that the embankment injuriously affects his use of some portion of the remainder of his flats. We think however that that damage is trifling.

Upon the whole, we are of opinion that the increased value of the premises by reason of the embankment should be estimated at four hundred dollars, and that the value of the premises at the present

time without the embankment should be estimated at two hundred dollars.

The demandant therefore is entitled to judgment for so much of the demanded premises as consists of flats which were embraced in the original Deborah Mills grant, the boundaries to be determined from the plan used at the trial. But the issuing of a writ of possession will be governed by the provisions of R. S., ch. 106, sects. 26-31 inclusive.

Judgment for demandant. Writ of possession to issue in accordance with the opinion.

KATE L. SANFORD *vs.* MARY CARR STILLWELL.

Waldo. Opinion July 16, 1906.

Deed. Exception Therein. Construction of Same with Reference to Unrecorded Deed. R. S., c. 76, § 11.

The plaintiff's deed contained, among other things, the following clause: "Also excepting any and all other portions of said premises which may have been conveyed by the Cape Jellison Land Improvement Company, the Penobscot Bay Land Improvement Company, Dustin Lancey and Jeremiah Nelson."

At the time of the delivery of this deed the plaintiff had notice by record of a deed of certain lots from Jeremiah Nelson to the defendant, but after the plaintiff's deed was placed on record the defendant caused to be recorded another deed from Jeremiah Nelson bearing the same date as the one previously recorded but purporting to convey not only the same several lots but also one half the area of the private ways adjoining and the shore and flats in front of these lots.

Held: that the exception in the plaintiff's deed included by reference the land conveyed to the defendant under the unrecorded deed.

On report. Judgment for defendant.

Real action wherein the plaintiff demanded against the defendant the possession of a certain lot of land situate in Stockton Springs, Waldo County. Writ dated August 30, 1905. Plea, the general issue and a brief statement of title in the defendant.

This action came on for trial at the April term, 1906, of the Supreme Judicial Court, Waldo County. At the conclusion of the evidence it was agreed to report the case to the Law Court, "to render such judgment as the law and the fact require."

The plaintiff's deed mentioned in the opinion is dated August 10, 1899, and was recorded August 15, 1899. The defendant's deed mentioned in the opinion and which was not recorded until after the record of the plaintiff's deed, is dated April 30, 1896, and was recorded August 9, 1901.

The case appears in the opinion.

Dunton & Morse, for plaintiff.

W. P. Thompson, for defendant.

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

PEABODY, J. This is a writ of entry and comes before the court on report.

The plaintiff is the owner of a large tract of shore property in Stockton Springs, Waldo County, Maine, which had been laid out and plotted for building purposes and from which portions had been sold prior to the plaintiff's acquisition of the property. The plaintiff's deed contained the following clause:

"Also excepting any and all other portions of said premises which may have been conveyed by the Cape Jellison Land Improvement Company, The Penobscot Bay Land Improvement Company, Dustin Lancey and Jeremiah Nelson."

The deed was dated August 10, 1899, and recorded August 15, 1899. At the time of the delivery of this deed the plaintiff had notice by record of a deed of certain lots from Jeremiah Nelson to the defendant; but after the plaintiff's deed was placed on record the defendant caused to be recorded another deed from Jeremiah Nelson

bearing the same date as that previously recorded but purporting to convey not only the same several lots but also one half the area of the private ways adjoining and the shore and flats in front of these lots. The plaintiff seeks to recover possession of that portion of the land occupied by the defendant which was not included in the deed first recorded. There is no evidence that either the plaintiff or the plaintiff's grantor had notice of the second deed prior to its recording. There is no evidence of fraud, and as the case stands full credit is to be given to all the transactions, and the rights of the parties must depend upon the construction of the deeds and the legal effect of their delivery and recording, which must be presumed to have been upon the dates indicated therein.

The plaintiff relies upon the statute R. S., chap. 75, sec. 11, which provides 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."

This would be sufficient to establish her title in the absence of evidence of actual notice of defendant's deed, were it not for the express exception in the plaintiff's deed of "all other portions of said premises which may have been conveyed by Jeremiah Nelson."

It would seem that the case as presented to the court turns entirely on the validity of this exception and its application to the premises referred to in the defendant's deed. Whatever may have been the rights of the plaintiff's grantor with reference to the premises, if he has purposely and by apt language excluded the defendant's land from the tract which he conveyed to the plaintiff she has not succeeded to his rights in that land. The question of actual notice of the defendant's deed is not involved in this case, if the plaintiff herself has no colorable title to the premises.

The language of the exception does not violate the requirements of accuracy. By reference to the conveyances of Jeremiah Nelson it incorporates the premises described in those conveyances which must necessarily have been set out with sufficient accuracy. The knowledge or ignorance of the grantor with reference to the conveyances of Jeremiah Nelson does not affect the certainty and accuracy of his

exception. If the conveyances existed in fact and are referred to that is sufficient. *King* v. *Wells*, 94 N. C. 344.

There is no ambiguity in his use of language, which clearly expresses the intention to include in his exception all land conveyed by Jeremiah Nelson whether the conveyances were within his knowledge or not. It therefore included by reference the land conveyed to the defendant under the unrecorded deed, which was a valid conveyance although until recorded effectual only against those having actual notice. *Adams* v. *Hopkins*, 144 Cal. 19.

The plaintiff not having acquired title to the demanded premises cannot maintain this action.

Judgment for defendant.

LYDIA W. WOOD *vs.* MAINE CENTRAL RAILROAD COMPANY.

ELLA M. BEEDY *vs.* SAME.

ARTHUR E. BEEDY *vs.* SAME.

Kennebec. Opinion July 17, 1906.

Railroad Crossing. Negligence. Care on Part of Passengers for Hire a Question of Fact. R. S., c. 52, §§ 70, 86.

When passengers for hire, riding in a public carriage, are about to cross a railroad track it cannot be said as a matter of law that it is negligence on their part if they are not as alert as the driver of the team over which they have no direct control, in looking and listening for an approaching train before attempting to cross the track, but it is a question of fact for a jury, under all the circumstances, to determine whether or not such passengers were in the exercise of ordinary care.

In the cases at bar, an instruction was given which was clearly within the rule of law, and the fact, if such be the fact, "that the language of the judge unduly emphasized the defendant's legal responsibility and unduly minimized its legal privileges and rights," is not deemed sufficient to sustain the exception to the instruction.

In the three above entitled actions, there was a verdict for the plaintiff in each action. *Held:* that the motions for new trials must be overruled on the question of liability, and also that the verdict in favor of the plaintiff husband must be sustained, but that the verdicts in the other two actions are excessive and that therefore on the question of the assessment of damages these two verdicts must be set aside unless the respective plaintiffs file remittiturs as stated in the opinion.

On motions and exceptions by defendant. Exceptions overruled. Motion overruled in one action and sustained in the other two actions on the question of damages unless remittiturs are filed.

Three actions on the case for negligence and all tried together. The actions by the two female plaintiffs were each to recover damages for personal injuries sustained by them and caused by the alleged negligence of the defendant company. The remaining action was brought by the husband of one of the other plaintiffs, to recover for expenditures and loss of service arising from the injury to his wife. These actions all grew out of the same accident which occurred in the Maine Central yards in Waterville, on the 24th day of July, 1903. Plea, in each case, the general issue.

The verdict in each case was for the plaintiff, in the following sums: Ella M. Beedy, $9,866.33; Arthur E. Beedy, $4,204.66; Lydia W. Wood, $7,558.92.

The defendant seasonably filed a motion to set aside each of said verdicts as against evidence and for excessive damages.

The defendant also excepted to certain instructions given to the jury by the presiding Justice.

The case appears in the opinion.

Heath & Andrews and Paul R. Blackmur (of the Massachusetts Bar) for plaintiffs.

Orville Dewey Baker and Charles F. Johnson, for defendant.

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

SPEAR, J. These three actions are for personal injuries against the Maine Central Railroad. They come up on motion and exceptions. They all grow out of the same accident and depend upon the same state of facts. Two of these suits are brought by the persons injured and the third by the husband of one of them for

damages. The accident occurred on the 24th of July, 1903, about seventeen minutes past eight o'clock in the morning of a clear day. The parties to the accident were two women passengers for hire in a mail stage with the driver of the stage which was struck by a freight train of four cars running backwards and pushed across a public crossing whereby the women were severely injured.

It is not controverted that they were lawfully travelling on Alden Street, a public highway in Waterville that crosses the yard of the defendant company connecting Ticonic Street and College Avenue. Six tracks run across the street covering the length of it for a distance of about eighty feet. There were no gates, flagmen, signals, signs or precautions of any kind calculated to warn persons of the approach of passing trains. The yard on both sides of the street was a long one and the use by the railroad of the tracks across the street was extensive. The use by travellers was equally frequent. As already observed, there were three parties in the carriage, an open carryall, which was being driven by a mail carrier who took passengers for hire, and the two ladies and himself were the occupants. The carryall had two seats, the driver was in the front seat, one of the plaintiffs, Mrs. Wood was on the seat with him, and Mrs. Beedy, the other plaintiff, occupied a rear seat alone. This carriage was a common carryall, with a small awning overhead with four small supports, giving an unimpeded view in every direction to the passengers. The plaintiffs were not traversing this street of their own choice, as the driver, receiving the usual fare, selected his own route. There seems to have been no lack of reasonable care on the part of the plaintiffs in selecting a driver of experience and one in whom they were entitled to have the confidence usually placed by passengers in a driver of a public carriage. He owned the team and had driven the stage route for eight years. He had been accustomed to the use of horses for thirty years. The horse driven on this occasion was twelve years old, steady, kind, fearless, easily managed and often driven by women. Austin had lost an arm when fourteen years of age but by long experience had learned to drive properly with one hand. There is no pretence in this case that the lack of a hand in any way contributed to the accident. He had passed

this crossing for eight years, at least once a week. He was well acquainted with the location and the tracks. No question was raised as to his sobriety, intelligence and experience. Mrs. Beedy had known him for a long time and had driven with him many times before in the same carriage and had an opportunity to notice his care and skill in driving. Mrs. Wood had driven with him once. Nothing in the case tends to show that anything happened to modify the confidence these women seemed to have had the right to repose in the carrier charged with the responsibility of conveying them safely.

These plaintiffs were coming from Fairfield and the driver pursued a course which took him along Alden Street and over the crossing in question. This crossing is composed of six tracks and as before stated, covered the length of the street to a distance of about eighty feet. The team had passed five tracks and was on the last and final track when the accident occurred. The horse had got completely over the last crossing so that he was not touched or injured. The carriage itself was right on the crossing between the rails of the final crossing when the accident occurred and the plaintiffs were injured. It was the off hind wheel or between the hind wheel and the front wheel of the carryall on the off side that the train struck.

The train which collided with them was a shifting freight having four loaded cars and an engine, being backed easterly towards Bangor. They were hit not by the engine but by the freight car being at the head of the train as it was backed up.

It is not disputed that the driver when he approached Alden Street and was about to turn into it, stopped his horse and looked across all the tracks to see if the street was clear its entire length. The evidence shows that not only the driver but the two plaintiffs also took the precaution to look and listen for the approach of a train over this street. After this until the moment of collision, no flagman, gate, signal or other precaution warned the driver or the occupants of the carriage of the approaching train. Under these conditions the driver proceeded until the collision. The two plaintiffs had no control over the management of the team. The driver said nothing to them but simply drove on.

Upon these different tracks both passenger and freight cars were

yarded, one lapping by the other in such a way, as the plaintiffs claim, as to completely impede the view of the car approaching upon the last track crossed by them, until they were nearly, if not quite, upon the track. In discussing the evidence, we will call the track upon which the accident occurred, track No. 1, and the other tracks 2, 3, 4, 5, and 6, in the order of their location.

Under the above state of facts the plaintiffs contend that the cars stretching along these various tracks in echelon order, including a car on track 2 but a few feet from the crossing, prevented them from hearing or seeing the approaching car; and that this fact, coupled with the undue speed of the train and the absence of any signals or warning of its approach, established a plain case of negligence on the part of the defendant company. On the other hand, the defendant claims that the cars standing on these various tracks were so distributed that the approaching train could have been seen both by the driver and the plaintiffs, if in the exercise of due care, from the third track, and that as a matter of fact, no car was standing upon the second track and that the train was backing down at a rate of speed not exceeding six miles an hour and that therefore the defendant was not negligent. The jury found in favor of the plaintiffs upon the question of the defendant's negligence, and we cannot say that their verdict upon this issue is so clearly wrong as to justify us in setting it aside.

But the defendants say, admitting that they were negligent in the respects referred to, they are not liable for the injuries occasioned by the accident because the plaintiffs were not only guilty of negligence as a matter of fact, but admitting the facts substantially as they claim, were guilty of contributory negligence as a matter of law.

The last two propositions interlace and must be discussed together, inasmuch as whether the plaintiffs were guilty of contributory negligence, conceding the defendant's negligence, depends upon determining the legal duty owed by the plaintiffs to the defendant in crossing these tracks. It is of course true, that if these plaintiffs could have seen or heard the car, backing down in such a manner as to threaten their safety, and in season to notify the driver of the danger and request him to stop, it was their duty to do so. But did they have

the opportunity to thus observe the approaching car? It is not our purpose to discuss the testimony at any length or to make a compilation of the time and distances respectively occupied by the team and the train in reaching the crossing.

The determination of one very important disputed fact we think justified the jury in relieving the plaintiffs from the charge of contributory negligence upon this point as a matter of fact. As already seen, the plaintiffs contend that a car was sitting upon track 2, but a few feet from the crossing. The defendants on the contrary say that there was no car upon track 2, anywhere near the crossing. If a car was upon track 2 near the crossing, then it is apparent that the plaintiffs could not have seen the approaching car until it had passed by the end of the car sitting upon track 2, thus bringing the team and the backing car in close proximity upon track 1, when they first came in sight of each other. On the other hand, if no car was upon track 2, near the crossing, then the plaintiffs could have seen the approaching car for quite a little distance up the track before it reached the crossing. We think the evidence is quite conclusive, at any rate, sufficiently so to fully warrant the inference by the jury, that a car was upon track 2, near the crossing at the time of the collision. The testimony of the defendant's own witnesses seem to establish this fact. Two of the defendant's witnesses explicitly stated that they were opposite the window of the telegraph office and that the end of their car, the colliding car, was opposite Fenner's windows, 66 feet from the crossing, when they first saw simply the head of a horse. Without going into any mathematical calculation of the distances or the time it would take to traverse them respectively by the team and the train, the situation as disclosed by the plans and the evidence quite clearly demonstrates that a car was sitting upon track 2, as claimed by the plaintiffs; otherwise, the defendant's employees could have seen the horse's head for some time and some distance before they arrived at the point opposite the window of the telegraph office.

We therefore think the jury did not so far err as to require the intervention of the court when they came to the conclusion, as they must have done in order to find a verdict for the plaintiffs, that the

cars upon these various tracks were so located as to prevent the plaintiffs from seeing the approaching train until so near the point of collision that no reasonable time intervened, between the discovery of the train and the collision, in which they, as passengers not in control of the team, were able to avoid the accident.

But the defendant goes still further and contends that, conceding these facts in favor of the plaintiffs as found by the jury, they should be inhibited from recovery by the law governing the conduct of persons approaching and about to cross the tracks of a steam railroad. If we understand its legal position correctly, it claims that the plaintiffs, immediately before attempting to cross the track, should have looked and listened for an approaching train with the same degree of care required of them had they been driving the team themselves; and that upon the approach of danger, they should have warned the driver; that under the well settled rule in this state, that a person in the possession of unimpaired sight and hearing, if he does look and listen at a railroad crossing and neither sees nor hears a train, is negligent for not seeing or hearing it, and if he does see or hear it and attempts to cross and is injured he is negligent for making the attempt, the plaintiffs upon either alternative were negligent and cannot recover.

Upon this point the presiding Justice instructed the jury as follows:

"The railroad company contends that the standard of ordinary care on the part of the passengers for hire, riding in a public carriage, is the same as that of the driver of the carriage under the circumstances of this case, except so far as it is modified by the fact that they have no direct control over the team.

"You may find it to be substantially so, as a matter of fact, upon the evidence in this case, but I cannot say to you as a matter of law that it is negligence in itself on their part if they are not as alert as the driver in looking and listening for an approaching train before attempting to cross the track. I cannot say to you as a matter of law that they must be presumed to be negligent if as passengers they failed to look and listen. It is a question of fact for you to decide under the particular circumstances of the case.

"I have said that you may find that it was the plaintiff's duty in this case to 'look and listen.'"

To this ruling the defendant excepted, but we think the ruling was correct. It makes this distinction as to the rule of law governing the conduct of one approaching and attempting to pass a railroad crossing who is driving and in the full control and management of his team, and that governing the conduct of passengers for hire who are not driving and do not have the control and management of the team in which they are riding; that in the former case it is, as a question of law, negligence per se for a person to cross a railroad track without first looking and listening if there is a chance for his doing so. While in the latter case, it is not a question of law and negligence per se, if the passengers fail to request the driver to stop or to look and listen, but a question of fact for the jury whether under all the circumstances in the case, ordinary care required that they should do so.

It is conceded in the defendant's brief that a person riding in a covered hack would be relieved of the duty of looking and listening in crossing a railroad track and authorized to rely upon the care and skill of his driver. In such a case, the situation relieves the passenger of the duty of looking and listening. He is within a closed carriage and cannot see or hear without stopping the team and alighting from his carriage. We see no reason why the same rule as to the degree of care to be exercised should not apply to a passenger in an open carriage. All the conditions are precisely the same except that the passenger in the open carriage can better hear and see.

But this is a circumstance affecting only the greater vigilance to be exercised on the part of the passenger riding in an open carriage to bring him within the rule requiring the observance of ordinary care. In each case the passenger has a right to and must to a certain extent rely upon the vigilance of the driver. While passive reliance upon the driver might relieve the passengers in the closed hack from contributory negligence with respect to the danger he could not see or hear, the same conduct might subject a person riding in an open carriage to the charge of contributory negligence with respect to the danger they could see and hear, if paying attention. In each case

it is a question of ordinary care under all the circumstances.

We think the rule laid down by the presiding Justice goes as far as the law required. The above distinction between the duty owed by the driver of the team and a passenger is recognized and stated in *State* v. *B. & M. R. R. Co.*, 80 Maine, 430. This was a case in which the deceased was riding as a passenger either for hire or gratuitously. While the whistle of the approaching train which caused the accident was heard and discussed by the other two occupants of the carriage, the deceased was silent and by the act of the driver to which he made no objection was driven directly to the collision which caused his death. With reference to the force of the fact that the plaintiff was only a passenger, Chief Justice Peters says: "The plaintiff's case is fortified by another consideration. He neither drove, nor, as far as appears, had any control of the team in which he was riding. It is reasonable to suppose that the owner carried him for hire or gratuitously as a neighborly kindness. His position was not of the same degree of responsibility to the railroad as was that of the driver. He was a comparatively passive party. Not that he had no duty to perform. He could have asked the driver to stop the team or he could have left it. But it would be natural, even though his fears were excited, that he should defer to some extent the experience and discretion of the driver, who was in the control of his own team, and before he had time to assert his own judgment against the driver's, or perhaps fully appreciate the situation, the inevitable event was upon him. We think this fact has considerable force in the combination of circumstances which weigh against the charge of contributory negligence."

If the rule contended for by the defendant is to prevail, there is no ground upon which to predicate the above reasoning, as it is apparent that under such a rule the act of the deceased in the above case would have been negligence per se and thus have precluded any consideration of the facts.

In *Howe* v. *Minn. St. Paul & S. S. M. R. Co.*, 62 Minn. 71, the precise question of law involved in this case was fully discussed and decided. The court held that the same duty did not necessarily devolve upon the passenger as upon the driver but that he must,

however, exercise reasonable care to avoid the danger and is responsible for his own negligence. It was said if the passenger knows the driver to be incompetent, sees that he is neglecting his duty, or participates in the driver's negligence, he is himself negligent. But that it was natural to trust somewhat to the driver seen to be watchful as under ordinary circumstances passengers have a right to rely largely upon a driver in exclusive control; that there can be no fast and hard rule. They specifically say "Every case must depend largely upon its own particular facts." The circumstantial evidence in this case may tend quite strong to prove that plaintiff, as well as driver, was negligent, but that was a question of fact for the jury." See also *Neal* v. *Rendall*, 98 Maine, 69; *Whitman* v. *Fisher*, 98 Maine, 575; *Smith* v. *Maine Central R. R. Co.*, 87 Maine, 339; *Brickell* v. *N. Y. Central*, 120 N. Y. 290; *Murray* v. *Ice Co.*, 180 Mass. 165; *Elkins* v. *B & A. R. R.* 115 Mass. 190.

We have disposed of the second exception first because it naturally came first in the discussion of the case. The first exception related to the instructions of the presiding Justice with respect to the effect of section 70 and section 86 of chapter 52, of the Revised Statutes, relating to the speed with which trains are allowed to proceed in passing through the thickly settled part of cities and towns. The substance of the instruction was as follows: "One word further in relation to the statute I read to you in regard to the speed of six miles an hour. I explained to you that of course this was not designed to be a description of the full measure of duty on the part of the railroad company, or to describe all the duties and obligations resting upon them. I did not say to you distinctly, I do say it now, that the fact that they were running more than six miles an hour without a flagman would not be conclusive evidence of negligence. It is a question of fact for the jury. But the fact that they were found violating the statute is always material and often important evidence tending to show negligence. For instance, we have another statute which requires persons about to meet and pass on the highway seasonably to turn to the right of the center of the road. Now the fact that one is found on the left side of the road in violation of the law would not be conclusive evidence of negligence on his

part, but it would be important evidence tending to show that he was negligent, if he was on the wrong side of the road, if he was violating the statute; but it might be open to explanation, there might be various reasons why he was there. I have explained also before, I believe, that they might be guilty of negligence if they were not going more than six miles an hour under given circumstances. It is a question of fact for the jury."

All that counsel have to say upon the propriety of this instruction is "That the language of the judge unduly emphasized the defendant's legal responsibility and unduly minimized its legal privileges and rights." Whether under all the circumstances in this case, this may or may not be true, we think the instruction is clearly within the rule of law governing this branch of the case.

While we do not see our way clear under the law and the evidence to set the verdict aside upon the question of liability, we are of the opinion that the jury erred in the assessment of damages. The verdict in favor of the plaintiff Ella M. Beedy was $9866.33; in favor of the plaintiff Arthur E. Beedy, her husband, for the loss of the comfort, assistance, service, society and benefit of his wife, on account of her injuries and for expenses paid in her behalf, $4204.66; in favor of Lydia W. Wood $7558.92.

It can serve no useful purpose to attempt an analysis of the evidence and undertake to give reasons for cutting down the size of these verdicts when upon a careful reading and consideration of the testimony we have become satisfied that justice requires this to be done. While the injuries to Mrs. Beedy were serious and painful, such perhaps as she would not again encounter for any sum of money, yet she has received the injuries and the question now is the amount to which she is entitled as just compensation for what she has in the past and will in the future suffer.

Upon a careful reading of the case we are convinced that $6000 will be just and adequate compensation for the injuries received by Mrs. Ella M. Beedy.

The compensation to which the husband is entitled as damages on account of the injuries received by his wife are more susceptible of computation than that of either of the other plaintiffs. The evidence

shows that at the time of the trial he had already expended about $1000 on account of the accident, and will undoubtedly be obliged for a long time at least to be under constant expense to supplement the household duties which could have been performed by his wife, but for her injuries, besides possible expense for medical attendance and medicine. While this verdict is a very large one under the circumstances of this case, yet in view of the contingencies that may arise on account of the injuries received by the plaintiff's wife, we are inclined to let this verdict stand. We are of opinion, however, that the verdict of $7558.92 in favor of the plaintiff Lydia W. Wood is clearly excessive. From a careful reading and consideration of the testimony in her case, we are fully persuaded that ample justice will be done by allowing her as compensation $4500. Our conclusion is that the plaintiff Ella M. Beedy should remit the amount of her verdict above $6000 and that Lydia W. Wood should remit the amount of her verdict above $4500, otherwise, a new trial is granted in each case. Motion overruled as to the plaintiff Arthur E. Beedy.

Exceptions overruled.

Motion sustained in case of Ella M. Beedy and Lydia W. Wood, unless plaintiffs file a remittitur for all of their respective verdicts above $6000 and $4500, within 30 days from the date of the rescript in this case.

STATE OF MAINE *vs.* JOSEPH P. BASS et als.

Penobscot. Opinion July 17, 1906.

Criminal Law. Evidence Must Support the Allegations. R. S., c. 29, § 45.

When in a criminal proceeding, the facts are entirely insufficient to support the allegations in the complaint judgment must be for defendant.

It is true that in misdemeanors all who participate in the commission of an offense are deemed principals and may be indicted and convicted either jointly or severally. But when a prohibited notice is printed in a newspaper published by a newspaper corporation, and a complaint therefor is against individuals they cannot be held responsible for the publication of such notice when there is an entire absence of any evidence to show that at the *time* of the alleged offense they had any interest whatever, either as stockholders or otherwise, in such corporation, or any participation in the conduct of its affairs.

In the case at bar, the capital stock of the corporation was all owned by the defendants at the time the complaint was made, which was six days after the publication of the prohibited notice, but the case fails to disclose that they had any interest in the corporation, either as stockholders or otherwise, on the 22nd day of April, 1905, the time of the commission of the alleged offense, or that they participated in the conduct of its affairs at that time.

On agreed statement. Judgment for defendants.

Complaint to the Bangor Municipal Court in the City of Bangor, under the provisions of section 45 of chapter 29 of the Revised Statutes. The substance of the complaint, omitting the "liquor advertisement" complained of, is as follows:

"Henry N. Pringle of Waterville in the County of Kennebec on the twenty-eighth day of April A. D. one thousand nine hundred and five in behalf of said State, on oath, complains that Joseph P. Bass, M. Robert Harrigan and Frederick H. Strickland, all of Bangor, in the County of Penobscot, laborers, on the twenty-second day of April, A. D. one thousand nine hundred and five with force and arms at Bangor aforesaid, in the County aforesaid, being then and there the owners and publishers of a newspaper known and called the Bangor Daily Commercial, did then and there in said newspaper

unlawfully and knowingly, publish notice of the sale and keeping for sale of intoxicating liquors in the words and tenor following:" (Copy of the liquor advertisement was here inserted.)

On this complaint a warrant in due form of law was issued on the 28th day of April, 1905, by said Municipal Court. The defendants were duly arraigned in said Municipal Court, pleaded not guilty and waived a hearing, and thereupon the Judge of said Municipal Court adjudged them guilty and imposed a fine of twenty dollars and costs upon each of the defendants, from which judgment an appeal was taken to the August term, 1905, of the Supreme Judicial Court, Penobscot County.

At said August term of said Supreme Judicial Court, the facts were agreed upon and it was then agreed that the case should be sent to the Law Court on the agreed statement of facts, with the following stipulation: "Judgment to be rendered by the Law Court as the facts and law of the case may require."

The agreed statement of facts is as follows: "It is agreed that at the time of said complaint and prior thereto and ever since, said newspaper, the Bangor Daily Commercial, including its plant, consisting of printing presses, boiler, engine, linotype machines, cases, type, paper and printing appliances, was owned and that said newspaper was published by the "J. P. Bass Publishing Company," a corporation duly organized and existing under the laws of this state, and having a capital stock fully paid in of forty thousand dollars, and that said capital stock is and was all owned at the time of said complaint by the respondents above named. And that the notice of the sale or keeping for sale of intoxicating liquors above named, and as described in the complaint and warrant was published with the knowledge of the respondents above named.

"It is further agreed that the said Con. Keefe, whose advertisement was alleged to have been published in the Bangor Daily Commercial, carried on business in the Commonwealth of Massachusetts and was legally authorized under the laws of said Commonwealth to sell and keep for sale intoxicating liquors therein.

"It is further agreed that said advertisement was published in said Bangor Daily Commercial in pursuance of a contract made and

entered into in Boston aforesaid through the Advertising Agency of Julius Matthews, between the said Keefe and the said Julius Matthews, acting on behalf of and as agent of said J. P. Bass Publishing Company."

H. H. Patten, County Attorney for the State.

Appleton & Chaplin, for defendants.

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

WHITEHOUSE, J. This is a complaint against the defendants for knowingly publishing in the Bangor Daily Commercial, a "notice of the sale and keeping for sale of intoxicating liquors." It is based on section 45 of chapter 29 of the Revised Statutes. The defendants waived a hearing in the Municipal Court, and being adjudged guilty, appealed to the Supreme Judicial Court. The case comes to the Law Court on an agreed statement of facts.

It is alleged in the complaint that the defendants, on the 22nd day of April 1905, "being then and there the owners and publishers of a newspaper called the Bangor Daily Commercial, did then and there in said newspaper unlawfully and knowingly publish notice of the sale and keeping for sale of intoxicating liquors" etc. This complaint bears date April 28, 1905.

It appears from the agreed statement that "at the time of said complaint and prior thereto and ever since, said newspaper, the Bangor Daily Commercial was published by the "J. P. Bass Publishing Company," a corporation duly organized and existing under the laws of this State, and having a capital stock fully paid in of forty thousand dollars, and that said capital stock is and was all owned at the time of said complaint by the respondents above named. And that the notice of the sale or keeping for sale, of intoxicating liquors above named, and as described in the complaint and warrant was published with the knowledge of the respondents above named."

It is thus apparent that the facts admitted in the agreed statement are entirely insufficient to support the allegations in the complaint. The material allegations in the complaint obviously are, that the

defendants were the owners and publishers of the Bangor Daily Commercial and published in it the advertisement in question; but in the agreed statement it is admitted that the paper was published by "The J. P. Bass Publishing Company, a corporation duly organized and existing under the laws of the state." There is a further statement of fact that the capital stock of this corporation was all owned by the defendants at the time of said complaint, which it has been seen, was made six days after the publication of the prohibited notice. But the agreed statement fails to disclose any admission that these defendants had any interest whatever in the Bangor Daily Commercial, either as stockholders or otherwise, at the time of the commission of the alleged offense on the 22nd day of April, 1905.

It is an elementary principle of criminal law and procedure, it is true, that in misdemeanors all who knowingly participate in the commission of the offense are deemed principals and may be indicted and convicted either jointly or severally. Bish. Cr. Proc. sec. 545; *State* v. *Sullivan*, 83 Maine, 417; but the agreed statement only admits that the prohibited notice was "published with the knowledge of the defendants." Even if it be conceded that the mere fact that such an advertisement was published by the corporation with the knowledge of the defendants would have been sufficient to render them liable as principals for participating in the act, if they had been shown to be the only stockholders at the time of the publication, there can be no reasonable ground for holding them responsible for the publication in question, when there is an entire absence of any evidence tending to show that at the time of the alleged offense they had any interest whatever, either as stockholders or otherwise, in the property of the J. P. Bass Publishing Company or any participation in the conduct of its affairs.

According to the stipulations accompanying the agreed statement in the case, the entry must therefore be,

Judgment for the defendants.

IVORY H. CRABTREE

vs.

WASHINGTON COUNTY RAILWAY COMPANY.

Washington. Opinion July 17, 1906.

Contracts. Railroad Excursion Tickets. Limitations of Use. Same Must be Stated "On the Ticket." Ticket Sole Evidence of Contract. R. S., c. 52, § 2.

Revised Statutes, chapter 52, section 2, provides as follows: "No railroad company shall limit the right of a ticket-holder to any given train, but such ticket-holder may travel on any train, whether regular or express, and may stop at any of the stations along the line of the road at which such trains stop; and such ticket shall be good for a passage as above for six years from the day it was first issued; *provided*, that railroad companies may sell excursion, return or other special tickets at less than the regular rates of fare, to be used only as provided on the ticket."

The defendant sold to the plaintiff an excursion ticket from Eastport to Machias and return for about one-fourth of the regular fare from Eastport to Machias and return, of the following tenor: "Washington County Railway Excursion Ticket. Eastport to Machias and return. This ticket is good only on continuous trains, and not good to stop off." The plaintiff rode on the defendant's train to Machias on the same day the ticket was issued to him, staid over night, and on the morning of the next day he boarded a regular train to return to Eastport and tendered the aforesaid ticket for his passage. The conductor refused to accept the same, and the plaintiff, upon his refusal to pay other fare, was ejected from the train. *Held:* that under the provisions of the aforesaid statute the only limitation of the use of this ticket "provided on the ticket" was that it should be "good only on continuous trains, and not good to stop off," and that the plaintiff had a right to a ride on any regular train from Machias to Eastport within six years from the date of the ticket provided he made a continuous passage.

It was undoubtedly the intention of the legislature by the enactment of the aforesaid statute to require railroad companies to state "on the ticket" all the limitations of its use other than the six year limitation imposed by the statute.

The plaintiff's use of the ticket was in no way modified by any provisions in posters or advertisements issued by the defendant that were not "pro-

vided on the ticket," even though he had knowledge of such provisions, And evidence of such knowledge is inadmissible as the ticket itself is the only competent evidence of the contract between the plaintiff and the defendant.

On agreed statement of facts. Judgment for plaintiff.

Action on the case to recover damages for the alleged unlawful ejectment of the plaintiff from the defendant's train on which he was a passenger.

The action came on for trial at the October term, 1905, of the Supreme Judicial Court, Washington County, at which time the parties filed an agreed statement of facts and on this agreed statement the case was sent to the Law Court with the following stipulations: "Upon such of the foregoing facts as are legally admissible, the court shall render judgment on law and fact, and if for plaintiff the damages assessed shall be twenty dollars."

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

William R. Pattangall, for plaintiff.

Curran & Curran, for defendant.

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

SPEAR, J. This case comes up on an agreed statement of facts. The Washington County Railway, the defendant, advertised an excursion from Eastport to Machias and return by posting handbills containing the following announcement:

"Washington County Railway. The All Rail Line. Everyone in Eastport will be at Machias Wednesday, March 22nd, 1905, to root for the Lobsters. Fare, Eastport to Machias 75 cents and return. Good going on regular trains and for return on the Lobsters' special."

The defendant caused to be inserted in the Eastport Sentinel, a newspaper published at Eastport on the 22nd day of March, a somewhat more extended notice.

The agreed statement also shows that the plaintiff purchased for seventy-five cents, a sum of about one-fourth of the regular fare from

Eastport to Machias, and return, a ticket for this excursion similar to the following copy:

"Washington County Railway Excursion Ticket, Eastport to Machias and Return. This ticket is sold for less than regular fare and is good only on continuous trains, and not good to stop off."

The plaintiff traveled upon this ticket to Machias on the regular train of the defendant the night of the twenty-second day of March aforesaid, and after the basket-ball game advertised, went with the other excursionists to the defendant's station at Machias for the purpose of boarding the special train there to return to Eastport. The special train was the "Lobsters' Special," so-called, and was made up for the return of the excursionists to Eastport, leaving Machias at about twenty minutes after twelve o'clock A. M. on the twenty-third day of March A. D. 1905, and was the only train other than the regular train leaving Machias on the night of the twenty-second, or the morning of the twenty-third. The plaintiff being unable to obtain a seat owing to the crowded condition of the train stayed in Machias over night, but on the morning of the twenty-third day of March boarded a regular train of the defendant to go to Eastport. He tendered for his passage his aforesaid ticket, and was told by the conductor that it was no good on that train. Upon plaintiff's refusal to tender other fare he was ejected from the train at a regular station without unreasonable or unnecessary force.

Upon such of the foregoing facts as are legally admissible, the court shall render judgment on law and fact, and if for plaintiff the damages assessed shall be $20.

Upon this statement, the plaintiff seeks to recover against the railroad company for its refusal to transport him upon the ticket in question. His right of recovery depends upon determining whether the ticket he offered was a valid contract between him and the railroad company upon which he was, at that time, entitled to a passage from Machias to Eastport.

Our statute declares, "no railroad company shall limit the right of a ticket holder to any given train, but such ticket holder may travel

on any train, whether regular or express, and may stop at any of the stations along the line of the road at which such trains stop; and such ticket shall be good for a passage as above for six years from the day it was first issued; *provided,* that railroad companies may sell excursion, return or other special tickets at less than the regular rates of fare, to be used only as *provided on the ticket.*" R. S., chapter 52, section 2. This proviso settles the case at bar. It was undoubtedly the intention of the legislature by this enactment to require railroad companies to state "*on the ticket*" all the limitations of its use other than that imposed by the statute viz., the six year limitation.

In this case the only limitation of its use "provided on the ticket" was that it should be "good only on continuous trains, and not good to stop off." The statute having prohibited any other limitation except the six year limit, we are unable to see that the plaintiff's use of the ticket he had purchased was in any way modified by any provisions in posters or advertisements that were not "provided on the ticket," even though he had knowledge of them. Evidence of such knowledge is inadmissible as the ticket itself is the only competent evidence of the contract between the plaintiff and defendant. Prior to the enactment of the statute, the ticket did not necessarily bear evidence, upon its face, of all the terms of the contract, *Burnham* v. *Grand Trunk Ry. Co.,* 63 Maine, 298. *Crosby* v. *Maine Central R. Co.,* 69 Maine, 418. But the statute containing the above proviso was enacted subsequent to the promulgation of each of the above cases and must be presumed to have been considered with reference to them and to negative the conclusions therein deduced. The plaintiff had a right to a ride on any regular train from Machias to Eastport within six years from the date of his ticket, provided, when he had once taken a train he made a continuous passage.

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

Judgment for the plaintiff for $20 and costs.

HERBERT W. MARSH et al.

vs.

GREAT NORTHERN PAPER COMPANY.

Penobscot. Opinion July 24, 1906.

Contract to Drive Logs. Contract Ratified by Legislature. Logs Lost by Negligent Driving. Privity of Contract Not Essential to Maintenance of Action. Negligence. Proximate Cause. Rule to Determine Proximate Cause Stated. Closeness of Casual Relation. Natural Conditions Must be Anticipated. Evidence. Private and Special Laws, 1901, c. 293, §§ 1, 2.

Prior to 1901 by legislative charter The Penobscot Log Driving Company had the exclusive right and duty of driving all logs coming into the West Branch of the Penobscot between the head of Chesuncook Lake and the East Branch to any place at or above the Penobscot Boom where logs are usually rafted, at as early a period as practicable. In February, 1901, it contracted with the defendant to drive into said boom during the driving season of that year all the logs which the log company should have to drive under its charter. By section 1, chapter 293 of the Private and Special Laws of 1901 the legislature ratified and confirmed this contract, and power and authority necessary to carry out its terms and for its execution was conferred upon the respective parties thereto. The plaintiffs' logs formed part of the drive of 1901, and this suit is brought to recover damages alleged to have been sustained by the negligence of the defendant in making said drive.

Held: that privity of contract is not essential to the maintenance of the action. By accepting the legislative act, as it did by accepting and undertaking to drive the logs, the defendant came under a duty to the public, including the plaintiffs, to drive the logs in accordance with the contract.

The duty was co-extensive with the contract, but as independent of it as if, instead of referring to the contract the duties of the defendant had been set forth in the act itself.

The defendant drove the plaintiffs' logs not only in the performance of the terms of its contract with the Log Driving Company, but also in the exercise of the powers conferred upon it by the state which carried along with them the corresponding duty to use due care and diligence in the exercise of those powers.

Under the terms of the report in this case upon the question of fact the issue is whether the evidence is sufficient to support a verdict for the plaintiff.

A majority of the court are of the opinion that the evidence is sufficient to support a verdict in favor of the plaintiffs' contentions and allegations that on account of the defendant's mismanagement, either through negligence or misfeasance, this drive of logs was so unnecessarily delayed that it did not arrive at its destination in season to be cared for and secured before the river froze, that as a result of this delay the logs became separately frozen into the ice of the river so that they could not be in any manner secured, that they there remained until a portion of the plaintiffs' logs were carried down river and out to sea during the December freshet of that year, and another portion of them were lost in the same manner in the freshet of the next spring.

In determining the question of proximate cause the true rule is that the injury must be the natural and probable consequence of the negligence complained of.

It is not necessary to prove that the defendant did anticipate or by the exercise of ordinary prudence should have anticipated, the precise form in which the injury resulted. It is sufficient that after the injury, it appears to have been a natural and probable consequence of the defendant's negligence.

Closeness of causal relation and not time or distance is the decisive test of proximity of cause, although in some cases time and distance may have an important bearing upon the question of causal relation. Upon the other hand it is not sufficient that the negligent act complained of may constitute one of a series of antecedent events without which the damage would not have happened, or that the negligence in question afforded only an opportunity or occasion for the injury or a mere condition of it.

The loss of the logs cannot be attributed to the magnitude of the freshets as there was evidence from which a jury would be justified in finding that the logs would have been lost, unsecured as they were, during any ordinary freshet which might happen while they were in this condition.

The early freezing of the river, in conjunction with the defendant's negligence whereby the logs were delivered much later than might or should have been, caused the plaintiffs' loss. This, however, was not an independent intervening cause, but a natural condition, the chance of the occurrence of which should have been foreseen. Unusual climatic conditions occur so frequently that in important affairs, they must be anticipated and guarded against.

On report. Judgment for plaintiffs.

Action on the case to recover damages caused by the alleged negligence and wilful acts of the defendant corporation in so misdriving and misdelivering the plaintiffs' logs entrusted to it, in the spring and summer of 1901, to be driven, that the same went out to sea and and were lost.

The declaration in the plaintiffs' writ is as follows: "In a plea of

the case for that whereas the said plaintiffs, to wit; on or about the 20th day of June, A. D. 1901, were the owners of a large quantity of spruce logs, to wit; 4,330,860 feet of spruce which said spruce logs were intended to be driven down from the West Branch of the Penobscot River into the Penobscot Boom in the spring and summer of 1901. And the plaintiffs aver that on or about said 20th day of June, A. D. 1901 they delivered into the custody and possession and under the management and control of the said defendant 4,330,860 feet of spruce logs in Chesuncook Lake, which said spruce logs there joined the West Branch Drive of logs, so called, from there to be driven with said West Branch Drive by the said defendant down the West Branch of the Penobscot River, to and upon the Maine Penobscot to the Penobscot Boom, their place of destination and market.

"And whereas the defendant was, by virtue of a contract entered into with the Penobscot Log Driving Co., dated the 16th day of February, A. D. 1901 and ratified by an act of the Legislature of the State of Maine, approved February 26, 1901, bound and obliged to drive and had the exclusive right and privilege to drive all logs and lumber seasonably delivered to said defendant in said Chesuncook Lake down said West Branch of the Penobscot River and to and on the main branch of the Penobscot River into said Penobscot Boom, all of which duties, obligations and responsibilities had been accepted by said defendant prior to the committing by the said defendant of the grievances hereinafter complained of by the plaintiffs.

"And the plaintiffs aver with certain privileges and obligations as to driving all logs which were intended to be driven down said West Branch of the said Penobscot River during the driving season of said year, said defendant received their said spruce logs between the head and outlet of said Chesuncook Lake and was bound thereby to properly drive said logs into the Penobscot Boom as aforesaid. And whereas the said defendant was, upon the delivery of said logs into its custody as aforesaid, in the exclusive possession, control and management of said logs and lumber for the purpose of driving them down said West Branch into the Penobscot Boom, and was bound and obliged to drive from said Chesuncook Lake all logs intended to be driven down said West Branch of said Penobscot River which

were seasonably delivered to said defendant at the head or outlet of said Chesuncook Lake during the driving season of 1901 into said Penobscot Boom. And the plaintiffs aver that on or about, to-wit, the 20th day of June, 1901, they seasonably delivered to said defendant said 4,330,860 feet of their said logs into the possession and control of the said defendant in said Chesuncook Lake, and then and there seasonably delivered the same to the defendant, and said defendant accepted said logs and the said defendant was then and there bound and obliged to take said logs and drive them to the Penobscot Boom aforesaid.

"And the plaintiffs aver that the defendant, unmindful of the plaintiffs' rights and their own obligation under and by virtue of said contract ratified by Legislature as aforesaid, although otherwise requested by the plaintiffs, did carelessly and negligently drive said plaintiffs logs so that they did not arrive at said Penobscot Boom in the year of 1901 in season to be cared for and protected from being lost by said plaintiffs. And the plaintiffs aver that, by reason of the defendant's wrongful acts as aforesaid, a large quantity of their logs, to-wit; 1,149,330 feet of the value of $15 per thousand, and all of the value of $17,239.95, were lost and went to sea, all of which loss and injury was through the wrongful acts, negligence and disregard of the duties imposed upon said defendant in the driving and caring for said logs and lumber, and all of which loss and damage was occasioned by the negligence and carelessness of the defendant in the driving of the logs of the plaintiffs without any negligence or fault or want of due care on the part of said plaintiffs.

"And the plaintiffs aver that by the negligence and wrongful acts of the said defendant many of their said logs, delivered to the defendant as aforesaid, did not enter, during the driving season of 1901, said Penobscot Boom, and none of their logs or lumber arrived at said Boom before November 13, 1901, when it was impossible for the plaintiffs, on account of the lateness of the arrival of said logs and lumber, to care for them or protect them from going out in the freshet of the following spring; all of which was known, or ought to have been known, by said defendant.

"And the plaintiffs aver that the reason, that their said logs and

lumber, delivered to the said defendant as aforesaid, did not arrive at said Boom in the driving season of 1901 earlier in the season so that said logs and lumber could have been rafted out and cared for so as not to have been carried out by the freshet of the spring, was through the fault and negligence and wrongful acts of the said defendant in not properly driving said logs as they should have done during said season.

"And the plaintiffs aver that the said defendant wrongfully, unreasonably, improperly and wilfully used water for the running of its mill at Millinocket which it should have used for the purpose of driving the plaintiffs' logs to said Penobscot boom; whereby and by reason of which wrongful, negligent and improper acts of said defendant the plaintiff lost 1,149,330 feet of their logs and lumber as aforesaid, all of which is to the damage of the plaintiffs, as they say, in the sum of twenty thousand (20,000) dollars.

"Also for that the defendant corporation during the year of 1901 had full and entire possession, management and control of all the logs and lumber, which came into the West Branch of the Penobscot River, to drive into certain booms of the Great Northern Paper Co., the defendant, in North Twin Lake and into the Penobscot Boom during said driving season of 1901, by virtue of a contract entered into with the Penobscot Log Driving Co., dated the 16th day of February A. D. 1901, which contract was ratified by an act of the Legislature of the State of Maine, approved February 26, 1901, as per Chapter 293 of the Private and Special Laws of said year.

"And the plaintiffs aver that by virtue of said contract and said act of the legislature all the duties and obligations which prior thereto had been incumbent on said Penobscot Log Driving Co. to do and perform in driving the logs and lumber of the plaintiffs out of Chesuncook Lake into the Penobscot Boom as aforesaid, became obligatory and incumbent upon said defendant to do and perform; and the plaintiffs further aver that the duties, obligations and responsibilities, which were incumbent upon said Penobscot Log Driving Co. to do and perform in the driving of the plaintiffs logs from said Chesuncook Lake to the Penobscot Boom as aforesaid, were assumed and accepted by the said defendant in the driving of their said logs.

"And the plaintiffs aver that, for the purpose of driving their said logs and lumber as aforesaid into the Penobscot Boom, the defendant corporation had the use of the anchors, headworks, booms and rigging of the Penobscot Log Driving Co., and from the time said logs and lumber left the head of Chesuncook Lake until they reached the Penobscot Boom said defendant had charge of all dams of the Penobscot Log Driving Co. and control of the West Branch water in said dams for driving purposes.

"And the plaintiffs say that they, relying upon the defendant to do its whole duty in the premises, did in the year 1901 cause to be delivered into the hands and possession and under the control and management of the said defendant a great quantity of spruce, to wit; 4,330,860 feet woods scale, all marked properly with their own marks, at the head of Chesuncook Lake and said defendant corporation then and there received and accepted said logs and took them into custody and care and under its control for the purpose of driving said logs out of the West Branch of the Penobscot River into the Penobscot Boom, so called, on the main branch of the Penobscot River.

"And the plaintiffs aver that said 4,330,860 feet of spruce were seasonably delivered into the custody and control of the said defendant, for the purpose as aforesaid, on or about to wit; the 20th day of June 1901; and the plaintiffs further say that the defendant corporation not regarding its said duty, wilfully, knowingly and negligently detained said logs in Chesuncook Lake for the purpose of using water, which should have been used in the driving of said logs, for the purpose of running its mill at Millinocket.

"And the plaintiffs aver that, from the time said logs and lumber of the West Branch Drive left the foot of North Twin Dam, the said defendant wilfully, negligently and wrongfully detained the logs and lumber of the plaintiffs, for the period of ten days, betwixt said North Twin Dam and Quakish Lake for the purpose of holding and storing and using water for its own advantage to the injury and damage of the plaintiffs; and the plaintiffs aver that on account of the negligence, carelessness and wrongful acts of the said defendant as aforesaid their said logs did not reach the Penobscot Boom until

the 13th day of November, 1901, whereby and by reason of which 1,149,330 feet of said 4,330,860 feet delivered to said defendant as aforesaid were lost and went to sea solely through the negligence, mismanagement and wrongful acts of the defendant corporation in driving their said logs as aforesaid.

"And the plaintiffs aver that if it had not been for the wrongful, negligent and wilful acts of the defendant in detaining said logs and lumber as aforesaid, and storing and using the water solely for manufacturing purposes, their said logs and lumber would have reached the Penobscot Boom by the 1st day of October, 1901, when all of their said logs, and lumber could have been rafted out and cared for by the plaintiffs.

"And the plaintiffs aver that their said logs and lumber did not reach said Penobscot Boom until the 13th day of November, 1901, and that part of them were never driven into said Boom by the said defendant; and that said logs and lumber of the plaintiffs were thus detained through the wrongful and negligent acts of the defendant in wilfully holding back the water for its own individual purposes and thereby said 1,149,330 feet of logs and lumber of the plaintiffs, of the value of $15 per thousand feet, amounting to $17,239.95 were lost and went to sea in the spring freshet, all of which loss accrued to the plaintiffs solely through the negligence, wrongful and wilful acts of the defendant in detaining their said logs and lumber by with-holding water for the defendant's use which should have been used during the driving season for the purpose of driving the logs of the plaintiffs into the Penobscot Boom in season to be rafted out and cared for by the plaintiffs, all of which loss to the plaintiffs, was through the negligent, wrongful and wilful acts of the defendant and without any negligence or want of due care on the part of the plaintiffs, all of which is to the damage of the plaintiffs, as they say, in the sum of Twenty Thousand (20,000) Dollars."

Writ dated January 14, 1903. Plea, the general issue. The action was heard at the January term, 1904, of the Supreme Judicial Court, Penobscot County. At the conclusion of the evidence, it was agreed to report the case to the Law Court with stipulations as follows: "The cause is submitted to the Law Court on report. If,

in the opinion of the court, the law and so much of the evidence as is legally admissible would sustain a verdict for the plaintiffs, the court is to award judgment for the plaintiffs for the sum of nine thousand eight hundred seventy-one dollars and thirty-one cents ($9871.31) with interest thereon from the date of the writ; otherwise judgment is to be awarded for the defendant."

All the material facts are stated in the opinion.

Orville Dewey Baker, P. H. Gillin, J. H. Gould and Lewis A. Barker, for plaintiffs.

Charles F. Woodard and Louis C. Stearns, for defendant.

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

POWERS, J. Action on the case reported to the Law Court with the stipulation that, if in the opinion of the court, the law and so much of the evidence as is legally admissible would sustain a verdict for the plaintiffs, the court is to award judgment for the plaintiffs for the sum of $9871.31 with interest thereon from the date of the writ; otherwise judgment is to be awarded for the defendant.

The first count of the writ alleges in substance the obligation and exclusive right of the defendant, both under the contract and its acceptance of the legislative act hereinafter named, to drive into the Penobscot Boom all the logs seasonably delivered to it in Chesuncook Lake, the seasonable delivery by the plaintiffs and the acceptance by the defendant of the plaintiffs' logs, the careless and negligent driving of the logs by the defendant and the unreasonable, improper and wilful use of water, for the purpose of running its mill at Millinocket, which it should have used for driving, so that the logs did not arrive at the Penobscot Boom in 1901 in season to be cared for and protected, by reason whereof they went to sea and were lost. The second count charges that the defendant wilfully and knowingly as well as negligently detained the logs in Chesuncook Lake and between North Twin Dam and Quakish Lake, for the purpose of storing or using water to run its mill, which should have been used during the driving season to drive the logs into Penobscot Boom in season

to be rafted out and cared for, with the same injurious results following therefrom to the plaintiffs as are set forth in the first count.

Prior to 1901, The Penobscot Log Driving Company had the exclusive right and duty of driving all logs, coming into the West Branch of the Penobscot between the head of Chesuncook Lake and the East Branch, to any place at or above the Penobscot Boom where logs are usually rafted, at as early a period as practicable. On February 16th, 1901, said Log Driving Company and the defendant entered into a contract, the parts of which material to this case are as follows:

"Party of the second part (the defendant) agrees to drive to the sorting booms of the Great Northern Paper Company in North Twin Lake and into the Penobscot Boom during the driving season of 1901 and the driving season of 1902, all the logs which the Penobscot Log Driving Company shall have to drive under its charter in said years, the drive of 1901 to be completed in 1901, and the drive of 1902 to be completed in 1902; to cause the rear of each of said drives to leave the head of Chesuncook Lake when directed so to do as hearinafter specified.

"Upon the approach of the rear of said drive to any sorting boom or booms upon the Penobscot River, in case the Company owning or controlling said booms should provide an insufficient crew of men to sort and turn by the logs arriving at the booms, party of the second part agrees that it will put on sufficient men of their own selection to drive and sort the logs so that said drive shall be delayed as little as possible; and in case of neglect of party of the second part to do so, party of second part shall be liable to party of the first part for all cost, expense or damage occasioned thereby.

"If it shall appear to the Commissioners hereinafter mentioned that said neglect and refusal of party of the second part are unreasonable and imperil the safety of the drive, they may order party of the second part to put sufficient additional men upon the work forthwith and, unless said order is at once complied with, upon notice to that effect to them given in writing by said Commissioners, the Directors of Penobscot Log Driving Company may take charge of said drive without any violation of this contract.

"Party of second part is to have the use of all anchors, head works booms, and rigging of Penobscot Log Driving Company now on hand.

"Party of second part further agrees in making said drive to take and use the steamboats of Penobscot Log Driving Company and man and run the same at its own expense and risk (excepting as to engineers.)

"F. W. Ayer, James W. Sewell and F. A. Gilbert are hereby agreed upon and appointed as a Commission, who shall fix in each year the time at which the rear of each drive shall leave the head of Chesuncook lake. Party of second part, after the rear of the drive leaves the head of Chesuncook lake, and until it reaches Penobscot boom shall have charge of all dams for driving purposes, and for manufacturing purposes, and shall make as clean and expeditious a drive as reasonably possible consistent with the saving of said water in said dams for said purposes.

"Party of first part shall pay party of second part each year for driving said logs that year as above."

This contract when made so far as it is related to driving logs was ultra vires as to the defendant corporation, and equally so as to the Log Driving Company so far as it is related to storing water in its dams for manufacturing purposes. By section 1 of chapter 293 of the Private and Special Laws of 1901, the legislature ratified and confirmed this contract; and power and authority necessary for its execution and to carry out its terms were conferred upon the respective parties thereto. Section 2 authorized the commissioners named in the contract to exercise the powers therein conferred upon them, "and to fix the dates of starting the rear of the drive from the head of Chesuncook lake in each of the years one thousand nine hundred and one and one thousand nine hundred and two, and all corporations and persons interested shall be bound by their decision in fixing said dates and the Charter of the Penobscot Log Driving Company shall be regarded as amended accordingly."

The first defense interposed is that the only obligation the defendant was under to drive the plaintiffs' logs, was by virtue of a contract to which the plaintiffs were not parties, and that for want of privity the action cannot be maintained.

The act of the legislature incorporated the contract into law and conferred upon the defendant powers which it did not before possess. If accepted it made the defendant a public and exclusive carrier so far as the public was concerned. By accepting the act, as it did by accepting and undertaking to drive the logs, the defendant came under a duty to the public, including the plaintiffs, to drive the logs in accordance with the contract. Having that duty it was bound to use due care and diligence in its performance, and a failure to do so would be actionable negligence. It had the exclusive right to drive the plaintiffs' logs to which the plaintiffs must submit. The plaintiffs could not contract with any other party to drive their logs, for the legislative ratification of the defendant's contract with the Log Driving Company and its acceptance of the powers thereby conferred made it an exclusive public carrier within the limits prescribed. *Weymouth* v. *P. L. D. Co.*, 71 Maine, 29. The duty to drive the logs in accordance with the contract was created by law. It was coextensive with the contract, but when "power and authority necessary to carry out the terms" of the contract were conferred upon and accepted by the defendant, the duty was as independent of the contract as if, instead of referring to the contract, the duties of the defendant had been specifically set forth in the act itself. When the defendant undertook to drive the plaintiffs' logs it did so not simply in the performance of the terms of its contract, but in the exercise of the powers conferred upon it by the state, which carried along with them the corresponding duty to use due care and diligence in the exercise of those powers. Privity is not essential to the maintainance of an action of tort for the neglect of a duty created by law. *Nugent* v. *B. C. & M. R. R.*, 80 Maine, 62, 73. It would be manifestly unjust if a man who is by law deprived of all choice, and who is not permitted to drive his logs himself, nor contract with anyone to drive them for him, but is compelled to deliver them for driving to an exclusive public carrier, could maintain no action against it for its negligence in driving his logs because the carrier was at the same time under a contract with some third party to drive them. But such is not the law.

Upon the questions of fact involved the court has given the case

much consideration, partially on account of the existence of considerable difference of opinion among its members. It must be remembered that these questions are so presented by the stipulation of the report that they are not to be decided by us as original questions. The issue before us is, not whether the evidence supports the contention of the plaintiffs, but whether it is sufficient to support a verdict for the plaintiffs, assuming that such a verdict had been rendered. In other words, the case is before us in precisely the same way as if it had come here upon the defendant's motion for a new trial after a verdict for the plaintiffs.

An analysis of this evidence would not be profitable. It is sufficient to say that a majority of the court are of the opinion that the evidence is sufficient to support a verdict in favor of the plaintiffs' contention and allegations, thus briefly stated; that on account of the defendant's mismanagement, either through negligence or misfeasance, of the large quantity of logs which it had undertaken to drive, including those of the plaintiffs, this drive of logs was so unnecessarily delayed that it did not arrive at its destination in season for the logs to be cared for and secured before the river froze, that as a result of this unnecessary delay, caused by the defendant's fault, either wilful or merely negligent, the logs became separately frozen into the ice of the river so that they could not be in any manner secured, that they there remained until a portion of the plaintiff's logs were carried down river and out to sea during a winter freshet that occurred in the month of December of that year, and that another portion of them were lost in the same manner in the freshet of the next spring.

Another question remains to be considered and decided, and that is whether this fault of the defendant was the proximate cause of this particular injury suffered by the plaintiffs, the amount of the pecuniary loss to the plaintiffs being agreed upon by the parties and stated in the stipulation of the report. Upon this question, the counsel for the defendant, while strenuously denying that the evidence shows fault upon the part of the defendant at any time, further claims that, in any event, the evidence fails to disclose any fault upon the part of the defendant after the drive was turned over the stone dam at the

foot of Quakish Lake on the nineteenth day of September; that after that date, at least, the evidence not only fails to disclose any delay that can be attributed to the fault of the defendant, but does show that there was no such fault, and that the long time occupied in driving the logs from this point to their destination was caused by extremely unfavorable conditions, especially a long continued and severe drought. We think that the defendant's position in this respect is supported by the report.

He thereupon argues that even if fault is disclosed prior to this date, it cannot be held to have been the proximate cause of the injuries sustained by the plaintiffs in the month of December and in the following spring; that numerous efficient and independent causes intervened to produce these injuries to the plaintiffs, viz; the very severe drought which delayed the drive after September nineteenth; the unusually early freezing of the river which occurred on the thirteenth of November, immediately after the arrival of the logs within the Penobscot Boom; and the unusual and extraordinary, if not unprecedented, freshets of December and of the following spring. So that the question is whether the defendant's earlier fault, which was, at least one of the reasons why the logs were delayed to such an extent that they did not arrive at their destination in season to be secured before they became separately frozen into the ice of the river, was the proximate cause of the subsequent loss of the plaintiffs' logs during the December and spring freshets.

The cases are so numerous in which courts have attempted to give definitions of proximate and remote causes, and to establish tests to aid in distinguishing between them, that it would be almost impossible to refer in detail to any considerable portion of them. And this would be useless since the most that can be practically done is to establish certain rather indefinite rules which are generally applicable to all cases, while the decision of each particular case must depend largely upon the peculiar circumstances of that case. As said by our court in *Page* v. *Bucksport*, 64 Maine, 51, in considering this question: "There can be no fixed and immutable rule upon the subject that can be applied to all cases. Much must therefore, as is often said, depend upon the circumstances of each particular case."

In many cases courts have said that in determining what is the proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence complained of. But in the use of the word probable in this definition, it is not meant that the defendant did anticipate or by the exercise of ordinary prudence should have anticipated the precise form in which the injury actually resulted. If a person is injured by the negligence of another, he may recover for the natural and probable consequence of such negligence, although the injury, in the precise form in which it resulted, was not foreseen. It is sufficient that after the injury it appears to have been a natural and probable consequence of the defendant's negligence. *Lane* v. *Atlantic Works*, 111 Mass. 136; *Hill* v. *Winsor*, 118 Mass. 251; *Louisville etc. Railway Co.* v. *Wood*, 113 Ind. 544; *West* v. *Ward*, 77 Iowa 323, 14 Am. St. R. 284.

Other courts have variously used these expressions as to what injuries were proximately caused by a defendant's negligence, differing not very substantially from the rule already referred to: "Such as might probably ensue in the natural and ordinary course of events." "Such, as according to common experience, is likely to result." "Such as according to common experience and the usual course of events might reasonably be anticipated." "Such as are known by common experience to be usually in sequence." "Such as follow according the usual experience of mankind." As few cases are herein cited, reference is made to the very extended note to *Gilson* v. *Delaware and Hudson Canal Co.*, 65 Vt., 213, in 36 Am. St. R. 802, where a very large number of cases upon all branches of the subject are collected.

Another important rule which must be taken into consideration, and which if very generally agreed to is that time or distance is not a decisive test of proximity of cause. The expression means closeness of causal relation, not nearness in time or distance, although it is undoubtedly true that time and distance, in some cases, may have an important bearing upon the question of causal relation. Upon the other hand, it is not enough that the negligent act complained of may constitute one of a series of antecedent events without which, as the result proves, the damage would not have happened;

or that the negligence in question afforded only an opportunity or occasion for the injury, or a mere condition of it, as said by our court in *Pollard* v. *Maine Central R. R. Co.*, 87 Maine, 51, and *Conley* v. *American Express Co.*, 87 Maine, 352.

Coming now to the circumstances of this case, and applying these general, but somewhat indefinite, rules, let us inquire as to the causal relation between the defendant's negligence and the plaintiffs' loss, in order to ascertain whether, upon the one hand, this negligence was merely one of a series of antecedent events, without which, to be sure, the injury would not have occurred, but which merely afforded a condition or opportunity for injury, and whether the injury was in fact caused by subsequent independent and efficient agencies, for which the defendant was not responsible, and which he would not be expected to have guarded against, or, upon the other hand, the plaintiffs' injury was the natural and ordinary result of this negligence, coupled with such natural conditions as should have been foreseen by the defendant, and to guard against which care should have been taken.

The defendant's first position in this respect, as we have seen, is that the delay after September nineteenth was occasioned solely by the severe drought of that season; that with the utmost diligence exercised by the defendant after that time the logs could not have been sooner delivered at the Penobscot Boom, and that except for this drought the drive would have arrived in ample season. The defendant had undertaken to drive a great quantity of logs, about eighty million feet, a distance of almost a hundred miles, across lakes, over rapids and past difficult places of all descriptions. If through negligence its servants delayed moving this drive with reasonable diligence when conditions were favorable, they should have anticipated the chance that later these conditions might become most unfavorable, that there might be a severe drought which would greatly delay, or even perhaps make it impossible to continue, the drive, because unfavorable log driving conditions and droughts, at that season of the year, are matters of frequent occurrence. The successful accomplishment of an undertaking of this magnitude, so that the drive would be concluded before the freezing of the river, permitted of no consider-

able delay from the very beginning of the driving and especially during the period when the conditions were favorable and the water abundant. The earlier delay could have been prevented, the later drought, or at least the chance of such a drought, should have been anticipated. We are therefore unquestionably of the opinion that the defendant's negligence, which a majority of the court are of the opinion that a jury would have been authorized in finding, was the proximate cause of the late delivery at the Penobscot Boom.

The defendant, through its counsel, then says that the actual causes of the injury to the plaintiffs were the two great freshets, when as a matter of fact, the logs were carried away and lost. If these had been unprecedented freshets, and if the loss would only have been occasioned by an unprecedented freshet, there would be great force, of course, in this position. And if, independently of the fact, that the logs became frozen in the ice of the river, they had been lost by reason of the occurrence of any freshet, it might well be claimed that the arrival of the logs, in conjunction with the occurrence of a freshet, merely created an occasion or opportunity or condition for the injury, since freshets are liable to occur at any time, and one might have occurred so as to have occasioned the loss of the logs if they had arrived much earlier in the boom. Under such circumstances the defendant's earlier negligence might have been only, in connection with the other incidents, a cause of the final, direct and proximate cause by which the damages sought to be recovered were immediately occasioned, and the defendant's negligence might not be called the proximate cause of the injury. See *Denny* v. *New York Central Railroad Co.*, 13 Gray, 481; *Hoadley* v. *North Transportation Co.*, 115 Mass. 304, and numerous other cases to the same effect.

But this loss cannot be attributed to the magnitude of the two freshets referred to, since there was evidence from which a jury would be justified in finding that the logs would have been lost, unsecured as they were, during any ordinary freshet which might happen while the logs were in this condition. Nor, do we think, that the loss of the logs can be attributed to the freshets at all, although, certainly, if there had been no freshet the logs would not have been carried away; but rather to the conjunction of these two causes, the

defendant's negligence whereby the logs were not delivered until the thirteenth of November when they might and should have been delivered much earlier, and the freezing of the river at that date, which was undoubtedly unusually early. But the defendant must have anticipated the necessity of driving the logs in before the river froze, and must have known that if they were not driven into the boom in season to be properly secured before the river froze, there was danger of the loss of the logs when the first freshet came, as it was almost sure to come at some time, in precisely the way that they were lost during those two freshets. Appreciating the necessity of concluding the drive before the freezing of the river, and realizing the danger of loss if it was not done, the defendant should have also anticipated that there is always the chance that the river may freeze unusually early. Climatic conditions are so frequently unusual that this fact must be anticipated and guarded against. No person can prudently rely, in important affairs, upon any great degree of regularity in such matters. Severe and long continued droughts in the latter part of the summer and early fall and the unusually early freezing of rivers in this climate are not so uncommon that the chance of both of these conditions occurring should not be eliminated from consideration by a prudent person who had undertaken a work of this magnitude, and this is especially true when it is obvious that, if these conditions do occur, there is danger of injury of precisely this character.

The defendant cannot avoid liability for its negligence by reason of the early freezing of the river, because this was not an independent intervening cause, but a natural condition, the chance of the occurrence of which should have been foreseen.

Our conclusion is that a jury would have been authorized in finding from the evidence, and in accordance with the rules of law that the negligence of the defendant, although all occurring prior to September nineteenth, was the direct and proximate cause of the injury sustained by the plaintiffs.

The members of the court who have concurred in this opinion have done so irrespective of their individual opinion upon the question of

fact involved in the case, the opinion, in that respect, simply stating the conclusion of the majority of the court.

In accordance with the stipulation the plaintiffs will have judgment for the sum of $9871.31, with interest thereon from the date of the writ.

In Equity.

EDWIN H. WILLIAMS et al. *vs.* NEWLAND DEARBORN et als.

Penobscot. Opinion August 7, 1906.

Wills. Rule of Construction. Codicil. Same Construed. Change of Intention.

The familiar rule in the construction of wills frequently recognized and stated by this court, that if a testator makes a testamentary disposition of the whole estate in any property a devise over of any remainder in that property is inoperative, because nothing is left which can be the subject of a devise over, is not applicable when the inconsistent devises are contained, one in the original will and the other in a subsequent codicil, as then the testator is presumed to have changed the intention which he had at the time of making the first testamentary disposition of the property in question, and his last will, that is, the codicil, will take effect.

By the will to be construed in this case, the testator devised and bequeathed all of his property of every description, after the payment of debts and expenses, to his wife in fee. Some sixteen years later he made the following codicil:

"Be it remembered, that I, Alonzo B. Dearborn of Corinna, a farmer and lumberman, do make this my codicil hereby confirming my last will made on the nineteenth day February 1881 and do hereby give, devise bequeath my estate and property real and personal to my legal heirs after the decease of my beloved wife, Julia A. Dearborn who will have the use and management during her lifetime should she survive my decease the balance if any to be disposed of as aforementioned."

Held: that the language of the codicil, "hereby confirming my last will made on the nineteenth day of February, 1881," should not be construed as showing an intention upon the part of testator to confirm that will in

full, since if such had been his intention he would not have made the codicil. That what he did mean was to confirm the will except as modified by the codicil. That under the will and codicil the wife took an estate for life in all of the property left by the testator, with the power to dispose of any portion of the same during her lifetime, and that at her decease all of the property of the testator remaining at that time went to his heirs at law.

Pickering v. *Langdon*, 22 Maine, 413, overruled in part.

In equity. On appeal by plaintiffs. Decree in accordance with opinion.

Bill in equity by the plaintiffs, Edwin H. Williams, of Sherman, and James Atwood Taber of Corinna as executor of the last will and testament of Julia A. Dearborn, late of Corinna, deceased, originally brought against the defendants, Newland Dearborn and Fred T. Dearborn, both of Bangor, Charles Dearborn and Francis M. Holt, both of Corinna, and James M. Sanborn of Newport as administrator de bonis non with the will annexed of the estate of Alonzo B. Dearborn late of Corinna, deceased. Afterwards by amendment, Mary E. Trueworthy of Bangor, Eliott Page of Brewer, Charlotte Darling of Enfield, Albion Currier of Spokane, State of Washington, Rufus Page and Alonzo Page both of Pittsfield, were also made defendants.

This bill was brought for the purpose of obtaining the construction of the last will and testament of the aforesaid Alonzo B. Dearborn and a certain codicil thereto.

The prayer in the plaintiffs' bill, omitting that part asking for general relief, was as follows:

"First. That the court will construe and interpret the provisions of said last will and testament and codicil of said Alonzo B. Dearborn, and particularly determine:

"1. Whether under the second paragraph of said last will and testament and the confirmation thereof by said codicil the said Julia A. Dearborn took an absolute title to all the property of the said Alonzo B. Dearborn, real, personal and mixed, after the payment of the debts and charges specified in the first paragraph of said will.

"2. Whether any legal effect can be given to any part of said codicil, and if so what, and whether all or any of said section is or is not void."

This cause was heard on bill and answer by the justice of the first instance, who "adjudged and decreed that under the will and codicil of Alonzo B. Dearborn, his widow, Julia A. Dearborn, took a life estate in all his property, and only a life estate, remainder over to his heirs." Thereupon the plaintiffs, in accordance with the provisions of chapter 79, section 22 of the Revised Statutes, appealed to the Law Court.

The case appears in the opinion.

W. I. Wood and Powers & Archibald, for plaintiffs.

James M. Sanborn and E. C. Ryder, for defendants.

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

WISWELL, C. J. Alonzo B. Dearborn died in December 1898 leaving a will which was duly admitted to probate. By the will, made February 19th, 1881, he devised and bequeathed all of his property of every description, after the payment of debts and of expenses, to his wife in fee. But on November 18, 1897, he made a codicil to this will which is as follows, correcting the spelling:

"Be it remembered, that I, Alonzo B. Dearborn of Corinna, a farmer and lumberman, do make this my codicil hereby confirming my last will made on the nineteenth day Feb. 1881 and do hereby give, devise, bequeath my estate and property real and personal to my legal heirs after the decease of my beloved wife Julia A. Dearborn who will have the use and management during her lifetime should she survive my decease the balance if any to be disposed of as aforementioned."

Mrs. Dearborn, the wife of the testator, died March 14, 1904. In this bill in equity, in which all of the persons interested, either as heirs of Alonzo B. Dearborn or of his widow, Julia A. Dearborn, are parties, a construction is asked of this will and codicil, the specific questions asked being: "Whether under the second paragraph of said last will and testament and the confirmation thereof by said codicil, the said Julia A. Dearborn took an absolute title to all the property of the said Alonzo B. Dearborn, real, personal and mixed,

after the payment of the debts and charges specified in the first paragraph of said will." And: "Whether any legal effect can be given to any part of said codicil and if so what, and whether all or any of said section is or is not void."

The position of the complainants, who claim under Julia A. Dearborn, is that by the will the testator gave all of his property in fee to his wife; that by his codicil he first confirms this will, and then proceeds to devise and bequeath a remainder, after the decease of his wife to his legal heirs; that this devise over of a remainder is inoperative and void because there was no remainder. And they rely upon the familiar rule, universally recognized and frequently stated by this court in its decisions from *Ramsdell* v. *Ramsdell*, 21 Maine, 288, down to the present time that if a testator makes a devise of the whole estate in any property a devise over of any remainder in that property is inoperative because nothing is left which can be the subject of a devise over. A testator can not divide an estate into more parts than the estate contains. But this rule is not applicable when the inconsistent devises are contained, one in the original will and the other in a subsequent codicil, as then the testator is presumed to have changed the intention which he had at the time of making the first testamentary disposition of the property in question, and his last will, that is, the codicil, will take effect. *Derby* v. *Derby*, 4 R. I., 414.

There is of course no question but that a testator may modify by a codicil any disposition of his property made in the original will, but the position of the complainants is that by the codicil in question the testator first confirmed the provisions of his will and that therefore the rule above referred to is applicable and makes the further provisions of the codicil inoperative.

But the controlling rule in the construction of wills, to which all other rules must yield, is that the intention of the testator is to be ascertained if possible, and that such intention when ascertained, will prevail, provided it is consistent with legal rules. In this case there can be no question but that this testator intended to modify the devise and bequest to his wife. At first, as shown by the will, he intended that she should be the sole beneficiary and should take an estate in fee in all of his property; sixteen years later, when he made the

codicil in question, his evident intention was to give the whole of his property to his wife for her life, with the power of disposing of it during her life, but that "the balance if any" at the decease of his wife, should go to his own legal heirs rather than to those of his wife's. Although it is apparent that the codicil was made by some one inexperienced in the drafting of legal documents, there would be no question but that this evident intention had been carried into effect, and in appropriate terms, except for the use of the language of the codicil in which he says that he confirms the previous will. Can the effect of this clause be to make the whole codicil of no effect? We think not. Such a construction would be unnatural and forced and contrary to the controlling rule that the intention of the testator is to control when it can be ascertained. The only purpose and intent that the testator could have had in making this codicil was to modify this devise to his wife, to give her a life estate, with the power of disposal during life, rather than the estate in fee which she would have taken under the will, the very purpose and object of a codicil.

We think it clear that the testator did not mean to confirm his will in whole, since if such had been his intention he would not have made the codicil. What he did mean was to confirm the will except as modified by the codicil. Such a construction is consistent and gives effect to the whole instrument. The whole of the will and codicil and all of its parts must be considered and construed together for the purpose of ascertaining the intention of the testator, and when this is done, we have no question that his intention was not to confirm the will in full, but to modify it to the extent that is clearly expressed therein.

While under the will and codicil the wife only took a life estate in the testator's property, we think, it is equally clear from the language of the codicil that she had the right to dispose of any portion of this property during her lifetime. The devise over was only of the "balance if any" at her decease. This clearly shows an intention upon the part of the testator to give to his wife a power of disposal during her lifetime, but it did not enlarge the estate given to her to a fee since it was expressly limited to a life estate. *Harris* v.

Knapp, 21 Pick. 412; *Ramsdell* v. *Ramsdell*, 21 Maine, 288; *Scott* v. *Perkins*, 28 Maine, 22; *McGuire* v. *Gallagher*, 99 Maine, 334.

Our conclusion is that the codicil is effective; that under the will and codicil the wife took an estate for life in all of the property left by the testator, with the power to dispose of any portion of the same during her lifetime; that at her decease, all the property of the testator remaining at that time went to the heirs at law of the testator. So far as this result is not in harmony with the case of *Pickering* v. *Langdon*, 22 Maine, 413, that case is overruled.

The result of the opinion is in accordance with the conclusion of the justice who heard the case and who ordered a decree, except that in the decree ordered and appealed from, nothing was said as to the wife's power of disposal, a question which was probably not raised, as it was not here. The decree will therefore be modified in that respect and a new decree made by a single justice in accordance with the opinion, at which time allowances for costs and counsel fees, to be paid out of the estate, may be made, as this court is not possessed of sufficient facts to pass upon these matters.

So ordered.

STATE OF MAINE *vs.* GEORGE BARBELAIS, Appellant.

Androscoggin. Opinion August 7, 1906.

Municipal Corporations. Municipal Ordinance Prohibiting Trade in Public Street. Construction of Same. R. S., c. 4, § 93.

Municipal corporations are authorized by statute to pass ordinances "not inconsistent with law," for the purpose, among other things, of regulating the use of their streets.

A municipal ordinance of the city of Auburn, providing that "no person shall in any part of a public street carry on any trade or business," unless the same is authorized in the manner therein provided, is not inconsistent with law, and is not unreasonable nor oppressive, when reasonably construed.

This ordinance should not be construed as prohibiting persons who happen to be upon the streets from commencing and consummating business transactions, nor that one person may not make a sale of an article to another upon a street, as the result of private negotiation, but it was intended to prohibit a person from offering articles for sale to the public in a public manner, either from a permanent stand or from a cart which he drives or pushes along the street with frequent stops whenever any one on the street desires to make a purchase of him. A person who is offering for sale articles in the street in this manner is using the streets of the city, not for the public purpose of travel, for which purpose streets are located and constructed, but for the private purpose of trade or business.

In accordance with the agreed statement of facts, the respondent in this case, "was selling strawberries, pineapples and bananas out of a push cart in one of the streets of Auburn, but was not blocking the highway or making any disturbance, but was going from place to place disposing of fruit to whomever expressed a desire to purchase the same."

Held: that these admitted acts of the respondent were within the letter and spirit of the ordinance.

On report. Judgment for the state.

In this case, an "agreed statement" of the following tenor, was filed: "This is a prosecution for a violation of one of the revised ordinances of the City of Auburn, which is as follows:

"Section 38. No person shall in any part of a public street carry on any trade or business unless the same is especially allowed

by law or some ordinance of the city without a written permit so to do from the Board of Mayor and Aldermen, or some person by them duly authorized to grant the same.

"The defendant is a Greek, and on the day of the date of the complaint lodged against him by the City Marshal of Auburn, was selling strawberries, pineapples and bananas out of a push cart in one of the streets of Auburn, but was not blocking the highway or making any disturbance, but going from place to place disposing of fruit to whoever expressed a desire to purchase the same.

"The complaint dated June 29, 1905, set out in proper words an alleged violation of the ordinance and the state and the defendant agree that the same, and the facts above stated, be reported to the Law Court for their decision as to whether or not any offence punishable by law has been committed, and whether the ordinance if valid extends to an act such as it is agreed was committed by the defendant.

"This ordinance with others was approved November 8, A. D. 1898, by William P. Whitehouse, Justice of the Supreme Judicial Court.

"If the above ordinance is valid judgment should be entered for the state, otherwise for the defendant."

Ralph W. Crockett, County Attorney, for the state.

George C. Wing and George C. Wing, Jr., for defendant.

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

WISWELL, C. J. Two questions are presented in this case, which comes to the Law Court upon a report of the agreed facts.

First. As to the validity of the following municipal ordinance of the City of Auburn: "Section 38. No person shall in any part of a public street carry on any trade or business unless the same is especially allowed by law or some ordinance of the city without a written permit so to do from the Board of Mayor and Aldermen or some person by them duly authorized to grant the same."

Municipal corporations are authorized by statute R. S., c. 4, sec.

93, to pass ordinances, "not inconsistent with law," in relation to a large variety of subjects, and, among other things, for the purpose of regulating the use of their streets. This ordinance is therefore valid unless it is inconsistent with law or unless it is unreasonable and oppressive, a question of law for the court. *Jones* v. *Sanford*, 66 Maine, 585. The ordinance is not inconsistent with any provision of law, and we are unable to perceive anything unreasonable in an ordinance, when reasonably construed, the object of which is to prevent the carrying on of trade or business in the public streets of a city. Upon the contrary it seems to us to be a salutary regulation by the municipality as to the use of its public streets. Streets are located and constructed, and the private property of individuals taken therefor, by the exercise of the right of eminent domain, when necessary, for the public purpose of travel, and not that other individuals may use these streets for the private purpose of carrying on trade or business therein.

Nor is it an objection to the validity of such an ordinance regulating the use of the streets, that the acts prohibited would not in and of themselves necessarily obstruct travel, or in any way create a nuisance. The carrying on of trade or business in the public streets by one, or by a few persons, might not be of sufficient consequence to materially obstruct the public travel, while if the same thing should be done by many it might create a serious obstruction and nuisance, and what may be done by one in this respect, all must have an equal right to do. The purpose of this ordinance was to preserve the use of the streets in the city for the public purposes for which all streets and ways are constructed.

A somewhat similar ordinance was sustained by the Massachusetts court in *Nightingale, Petitioner, &c.*, 11 Pick. 168, the court saying in its opinion: "The city government had an undoubted right to prohibit the occupation of the stand in the street by any one, or by any one not having a license or permission for that purpose from the clerk of the market." And in *Commonwealth* v. *Ellis*, 158 Mass. 555, it was held that an ordinance of a city which provided that no person should sell in any street or from any building, any goods or article to any person on the street, except in accordance with a

permit from the superintendent of streets, is reasonable, constitutional and valid.

The remaining question is whether the admitted acts of the respondent were within the prohibition of the ordinance. These acts are thus stated in the agreed statement; the respondent, on the day that he was complained of, "was selling strawberries, pineapples and bananas out of a push-cart in one of the streets of Auburn, but was not blocking the highway or making any disturbance, but was going from place to place disposing of fruit to whomever expressed a desire to purchase the same." The ordinance must, of course, receive a reasonable construction. It was not intended to prohibit two persons who happened to be on the street from commencing and consummating a business transaction, nor, necessarily that one person may not make a sale of an article to another upon the street, as the result of private negotiation, but it does mean, we think, that a person shall not, among other things, offer articles for sale to the public and in a public manner, either from a permanent stand or from a cart which he drives or pushes along the street with frequent stops whenever any one on the street desires to make a purchase of him. A person who is offering for sale articles in this manner is using the streets of the city, not for the purpose of travel along the streets in going from place to place, but as a place of business, and such acts are within the prohibition of the ordinance.

The admitted acts of the respondent were, we think, within the letter and spirit of the ordinance. In accordance with the stipulation of the report the judgment will be entered for the state and the case remanded to nisi prius for further proceedings.

Judgment for the State.
Case remanded to nisi prius.

JAMES MAY, Petitioner, *vs.* WILLIAM M. PENNELL.

Cumberland. Opinion August 11, 1906.

Suicide. Attempt to Commit. Same not Indictable. "Body of Liberties," 1641. Colony Act, 1660. Penal Code, N. Y., 1881, § 178. Penal Code, Hawaii, 1868, 24 & 25 Victoria, 100. R. S., c. 132, § 9; c. 136, § 1.

An attempt to commit suicide is not an indictable offense in the State of Maine.

On exceptions by plaintiff. Sustained.

Petition for writ of habeas corpus. The plaintiff was indicted in the Superior Court, Cumberland County, for an attempt to commit suicide, and upon conviction he was sentenced to imprisonment, at hard labor, in the county jail for the term of eleven months, and was committed in execution of said sentence.

The plaintiff then presented to a justice of the Supreme Judicial Court, in vacation, his petition for a writ of habeas corpus to obtain his release from imprisonment on the ground that the act charged in the indictment is not a crime in the State of Maine, and that the aforesaid sentence inflicted upon him was not warranted by law.

The justice hearing the matter, ruled pro forma that the plaintiff was not entitled to a discharge from imprisonment, and thereupon the plaintiff excepted.

The case fully appears in the opinion.

William H. Connellan, for plaintiff.

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

WHITEHOUSE, J. The petitioner was indicted in the Superior Court for Cumberland County for the alleged crime of attempting to commit suicide, and upon conviction was sentenced at the May term 1906 to imprisonment at labor in the county jail for the term of eleven months. Thereupon he presented to a single justice his peti-

tion for a writ of habeas corpus, to obtain a release from imprisonment on the ground that the act charged in the indictment is not a crime in this state, and that the sentence inflicted upon him was not warranted by law. The justice overruled this contention pro forma, and refused to discharge the petitioner. The case comes to the Law Court on exceptions to this ruling.

By the early common law of England, suicide was ranked among infamous crimes and held to be a "species of felony." It was punished by a forfeiture to the king of the goods and chattels of the felo de se, and an ignominous burial in the highway with a stake driven through his body. 4 Bl. Com. 189. But aside from the mental suffering which might thus be inflicted upon innocent surviving relatives of the suicide by a desecration of his body, it was not in the power of human tribunals to impose any other punishment than the forfeiture of his estate; and "since forfeitures for crime are not practiced in our states," says Mr. Bishop, "suicide is not practically an offense with us." Bish. Cr. law, 1, sect. 512; 2, sec. 1187. No case has been brought to the attention of the court in which it has been held in any of the United States that suicide is a punishable offense. Although it may be deemed ethically reprehensible and inconsistent with the public welfare, it has never been declared by the legislature or held by the court of this state, to be such a public wrong as will subject the doer to legal punishment. Section one of chapter 136 of the Revised Statutes declares that "when no punishment is provided by statute, a person convicted of an offence shall be imprisoned for less than one year or fined not exceeding five hundred dollars." But even if suicide is deemed to be criminal as malum in se, neither of the penalties specified in this statute can be inflicted upon one whose life is ended.

Nor is there any statute in this state which constitutes an attempt to commit suicide a substantive offense or makes it subject to legal punishment. Section nine of chapter 132, R. S., provides as follows: "Whoever attempts to commit an offence, and does anything towards it, but fails, or is interrupted, or is prevented in its execution, where no punishment is expressly provided for such attempt, shall, if the offence thus attempted is punishable with imprisonment for life, be

imprisoned for not less than one, nor more than ten years; and in all other cases, he shall receive the same kind of punishment that might have been inflicted, if the offence attempted had been committed, but not exceeding one-half thereof." But here again it is obvious that cases of suicide were not within the contemplation of the legislature in the enactment of this statute. As no penalty of any kind is attached to suicide if actually committed, there could be no punishment whatever by force of this statute for an attempt to commit it.

In the absence of any statute in this state expressly making an attempt to commit suicide a punishable offense, it is therefore difficult to discover any satisfactory ground upon which the sentence in this case can rest; for it would appear to be a palpable solecism in the law to declare that a mere attempt to commit an act which is not penal, is itself punishable.

It is suggested, however, that inasmuch as suicide was a " species of felony " by the common law of England, and an attempt to commit suicide was there held to be a misdemeanor it became incorporated in the common law of Massachusetts as a substantive offense, and in this state is subject to the provisions of section one of chapter 136 R. S., above quoted, declaring that " when no punishment is provided by statute, a person convicted of an offense shall be imprisoned less than one year, or fined etc."

The only English cases that have been cited in any of the text books or cyclopædias as authority for the doctrine that an attempt to commit suicide was a misdemeanor by the common law of England, are *Reg.* v. *Doody*, 6 Cox's Cr. Cases, 463, and *Reg.* v. *Burgess*, 9 Cox's C. C. 247. The former case is simply the report of a nisi prius ruling at a trial in which the prisoner was not defended by counsel. In the latter case the defendant pleaded guilty, and the question reserved for the court of criminal appeals was primarily one of jurisdiction. It was contended in behalf of the defendant that an attempt to commit suicide was an attempt to commit murder within the meaning of chap. 100 of 24 and 25 Victoria, and hence was not within the jurisdiction of the county assizes; but the court held that though suicide was deemed a felony in England, it was not murder within the meaning of the act named, and that the attempt to commit

suicide was a misdemeanor and within the jurisdiction of that court; but sentence was respited.

"An attempt," says Mr. Bishop" is an intent to do a particular thing which the law either common or statutory, has declared to be a crime, coupled with an act towards the doing of it." 1 Bish. Cr. L. sec. 728; while a substantive offense is one depending on itself alone and not on another offense to be first established by the conviction of the person who directly committed it." 1 Bish. C. L. sec. 696. It is not claimed that the attempt to commit suicide was ever made a substantive offense by any act of the British parliament, and there is no suggestion in the brief oral utterances of the judges in the English cases above cited, that the misdemeanor of which the defendant was in each instance there convicted, was other than the ordinary attempt to commit a punishable felony; it is not suggested that it was a substantive offense by the law of England. If the accomplished act of suicide had not there been a punishable crime, the attempt to commit the act could not have been held to be a punishable misdemeanor. For it has been seen that an attempt involves an "intent to do a particular thing which the law declares to be a crime," and the word "crime" or "offense" as ordinarily used in legislative enactments, by text-writers on criminal law and in the practical administration of it by the courts, uniformly signifies a public wrong which subjects the perpetrator to legal punishment. Standard Dict.; 1 Bish. Cr. L. 32. In accordance with this view is the statement of Mr. Bishop, as above shown, that suicide is "not practically an offence with us." But an attempt to commit an act which is not "practically a crime" is not itself "practically criminal," because not punishable. In Massachusetts forfeitures were abolished by the "Body of Liberties" of 1641, the statute providing for an ignominious burial of the suicide fell into disuse at the close of that century and the Colony Act of 1660 was repealed in 1823. Thus the common law of England upon this subject was modified in Massachusetts, and suicide ceased to be a punishable offense. The ground work for the English doctrine that an attempt to commit it was a misdemeanor was thus removed. If it was a misdemeanor by the common law of England, it ceased to be such under the law of

Massachusetts and has never been recognized as a part of the common law of Maine. "Reason is the soul of the law," says Lord Coke, "and when the reason changes the law also changes." 7 Coke, 7. Although there have been attempts to commit suicide in great numbers in the history of both Massachusetts and Maine, in no instance, which this court has been able to discover, has there been a conviction of such an attempt before any court prior to the case at bar.

In *Com.* v. *Dennis*, 105 Mass. 162, it was distinctly held that "an attempt to commit suicide was not an indictable offence in that Commonwealth;" but the decision rests upon the construction of their statutes, which, however, are in substance and effect precisely like our own. In the opinion the court say: "In this commonwealth the whole matter of punishments for all attempts to commit an offence prohibited by law, where no express provision is otherwise made, has been subject to revision by statute." After stating the provision of the statute, in terms like sect. 9, chap. 132 of our statutes above quoted, the court add: "The attempt to commit suicide is thus left without pnnishment, because the act itself could never be punished by any of the modes stated. By a well established rule of the construction of statutes, the common law is held to be repealed by implication, when the whole subject has been revised by the legislature. *Commonwealth* v. *Cooley*, 10 Pick. 37; *Commonwealth* v. *Marshall*, 11 Pick. 350; *Lakin* v. *Lakin*, 2 Allen 45. This rule requires us to look to the statute alone for the punishment, if any, affixed to the act here indicted. If it is not there made punishable, it is enough, whatever the reason which induced its omission. The end of punishment is the prevention of crime, and it may have been thought at least impolitic to punish an attempt to do that which is itself dispunishable, when the direct effect of the penalty must be to increase the secrecy and efficiency of the means employed to accomplish the end proposed."

It is true that in *Com.* v. *Mink*, 123 Mass. 422, it was held that suicide must still be deemed criminal as malum in se, and although an attempt to commit it is not punishable, yet a person who in attempting to commit it accidentally kills another who is trying to

prevent its accomplishment is guilty of manslaughter. But Chief Justice Gray, who drew the opinion in the latter case appears to have concurred in the former, and expressly states in his opinion that the conclusion reached in *Com.* v. *Mink* is not affected by the fact that the legislature, having in the general revision of the statutes measured the degree of punishment prescribed for attempts to commit offences, by the punishment prescribed for each offense if actually committed, has intentionally or inadvertently, left the attempt to commit suicide without punishment, because the completed act would not be punished in any manner," citing the former case of *Com* v. *Dennis*, 105 Mass.

The question arose under the penal code of Hawaii in 1868, upon a demurrer to an indictment for an attempt to commit suicide, and the demurrer was sustained and the indictment quashed. In the opinion of the court published in 2 American Law Rev. 794, Chief Justice Allen says in conclusion. "The wisdom of legislative bodies has never deemed it wise to make a provision to apply to the act charged against the defendant, and we are of opinion that we should be slow to give an entirely new construction to the code concerning murder, and to impose a punishment never contemplated and of the wisdom of which the framers of the law have not as yet expressed a favorable opinion. . . . . We find no statute of any country nor any provision of the common law which will sustain this indictment."

By section 178 of the penal code of New York, however, enacted in 1881, "Every person guilty of attempting suicide is guilty of felony, punishable by imprisonment in a state prison not exceeding two years or by fine not exceeding one thousand dollars, although no forfeiture is imposed in the case of the "successful perpetrator." These sections of the New York code are incorporated in the codes of North and South Dakota. But these provisions appear to have fallen into utter disuse; for we have been unable to find any reported convictions for this offense in either state since the adoption of this code. And although there have doubtless been innumerable attempts to commit suicide in the United States, no instance has been discovered in which there has ever been a conviction for this offense on

either statutory or common law grounds, prior to that in the case at bar.

It is accordingly the opinion of the court that an attempt to commit suicide is not an indictable offense in this state, and that the entry should be,

Exceptions sustained.
Prisoner discharged.

TREFFLE ST. HILAIRE, Petitioner

FOR WRIT OF HABEAS CORPUS.

Androscoggin. Opinion August 14, 1906.

Criminal Law. Habeas Corpus. Statutes. Directory. Mandatory. Criminal Cases Continued for Sentence. Sentence Afterwards Awarded. R. S., c. 29, § 62.

The plaintiff was indicted as a common seller of intoxicating liquors under an indictment alleging prior conviction, pleaded guilty, and the court ordered the case continued for sentence. Nearly four years after the plea of guilty was filed, the indictment was brought forward and the plaintiff was sentenced to pay a fine of $200 and costs and to imprisonment four months in jail, and in default of payment of fine and costs imprisonment four months additional. The plaintiff then applied for a writ of habeas corpus, alleging that his imprisonment was illegal, relying upon the provisions of chapter 29, section 62 of the Revised Statutes and also upon the principles of the common law, and the writ was issued. The justice hearing the matter ruled that the plaintiff was legally imprisoned and denied his discharge on habeas corpus. The plaintiff excepted to this ruling.

Revised Statutes, chapter 29, section 62, reads as follows:

"When a person has been convicted in the Supreme Judicial or Superior Court, of a violation of this chapter, the county attorney shall have him sentenced at the same term, unless for reasons satisfactory to the court, the case is continued for sentence one term, but no longer."

Held: that the aforesaid statute which merely commands the county attorney to perform an official act at a certain time is to be construed as directory to him. But if the statute were mandatory as to him, it could not limit the discretion of the court to suspend sentence where the interests of justice demand it.

It is a recognized power of courts of general jurisdiction, having stated terms for the trial of criminal cases, for good cause, to place the indictment on file or continue the case to a subsequent term for sentence.

It could rarely happen that an act of leniency in temporarily suspending sentence against a person, convicted upon his plea of guilty, could be regarded a ground of complaint. Should an exceptional case arise and injustice be made to appear, relief would not be denied by the courts, or a more ample relief by the pardoning power.

The sentence and commitment of the plaintiff were legal and the exceptions must be overruled.

On exceptions by plaintiff. Overruled.

Petition for writ of habeas corpus, alleging that the plaintiff was illegally imprisoned. The writ was issued and a hearing had before a justice of the Supreme Judicial Court. The justice ruled, as matter of law, that the plaintiff was legally imprisoned and denied his discharge on habeas corpus. Thereupon the plaintiff took exceptions.

The case fully appears in the opinion.

S. J. Kelley, for plaintiff.

Ralph W. Crockett, County Attorney, for the state.

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

PEABODY, J. The petitioner was indicted as a common seller of intoxicating liquors, under an indictment in which prior conviction was alleged, at the September term, 1901, of the Supreme Judicial Court in the County of Androscoggin. He pleaded guilty, and the court ordered that the case be continued for sentence. At the September term, 1902, of the court, the case was placed on the special docket. At the April term, 1905, the indictment was brought forward, and the petitioner was sentenced to pay a fine of $200.00 and costs $1.80, and to imprisonment four months in jail, and in default of payment imprisonment four months additional.

On May 6th, 1905, the petitioner applied for a writ of habeas corpus, which was issued on the same day. On the hearing the presiding Justice ruled, as matter of law, that the petitioner was legally imprisoned and denied his discharge on habeas corpus; and the case is before the Law Court on exceptions to this ruling.

The regularity of the warrant of commitment and the officer's return thereon, as to form and substance, is not questioned.

The record does not show whether or not the sentence was suspended at the request or with the consent of the petitioner, and we do not deem this material. It cannot be presumed that any reason influenced the court in the exercise of its discretion which was prejudicial to the interests of the petitioner or inconsistent with public justice.

The complaint of the petitioner is:

1. That the revival of the active criminal proceedings after his social and business relations had become changed was unjust to him and contrary to the welfare of society. It could rarely happen that an act of leniency in temporarily suspending sentence against a person, convicted upon his plea of guilty, could be regarded a ground of complaint. Should an exceptional case arise and injustice be made to appear, relief would not be denied by the courts, or a more ample relief by the pardoning power.

2. That he was illegally imprisoned, because the court had no right to impose sentence nearly four years after the plea of guilty was filed, and in support of this claim he relies upon the language of sec. 62, chap. 29, R. S., also upon the principles of the common law. The statute referred to provides: "Sec. 62. When a person has been convicted in the supreme judicial or superior court, of a violation of this chapter, the county attorney shall have him sentenced at the same term, unless for reasons satisfactory to the court, the case is continued for sentence one term, but no longer."

It is essential to the petitioner's contention that this statute be interpreted as mandatory.

It is difficult to formulate exact rules for determining when a statutory provision should be construed as mandatory and when as directory, but it may be stated as a general rule founded upon rea-

son and authority, that the interpretation will be adopted which will best subserve justice and the true legislative intent. A statute is mandatory when if not all its provisions are complied with according to their terms, the thing done in reference to it is void; a directory statute is one whose provisions, or part of them, operate merely to advise the official or other person who is to do or omit something therein pointed out, leaving the act or omission not destructive of the legality of what is done in disregard of the direction. Bish. Cr. L. sec. 25; Endlich on Int. Stat. sec. 431.

When no rights are impaired, provisions concerning the time and manner in which public officers are to perform assigned acts are directory. Endlich on Int. Stat. sec. 436; Sedgwick's Stat. & Const. 368; 26 Amer. & Eng. Enc. of Law, 689 (2d ed.)

When there is no substantial reason why an act may not as well be done after as at or before the time prescribed, such a statute is directory. *State* v. *Smith*, 67 Maine, 328; *Colt* v. *Eves*, 12 Conn. 243; *People* v. *Allen*, 6 Wend. 486; Bish. on Stat. Crimes, sec. 255.

It would thus seem that the statute quoted which merely commands the county attorney to perform an official act at a certain time is to be construed as directory to him. But if the legislative enactment were mandatory as to the county attorney, it could not limit the discretion of the court to suspend sentence where the interests of justice demand it. 8 Cyc. 822.

We have recognized the power of courts of general jurisdiction, having stated terms for the trial of criminal cases, for good cause to place the indictment on file or continue the case to a subsequent term for sentence. *Tuttle* v. *Lang*, 100 Maine, 123. Such practice has long existed in this state, New Hampshire and Massachusetts. *Sylvester* v. *State*, 65 N. H. 193; *Com.* v. *Dowdican's Bail*, 115 Mass. 133.

In the last case cited, which is similar to the one under consideration, the court, by Gray, C. J., say, "Such an order is not equivalent to a final judgment, nor to a nolle prosequi, nor discontinuance, by which the case is put out of court; but is a mere suspending of active proceedings in the case, which dispenses with the necessity of entering formal continuances upon the docket, and leaves it within

the power of the court at any time, upon the motion of either party, to bring the case forward and pass any lawful order or judgment therein."

This doctrine is established and this practice is recognized by law writers and by decided cases in other jurisdictions. Abbott's Trial Briefs in Crim. Cases, 2 ed. 744, and cases cited; Chitty's Crim. Law, 1 ed. 616; *People* v. *Court of Sessions of Munroe County*, 141 N. Y. 288; ex-parte Williams, 26 Fla. 310; *State* v. *Addy*, 43 New Jersey L. 113; *People* v. *Reilly*, 53 Mich. 260. These authorities are distinguishable from cases cited in behalf of the petitioner, which deny the power of the court to suspend sentence for an indefinite time. *People* v. *Brown*, 54 Mich. 15; *People* v. *Allen*, 155 Ill. 61; *U. S.* v. *Wilson*, 46 Fed. Rep. 748; *People* v. *Barrett*, 202 Ill. 287.

We therefore hold that the sentence and commitment of the petitioner were legal.

Exceptions overruled.
Discharge of petitioner denied.

CHARLES SARGENT *vs.* GEORGE D. PERRY.

Cumberland. Opinion August 29, 1906.

Superior Court. Review. Estoppel.

Findings of fact by a Justice of the Superior Court cannot be reviewed by the Law Court.

Held: that the defendant was not estopped from pleading the statute of limitations in defense in this action.

On exceptions by plaintiff. Overruled.

Assumpsit to recover for professional services, disbursements and certain cash items, brought by the plaintiff against the defendant in the Superior Court, Cumberland County. Plea, the general issue and statute of limitations.

The case was heard before the Justice of the Superior Court, without the intervention of a jury, with the right of exceptions on questions of law. After finding the facts, the Justice ruled that the defendant was not estopped from pleading the statute of limitations, and found for the defendant. Thereupon the plaintiff excepted.

The case fully appears in the opinion.

Charles Sargent, pro se.

C. B. & E. C. Donworth, for defendant.

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

PEABODY, J. This case is before us on the plaintiff's exceptions. It was an action of assumpsit to recover for professional services, disbursements and certain cash items commenced by the plaintiff against the defendant, by writ which was issued from the Superior Court for Cumberland County June 15, 1903, and returnable to the September term, 1903.

The plea was the general issue with a brief statement of the statute of limitations.

The case was heard before the judge of the Superior Court without the intervention of a jury, with right of exception to rulings on

questions of law. The court found the facts and made rulings as follows:

The plaintiff had performed professional services substantially as charged in his account which were required and accepted by the defendant while acting in the capacity of administrator of his father's estate; the charges therefor, amounting to $528, were reasonable and proper, and the defendant was liable for each item of the services when performed by a contract implied from the circumstances, but the cause of action did not accrue within six years prior to the date of the writ and the items should be disallowed; in the account were items of disbursements for taxes, amounting to $82.46, made at the request of the defendant, but the cause of action did not accrue within six years prior to the date of the writ and they should be disallowed; the items of cash payments charged against the defendant, amounting to $563.83, were voluntarily made and applied by the plaintiff in part payment of a note of $500 which he had given to the defendant on the seventeenth day of October, 1888, and they could not be recovered back in this action; the item of $60 charged in the account was the subject of conflicting evidence, the plaintiff testifying that it was a loan made to the defendant at his request, while the defendant testified that it was a payment made on a note then in suit in the Supreme Judicial Court for Washington County, and the plaintiff having the burden of proof that it was a loan has not sustained that burden; that on the sixteenth day of December, 1899, the defendant made a common law assignment of his property for the benefit of creditors to C. B. Donworth, Esq., and the plaintiff wrote to the assignee in April, 1900, in reference to his demands against the defendant and received the following reply:

MACHIAS, ME. Apr. 17, 1900.

Charles Sargent, Esq., Portland, Me.

Brother Sargent:

Thank you for your letter of 13th inst. relative to Perry's matters. I have not yet had time to submit it to George, but will do so very soon. Of course, he must do the square thing by you.

Yours truly,

C. B. DONWORTH.

The findings of fact by the judge of the Superior Court cannot be reviewed by this court. No facts are shown which would affect the statute of limitations as a defense to the items of the plaintiff's account not found due within six years prior to the commencement of the action, unless the defendant is estopped from availing himself of this defense by the act of his assignee. The plaintiff claims that the letter was equivalent to an assurance that whatever business obligation Perry was under to him should be performed, and that relying on this promise he omitted seasonably to commence his action. There is no pretence that there was any intention of misleading the plaintiff, and the presiding judge found as matter of fact that he was not misled by the letter, and ruled as matter of law that the defendant was not thereby estopped from pleading the statute of limitations.

The plaintiff's claim rests therefore solely upon the effect of the letter as implying a promise on the part of the assignee to preserve the rights of the plaintiff while the subject matter of the assignment was under his control. He might perhaps bind his assignor in reference to the claim of the plaintiff by acts done within the scope of the assignment, *Bridges* v. *Stephens*, 132 Mo. 524; *Chouteau* v. *Goddin*, 39 Mo. 229; *Warren* v. *Walker*, 23 Maine, 453; *Webber* v. *Williams College*, 23 Pick. 302; *Davies* v. *Edwards*, 7 Exc. 22; *Roscoe* v. *Hale*, 7 Gray, 274; but such is not the effect of the writing; the demand of the plaintiff had not even become the subject of negotiation between the plaintiff and the assignee, and the letter was merely an acknowledgment of the notice which the plaintiff had given of the assignor's indebtedness to him, with the writer's personal assurance that in his official business of adjusting the financial affairs of the debtor this creditor should receive fair treatment.

The plaintiff is a lawyer and knew that the assignee was acting in a trust capacity between the estate of the assignor and such of his creditors as became parties to the assignment; and the letter could not reasonably be understood as relieving him from the duty of taking such formal action as would entitle him to participate in the distribution of the debtor's property among his creditors, or at least of seasonable action against the defendant. There can be discovered

in its terms no element of contract or waiver of any prerequisite for the enforcement of the plaintiff's demand, and it was not an act which could operate to suspend the statute of limitations, or to estop the defendant from pleading it in defense of the action against him. *Exceptions overruled.*

VICTOR CLARK *vs.* ALBION B. HEATH.

Penobscot. Opinion August 29, 1906.

Action. Trover. Assumpsit. Mistake of Remedies. Inconsistent Remedies. Election of Remedies.

The plaintiff first brought an action of trover against the defendant for the alleged conversion of two cows. The judgment was for the defendant. The plaintiff then brought this action of assumpsit against the defendant for the price of the cows. *Held:* that if there had actually been two remedies open to the plaintiff, and he had elected one of them, he would have been precluded from subsequently resorting to the other form of action, but in this case his only remedial action was in assumpsit for the price of the cows, and having mistaken his remedy he is not precluded from bringing the proper action.

Mistake of remedies differs from an election between inconsistent remedies. The rule that "the definite adoption of one of two or more inconsistent remedies, by a party cognizant of the material facts, is a conclusive and irrevocable bar to his resort to the alternative remedy" does not apply if, in reality, he had only one remedy.

On exceptions by defendant. Overruled.

Assumpsit on account annexed for two cows. Writ dated March 15, 1906. Plea, the general issue and a brief statement. The only statement of the case is found in the defendant's brief statement which is as follows:

"And for brief statement defendant further says, "that on May 13, 1905, the plaintiff was the owner of two cows which, subsequently came into the possession of the defendant and on the 12th day of July A. D. 1905 the plaintiff claimed to have two causes of

action against this defendant for the value of said two cows sued for in his pending action, one an action of trover for the conversion of said cows, and one of assumpsit for the price of said cows; and on that day he elected the action of trover and sued out of the clerk's office of the Bangor Municipal Court a writ against this defendant declaring therein for a conversion of said two cows by this defendant. Said writ was duly served on this defendant by arrest of his body, entered in said Municipal Court and by appeal came to this court where in the January term 1906 thereof the facts were tried to a jury and a verdict of not guilty was rendered and judgment therein entered up. The parties are the same in this action as in the former action, the declaration and account annexed in this writ under which the plaintiff seeks to recover the price of two cows describes the same two cows as were described in the former writ, to wit: The count in the former writ for trover for conversion. And this defendant avers that the two remedies are inconsistent with each other, and that with full knowledge of all the facts, having elected one remedy which he pressed to judgment this plaintiff cannot maintain this action."

At the April term, 1906, of the Supreme Judicial Court, Penobscot County, the action was referred to the presiding Justice with the right to except. After hearing the matter, the presiding Justice ruled as matter of law that the action could be maintained and rendered judgment for the plaintiff for $45.00 and interest from the date of the writ. Thereupon the defendant excepted.

T. P. Wormwood, for plaintiff.

T. W. Vose and Lewis A. Barker, for defendant.

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

PEABODY, J. This is an action of assumpsit for two cows of the value of $45.00, and comes before the court on exceptions.

The defendant pleaded the general issue with a brief statement admitting that the cows came into his possession, and alleging a prior judgment for the defendant in trover based upon the same cause of

action. It was claimed on behalf of the defendant that the plaintiff, having full knowledge of the facts and having his election between an action of trover and an action of assumpsit, cannot after judgment in trover proceed in assumpsit. The court ruled that the action could be maintained and rendered judgment for the plaintiff for $45.00 and interest. To this ruling the defendant excepted.

The case of *Foss* v. *Whitehouse*, 94 Maine, 497, and the case of *Hussey* v. *Bryant*, 95 Maine, 51, cited by the defendant, are not in point. In the first of these cases the two remedies of assumpsit and trespass were both open to the plaintiff, as rights both in contract and in tort had accrued to him, but the court held that as the action of assumpsit, which was brought first, covered a portion of the items which made up the damages in the action of trespass, the plaintiff having prosecuted the first to judgment could not proceed with the latter.

In the second case the plaintiff had waived the defects in certain condemnation proceedings, and had recovered compensation for her land; and afterwards sought in an action of trespass quare clausum to recover damages which could only be awarded on the ground that the proceedings in condemnation had been irregular. It was held that, having elected the former remedy, she had waived the irregularity and the latter remedy was not available to her.

It will be seen that in both these cases there were actually two remedies open to the plaintiff, either of which could be elected, while in the case at bar the plaintiff's only remedial right was in assumpsit for the price of the goods; and having mistaken his remedy he is not precluded from bringing the proper action. *McNutt* v. *Hilkins*, 80 Hun. 235.

Mistake of remedies differs from an election between inconsistent remedies. *Sullivan* v. *Ross' Estate*, 113 Mich. 311, 318. The rule that "the definite adoption of one of two or more inconsistent remedies, by a party cognizant of the material facts, is a conclusive and irrevocable bar to his resort to the alternative remedy" does not apply if in reality he had only one remedy. 7 Enc. of Pl. & Prac. 364; *Morris* v. *Rexford*, 18 N. Y. 552; 15 Cyc. 262.

Exceptions overruled.

GEORGE W. HOOPER *vs.* HORACE S. BACON.

York. Opinion September 11, 1906.

Negligence. Personal Injuries. Unskilful Treatment by Surgeon. Damages not Mitigated Thereby, When.

In a suit to recover damages for personal injuries, if the plaintiff employed a surgeon of ordinary professional knowledge and skill, and followed his directions, he is entitled to recover compensation for all the damages sustained, though the surgeon may not have used the requisite skill, or may have erred in judgment, and by unskilful treatment have prevented the plaintiff from recovery from the injury as soon or as perfectly as he would have recovered under skilful treatment.

On motion and 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, who was driving an automobile.

The writ originally contained two counts, but during the progress of the trial, the plaintiff, against the defendant's objection, was allowed to amend his writ by inserting a third count. The three counts are as follows:

"For that the plaintiff on the seventh day of July A. D. 1904, was driving along a highway, to wit, a public street, within the compact and built up portion of the town of York, the same being the highway leading from Long Sands, so called, to Short Sands, with a horse and carriage, and the said defendant was then and there in the possession of, and driving, operating and moving an automobile or motor vehicle along said highway or public street, in the same direction, and coming behind the said plaintiff's team, and the said defendant then and there had the management and control of said automobile or motor vehicle, and that the said defendant carelessly and negligently drove, operated and managed said automobile or motor vehicle along said highway at a rate of speed greater than was reasonable and proper, with regard to the traffic and use of said highway by others, and at a rate of speed so great as to endanger the life and limb of any person traveling therein, to wit, at the rate of thirty

miles an hour, that said town of York made no ordinance or by-law permitting any automobile or motor vehicle to be run at a greater rate of speed than eight miles an hour, that by reason of the careless and negligent manner in which the defendant was then and there driving, operating and managing said automobile or motor vehicle and of the great rate of speed, to wit, a rate of speed greater than eight miles an hour which he was then and there driving said automobile or motor vehicle, and after the said defendant had been requested and signalled by the plaintiff to stop by putting up his hand, and while the plaintiff was in the exercise of due care on his part, the defendant ran said automobile or motor vehicle against the said plaintiff, and the plaintiff was thereby thrown with great force to the ground and severely bruised and injured about the head, back, spine, arms, body and legs, and otherwise bruising and injuring him, and permanently disabling him from future labor and employment, causing him to suffer great pain in body and mind from which he is not likely to recover, and causing him great expense, which he has incurred and has yet to incur, for medical attendance, advice, medicine and nursing.

"Also for that the said plaintiff on the seventh day of July A. D. 1904 was driving and riding his horse and carriage along a public highway in the town of York in said county, using due care, that said public highway leads from Long Sands, so called, in said town of York to Short Sands, so called, in town of York, and said plaintiff was driving from said Long Sands to said Short Sands, that said defendant was then and there driving and operating an automobile or motor vehicle along said public highway, that said town of York did not then and there permit by its ordinance or by-law a greater rate of speed than eight miles an hour. That said highway from said Long Sands to said Short Sands is within the compact part of said town of York, that the said defendant was then and there driving said automobile or motor vehicle at a rate of speed greater than eight miles an hour, to wit, at the rate of thirty miles an hour, that said defendant was then and there driving said automobile or motor vehicle at a rate of speed greater than was reasonable and proper, having regard to the traffic and use of the way by others, that

said defendant was then and there driving said automobile or motor vehicle at such a rate as would endanger the life and limb of any person traveling in said highway, that while the said plaintiff was then and there driving his said horse and carriage in said highway as aforesaid at a point in said highway opposite the road leading from said highway to the Nubble, so called, which point is about two hundred feet northerly of the Joseph F. Noues cottage on Long Sands, and while the said plaintiff had requested and signalled the said defendant by putting up his hand, to stop, and while the said defendant was then and there carelessly and negligently and recklessly driving his said automobile or motor vehicle as aforesaid, at said great rate of speed, and without heeding the request and signals of the plaintiff to stop, and while going at said great rate of speed said defendant ran said automobile or motor vehicle against the plaintiff, causing him to fall to the ground, crushing his legs and injuring his back, side, and spine, breaking a bone of his right leg and other injuries to said plaintiff then and there did, all caused by the great rate of speed which the said defendant was then and there driving, and the careless, negligent and reckless manner in which the said defendant managed and controlled said automobile or motor vehicle, thereby causing him to suffer great pain in body and mind from which he is not likely to recover, and causing him great expense, which he has incurred and has yet to incur for medical attendance, advice, medicines and nursing.

"And also, for that the said plaintiff on the seventh day of July A. D. 1904, was driving and riding his horse and carriage along a public highway in the town of York, in said County, using due care; that said public highway leads from Long Sands, so-called, in said town of York, to Short Sands, so-called; that said defendant was then and there driving and operating an automobile along said highway; that said highway is within the compact part of said town of York; and while the said plaintiff was then and there driving in his said team along said highway in the direction of said Short Sands, while at a point opposite the road leading from said highway to the Nubble, so-called, otherwise called Dover Bluffs, the said defendant, after he had been signalled by the plaintiff to stop and

after he had sufficient time to bring his automobile to a standstill, long before reaching Mr. Hooper, carelessly, negligently, recklessly and before bringing his automobile to a standstill, said defendant ran said automobile up behind said Hooper's team, and along the road beside of said team and passed the same, whereby the plaintiff's horse became frightened, causing Mr. Hooper to be thrown to the ground and the bone of his right leg broken and the ankle and foot of his right limb crushed, jammed and injured. All caused by the careless, negligent and reckless manner in which the said defendant moved and operated his said automobile, after having been signalled to stop as aforesaid. That the said plaintiff was in the exercise of due care. In consequence of the injuries to the plaintiff's limb as aforesaid, he has suffered great pain in body and mind, has been subjected to great expense for medicine, medical treatment and care and has been wholly prevented from performing any labor, and that he will in the future be wholly incapacitated from performing any labor, and will continue to suffer from said injuries so long as he shall live."

Tried at the January term, 1906, of the Supreme Judicial Court, York County. Plea, the general issue. Verdict for plaintiff for $1925. The defendant then filed a general motion for a new trial and also took exceptions to the ruling allowing the aforesaid amendment to the plaintiff's writ. At the hearing before the Law Court the exceptions were waived and the case was argued by the defendant on the motion only.

The point relied upon by the defendant is stated in the opinion.

Mathews & Stevens, for plaintiff.

Cleaves, Waterhouse & Emery, for defendant.

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

SAVAGE, J. Case for personal injuries. The only point relied upon by the defendant under his motion for a new trial is that the damages awarded are excessive. It is not seriously contended that they are excessive in view of all the consequences of the plaintiff's

original injuries. But it is claimed that for a part of the consequences the defendant is not responsible. In other words, the defendant says that the plaintiff's injuries did not receive proper surgical treatment, and that by reason of the want of proper care or skill on the part of the surgeon employed by the plaintiff, his injuries were greatly aggravated, and the consequences much more serious than they would have been otherwise.

The law is against the defendant on this point. It was the duty of the plaintiff to use due care in the selection and use of means for his recovery. It was his duty to employ a surgeon of ordinary professional knowledge and skill, and to follow his necessary directions, and if he did so he would be without fault in that respect himself. And if he did so he would be entitled to recover compensation for all the damages sustained, though the surgeon may not have used the requisite skill, or may have erred in judgment, and by unskilful treatment have prevented the plaintiff from recovery from the injury as soon or as perfectly as he would have recovered under skilful treatment. The unskilful treatment by the surgeon, itself, if any there was, arose as a consequence of the original fault of the defendant. *Stover* v. *Bluehill*, 51 Maine, 439.

Nothing appears in the record before us to show that the plaintiff did not fully perform his duty in the employment of a surgeon.

The exceptions are waived.

Motion and exceptions overruled.

FRANCIS E. HURLEY, Aplt.,

vs.

INHABITANTS OF SOUTH THOMASTON.

Knox. Opinion September 11, 1906.

Grade of Highway Raised. Complaint for Assessment of Damages. Motion to Dismiss Complaint Not a Dilatory Plea. Premature Exceptions. Practice. R. S., c. 23, § 68; c. 79, § 56.

1. Upon an application in writing to the municipal officers of a town, for the assessment of damages occasioned by raising the grade of the highway in front of the applicant's premises, the municipal officers made the following endorsement: —

"We, the undersigned municipal officers assess no damages on the within application for the reason that upon the facts as they exist there is no liability of the town in the premises, nor any jurisdiction in us to assess damages.

Held: that this was such a decision as afforded the applicant a remedy by complaint to the Supreme Judicial Court, under the provisions of R. S., chapter 23, section 68. And a motion to dismiss such a complaint on the ground that the municipal officers had made no assessment, or any other decision, upon which a complaint can be founded, cannot be sustained.

2. A motion to dismiss a complaint for an assessment of damages serves the purpose of a demurrer, and is not to be regarded as a dilatory plea. The question raised by it is merely whether the complainant has stated sufficient grounds to maintain the complaint.

3. When a motion to dismiss, in such a case, is overruled, and exceptions to the ruling are taken, the case should then proceed to trial, and only after trial upon the merits should the exceptions be taken to the Law Court. When prematurely brought forward, they will be dismissed from the law docket.

On exceptions by defendants. Dismissed.

Complaint for the assessment of damages occasioned by raising the grade of the highway in South Thomaston in front of the plaintiff's premises, brought under the provisions of sections 68, chapter 23, of the Revised Statutes.

The municipal officers refused to assess any damages and refused to take jurisdiction of the complaint. Thereupon under the provis-

ions of the aforesaid section 68 the plaintiff appealed to the Supreme Judicial Court, Knox County. The appeal was duly entered in said court, and the defendants appeared and filed a motion to dismiss the appeal. This motion was overruled and the defendants excepted.

The case appears in the opinion.

D. M. Mortland, for plaintiff.

Arthur S. Littlefield, for defendants.

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

SAVAGE, J. This is a complaint for the assessment of damages occasioned by raising the grade of the highway in South Thomaston in front of the complainant's premises. It is brought under the provisions of R. S., ch. 23, sect. 68, and is in the nature of an appeal from the refusal of the selectmen of South Thomaston to allow any damages, upon her application therefor. The statute in question provides that "when a way or street is raised or lowered by a road commissioner or person authorized, to the injury of an owner of adjoining land, he may, within a year, apply in writing to the municipal officers and they shall view such way or street and assess the damages, if any have been occasioned thereby, to be paid by the town, and any person aggrieved by said assessment may have them determined, on complaint to the Supreme Judicial Court." After alleging various jurisdictional facts not in question here, the complainant further alleges that she made the statutory application to the municipal officers for an assessment of her damages, upon which they made the following endorsement:

"We, the undersigned, municipal officers, assess no damages on the within application for the reason that upon the facts as they exist there is no liability of the town in the premises, nor any jurisdiction in us to assess damages," by which decision she alleges that she was aggrieved, and so forth.

The town filed a motion to dismiss, which was overruled, and exceptions were taken. The case has not yet been heard upon the merits, and the complainant urges that the exceptions are prematurely

brought forward, that the motion to dismiss is a dilatory motion, and being overruled, the exceptions must wait below until the case is tried. R. S., ch. 79, sect. 56. But it has been held that a motion to dismiss, in a proceeding like this, is not to be regarded as a dilatory plea. It serves, rather, the purpose of a demurrer. The question raised by it is merely whether the complainant has stated sufficient grounds to entitle her, upon their being proved, to maintain her complaint. *Rines* v. *Portland*, 93 Maine, 227. Nevertheless, when the motion was overruled, and the complaint was thereby adjudged good in form, we think the case should then have proceeded to trial, and only after trial should the exceptions have been brought forward to this court. In a trial upon the merits, all the questions of defense which the town raises under its motion, and some that it cannot raise now, will be open for the determination of the court. *Phillips* v. *County Com.*, 83 Maine, 541. It is the better practice to allow exceptions to rulings on preliminary motions in cases of this kind, (unless the rulings are adverse to the proceeding) to rest in the court below until trial is had and all questions considered, when all issues can be finally determined once for all by the Law Court. A case should not be brought to this court by piece meal, when it can be avoided. *Millett* v. *County Com.*, 81 Maine, 257; *Shaw* v. *County Com.*, 92 Maine, 498; *Monaghan* v. *Longfellow*, 82 Maine, 419. It is therefore considered that these exceptions are prematurely brought forward, and that they should be dismissed from the law docket.

But as the practice heretofore has not been uniform, and as the parties have fully argued the one point raised by the motion to dismiss, we will briefly consider it. It is this. The town claims that it is shown by the complaint itself that the municipal officers did not make any assessment of damages, or any other decision or decree upon which the complainant can found her complaint or from which she can take a virtual appeal. We think otherwise. If the municipal officers had taken no action upon the complainant's application for an assessment of damages, the point now taken might have been tenable. But the complaint shows that they did take action, and decided questions both of law and fact. They decided to assess no

damages because upon the facts which they found "there is no liability of the town in the premises," and they decided further upon the facts which they found that they had no jurisdiction to assess damages. It was within their province to determine the relevant facts and the rules of law which were applicable. We cannot know now whether they decided either the law or the facts correctly. Nor is it of any consequence at this stage of the case. It is enough that they decided them, and adversely to the complainant, so that she is aggrieved.

We think that the statute in question contemplates that an aggrieved party shall have this remedy by complaint whenever municipal officers shall have acted upon an application, and made a decision thereon. It makes no difference whether they have assessed damages in too small an amount, or whether they have refused to assess any. And in the latter case it makes no difference whether they refused because they thought that no damages were sustained in fact, or that there was no liability in law for damages in fact sustained, or that the facts as they found them did not bring the application within their jurisdiction. Their decision upon any of these matters is not final. It is reviewable upon complaint by an aggrieved party. The correctness of their decision,— their errors, if any,— will be determined by the court, when the complaint is tried in the regular manner. And so will all other material questions in prosecution or defense.

Exceptions dismissed from the law docket.

ANTHONY COLLINS *vs.* FRANK TAYLOR.

Penobscot. Opinion September 11, 1906.

Forcible Entry and Detainer. A Building is Personal Estate, When. Evidence. Admissions.

1. When one builds a house upon the land of another, with the consent of the land owner, or the land owner subsequently assents to its remaining there as the property of the builder, in either event, the house is the personal property of the builder.
2. When one has erected a house upon the land of another, and has conveyed it to a third person, and when in a suit by such third person to recover possession, the defendant claims to hold as tenant of the land owner, admissions by the latter, as to title, are admissible against the defendant.

On report. Judgment for plaintiff.

Action of forcible entry and detainer brought by the plaintiff against the defendant to recover a certain dwelling house situated in Old Town, and standing on land of one Lucy A. Bachelder. The writ was sued out of the Old Town Municipal Court, under the date of May 21, 1901. Plea, the general issue with a brief statement alleging the title of the dwelling house, as well as the land on which it stands, to be in the aforesaid Lucy A. Bachelder, and under whom the defendant claimed to occupy by the consent of his wife who was the tenant of the said Lucy A. Bachelder.

Tried at the January term, 1904, of the Supreme Judicial Court, Penobscot County. (The case does not show what disposition was made of the matter in the Old Town Municipal Court, nor how the Supreme Judicial Court obtained jurisdiction of the action.) At the conclusion of the testimony it was agreed that the case should be reported to the Law Court "for determination on so much of the evidence as is legally admissible."

The facts sufficiently appear in the opinion.

J. F. Gould, for plaintiff.

Clarence Scott and P. H. Gillin, for defendant.

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

SAVAGE, J. Action of forcible entry and detainer to recover a house standing on the land of a third party. In a brief statement pleaded under the general issue the defendant avers that the building, as well as the land on which it stands, is the estate and freehold of Lucy A. Bachelder, in whom is the sole title to the premises, and under whom the defendant claims a right to occupy, by the consent of his wife who is the tenant of Bachelder. The plaintiff claims title under a foreclosed chattel mortgage of the house, given by the defendant.

To the maintenance of the suit, the defendant's counsel, in argument, interposes one objection only, and that objection we will proceed to consider. It is, that the case fails to show affirmatively that the plaintiff has title to the house in question. It is not in controversy, as appears by the defendant's brief, that the defendant built the house on the Bachelder land. But it is claimed that it is not shown whether it was built under the license or permission of the owner of the land, or under a contract on the part of the defendant to purchase the land, and so became the personal property of the defendant, or whether it was built without any permission whatever, and so became a part of the real estate of Mrs. Bachelder. Hence it is contended that the plaintiff has failed to show that the defendant owned the house which he mortgaged, or that the plaintiff got any title under the mortgage.

The record before us is made up entirely of documentary evidence. The plaintiff introduced a chattel mortgage of the house, from the defendant to William M. Bean, dated November 9, 1891, together with the note which it secured. He then introduced a foreclosure of the mortgage, recorded July 18, 1893, and a bill of sale of the house from Bean to himself, dated May 15, 1901. He also introduced a writ of forcible entry and detainer, brought by Lucy A. Bachelder against the defendant May 23, 1894, to which further reference will be made. The defendant showed that judgment was rendered for Mrs. Bachelder in the foregoing suit, and that a writ of possession

was issued. Whether it was served or not does not appear. The defendant also introduced another writ of forcible entry and detainer between the same parties, dated July 13, 1897, a lease from Mrs. Bachelder to the defendant, dated August 1, 1897, and a lease from Mrs. Bachelder to the defendant's wife, dated April 1, 1901.

Passing any question of estoppel which might prevent the defendant from disputing the title which he mortgaged to Bean, we think the case discloses sufficient evidence to warrant a finding that the house when mortgaged was the personal property of the defendant, and, in the absence of countervailing proof, to require such a finding. In her first writ against the defendant, in 1894, Mrs. Bachelder described the land, the recovery of which she sought, as "land upon which said Taylor's dwelling house stands." It is admitted that the house named in the mortgage is the same house as was named in Mrs. Bachelder's writ. And in the same writ, Mrs. Bachelder averred that she had given Taylor thirty days notice "to terminate his estate in the premises." In her writ of July 13, 1897, Mrs. Bachelder, having first described the dwelling house in question, averred that she had given Taylor thirty days notice "to remove said building," "to terminate his estate in the premises."

The defendant claims solely under a tenancy subsequently created by Mrs. Bachelder, and that the land and buildings now belong to her. These admissions by her are admissible against him to show that at the dates of these writs she did not claim to be the owner of the dwelling house. Undisputed and unexplained, they afford persuasive proof that even as late as 1897, she understood that the building belonged to Taylor. From this the inference is reasonable that it had been built on her land by her consent, or remained there, as his personal property, by her subsequent assent. And it is immaterial which. *Fuller* v. *Tabor*, 39 Maine, 519. In either event the building was his property. And if the building was ever his property, there is nothing in the case to show that he ever parted with title except by his mortgage to Bean and the subsequent foreclosure. His title has come through Bean to the plaintiff.

It is true that Mrs. Bachelder in her 1897 suit recovered judgment against the defendant for the possession of the house, and

obtained a writ of possession. But that does not concern this plaintiff, and did not concern Bean who then owned the house. Bean was not a party to that suit, and his interest was not affected by the judgment. Taylor did not own the house. Bean did. He had owned it absolutely from September 17, 1893, by a title of which Mrs. Bachelder had constructive, if not actual, notice. Judgment against Taylor could not disturb Bean's title. No more could the subsequent leases given by Mrs. Bachelder to the defendant or his wife.

Judgment for plaintiff.

F. W. BROWN, JR., *vs.* CHARLES E. SMITH.

Waldo. Opinion September 13, 1906.

Probate Law. Conflict of Jurisdiction. Executors and Administrators. Power and Authority Limited. Foreign Decedent. Ancillary Administration Necessary, When. Foreign Administrator Cannot Assign Mortgage on Land in Maine. R. S., c. 65, § 7; c. 66, §§ 14, 15, 16.

It is a well settled principle of the common law that the power and authority of an administrator or executor, over the estate of the deceased, is confined to the sovereignty by virtue of whose laws he is appointed.

When assets of a foreign decedent are found in this state, ancillary administration must be obtained here before our courts will enforce the recovery of debts due the foreign decedent.

An administrator appointed in another state, cannot assign a mortgage of land situate in this state so as to enable the assignee to enforce payment thereof.

On report. Judgment for defendant.

Real action to recover certain lands in Thorndike. Writ dated December 16, 1904. Plea, the general issue.

The plaintiff held by assignment a mortgage of the demanded premises given May 28, 1887, by Albert D. Bumps of Thorndike,

Maine, to George Tyler of Boston, Massachusetts, to secure a certain judgment recovered by said Tyler against said Bumps in the Supreme Judicial Court, Waldo County. Afterwards the said Tyler died and Isabella J. Tyler of Waltham, Massachusetts, was duly appointed administratrix of the estate of said Tyler by the Probate Court of Middlesex County, Massachusetts. The administratrix then assigned said mortgage to the plaintiff.

There was no ancillary administration on the estate of the said deceased, George Tyler, in the State of Maine. The defendant contended, among other things, that the administratrix of the estate of said deceased, George Tyler, had no power to make a valid assignment of the aforesaid mortgage given to her intestate as she had been appointed administratrix in another state while the mortgage was of land in the State of Maine.

The action was tried at the April term, 1906, of the Supreme Judicial Court, Waldo County, and at the conclusion of the evidence it was agreed to report the case to the Law Court "to be determined upon such evidence as is competent and legally admissible."

The case appears in the opinion.

F. W. Brown, Jr., and W. H. McLellan, for plaintiff.

R. F. Dunton and W. P. Thompson, for defendant.

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

POWERS, J. Writ of entry to recover certain lands in Thorndike. The case comes here on report.

To make out title plaintiff introduced; (1) a duly recorded mortgage of the demanded premises from Albert D. Bumps of Thorndike, Maine, to George Tyler of Boston, Massachusetts, dated May 28, 1887, given to secure a certain execution and judgment recovered by said Tyler against said Bumps in this court in said Waldo County; (2) copies of records of the Probate Court of Middlesex County, Massachusetts, showing that December 10, 1889, Isabella J. Tyler of Waltham in the County of Middlesex was duly appointed administra-

trix of the estate of George Tyler late of said Waltham deceased; (3) assignment from said administratrix to the plaintiff of said mortgage, duly recorded and dated Nov. 21, 1904. This makes a prima facie case, if an administratrix appointed in another state has power to assign a mortgage given to her intestate upon real estate in this state.

It is a well settled principle of the common law that the power and authority of an administrator or executor, over the estate of the deceased, is confined to the sovereignty by virtue of whose laws he is appointed. In recognition of this principle provision is made by our statutes for the granting of ancillary administration on the estate of non-residents, who die leaving estate to be administered in this state, or whose estate is afterwards found therein. R. S., chap. 65, section 7; chap. 66, sections 14, 15 and 16.

One reason at least upon which this rule is founded, is to prevent the effects or credits of the deceased found in any state, which may be needed to satisfy debts due to the citizens of that state, from being withdrawn from its jurisdiction. That no such necessity in fact exists can never be known with certainty in any given case unless administration is granted, and an opportunity thereby afforded to creditors to present their claims. *Mansfield* v. *McFarland*, 51 Atl. 763. It is said in *Stearns* v. *Burnham*, 5 Maine, 261, that the principles of justice and policy, upon which similar statutes to those above cited were founded, "would seem to lead our courts of law to that course of proceedings which would harmonize with those principles and have a manifest tendency to produce the same beneficial results." In that case it was accordingly held that an executor appointed under the laws of another state, cannot indorse a promissory note payable to his testator by a citizen of this state, so as to give the indorsee a right of action here in his own name.

The debt due from Bumps, who at the time of the recovery of the judgment and ever since has been a resident of this state, constituted no part of the goods, effects, rights and credits of the intestate in Massachusetts, which alone the administratrix was authorized and empowered to administer. The debt follows the creditor while living; after his death it follows the debtor. *Saunders* v. *Weston*,

74 Maine, 85. The situs of the debt being in Maine, the administratrix, deriving her authority solely from the laws of Massachusetts, had no control over it.

There is even stronger reason for holding that she had no control over the mortgage. A mortgage and its assignment are conveyances of land in fee which must be recorded. It is desirable that title to real estate should so far as possible appear of record. The party having a right to redeem ought to be able, by an examination of the records in the registry of deeds and the probate courts of this state, to ascertain who is entitled to receive payment and give a discharge of the mortgage, without being compelled at his peril, to incur the expense of searching the records of other states and countries. Without doing this the defendant in the present case could not know, until the evidence was produced at the trial, that the plaintiff's assignee had ever been appointed administratrix of the deceased in the place of his domicile. The courts of Massachusetts in a case, which has been frequently cited and followed in that state, have decided the precise point here presented against the plaintiff's contention. *Cutter* v. *Davenport*, 1 Pick. 81. The question is a new one in this state; but the trend of our decisions has been to restrict the power of a foreign administrator to the jurisdiction of his appointment. *Stevens* v. *Gaylord*, 11 Mass. 255; *Stearns* v. *Burnham*, supra; *Smith* v. *Guild*, 34 Maine, 443; *Gilman* v. *Gilman*, 54 Maine, 453; *Smith* v. *Howard*, 86 Maine, 203; *Green* v. *Alden*, 92 Maine, 177.

It may fairly be regarded as the settled policy of this state that, when assets of a foreign decedent are found here, ancillary administration must be obtained here for the protection of resident creditors, before our courts will enforce the recovery of debts due the foreign decedent. Otherwise the assets could be converted into money, taken outside the state, distributed under the jurisdiction of foreign courts, and our citizens compelled to go into other jurisdictions to collect their just dues. Such is the general rule. Note to Shinn's Estate, 45 Am. St. Rep. 667; *Maas.* v. *Bank*, 176 N. Y. 377.

Inasmuch therefore, as ample provision is made by our statutes for the granting of ancillary administration in this state, a course

which seems to be in accord with our legislative policy and judicial decisions and may in any case be necessary for the protection of our citizens who are creditors of the estate, in view also of the fact that it is desirable so far as possible that title to real estate should somewhere appear of record in this state, we hold, in accordance with *Cutter* v. *Davenport* above cited, that an administrator cannot, by virtue of letters granted in another state, assign a mortgage of land situated in this state, so as to enable the assignee to enforce payment thereof. *Dial* v. *Gary*, 14 S. C. 573; 37 Am. Rep. 737; 18 Cyc. 1231; *Reynolds* v. *McMullen*, 55 Mich. 568. The right of a foreign administrator to receive a voluntary payment, and give a discharge of a debt so paid, is not involved in this case.

Judgment for the defendant.

GERALD M. GARLAND, by next friend,

vs.

HELEN J. HEWES.

Penobscot. Opinion September 13, 1906.

Animals. Dog. "Fault" in R. S., Chapter 4, Section 52, Equivalent of Negligence. Burden of Proof. Verdict for Defendant Sustained. Statute, 1903, c. 109, § 1. R. S., c. 4, § 52.

For damage to person or property by a dog a right of action against his owner is given, by R. S., chapter four, section fifty-two, only in those cases in which the damage was not occasioned through fault of the plaintiff.

The word "fault" as used in this statute is the equivalent of negligence; and the burden in such an action is upon the plaintiff to allege and prove that no want of due care on his part occasioned the injury.

After verdict for the defendant upon motion for a new trial in this case, although the court if sitting as jurors might have drawn a different inference or reached a different conclusion than did the jury, it cannot be said that the verdict is so clearly and manifestly erroneous that justice requires it to be set aside.

On motion by plaintiff. Overruled.

Action under Revised Statutes, chapter 4, section 52, to recover damages for an injury resulting from bite of defendant's dog. The plaintiff was eight years old at the time of the injury, and the dog was a St. Bernard weighing between seventy-five and eighty pounds. The next morning after the plaintiff was bitten, the dog was killed by order of the defendant.

The action was tried at the January term, 1906, of the Supreme Judicial Court, Penobscot County. Plea, the general issue with the following brief statement: "That the damage complained of in the writ and declaration of the plaintiff was occasioned through the fault of the person injured, to wit, the minor plaintiff." The verdict was for the defendant. The plaintiff then filed a general motion for a new trial.

The case appears in the opinion.

Martin & Cook, for plaintiff.

P. H. Gillin, for defendant.

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

POWERS, J. Action under the statute to recover damages for an injury resulting from bite of defendant's dog on July 12, 1905. The case comes here on motion to set aside the verdict which was for the defendant.

Only two witnesses, the plaintiff and defendant, testified as to what took place at the time of the injury. The plaintiff, a boy eight years old, testified that he had played with the dog a year or so, that the dog seemed to like him, had never been cross to him or snapped at him, that on the day named he was playing with the dog throwing sticks in the water and trying to get the dog to go after them, that the defendant came down to the brook with a horse and wagon, that the dog was along side of the horse and wagon when the plaintiff put his arm around the dog's neck and kissed it, and the dog bit him in the face. He denied that he used any violence toward the dog or did any act to plague, irritate or provoke it.

Defendant testified as follows: "The little boy came up side of the horse and went up to the dog, and the first thing he done when he went up to the dog, he took his hand and struck him a few times on the head. Then he took hold of his ears and pulled them out. The next thing he done he grabbed him right around the neck and put his face right down into the dog's face,—you might say in his mouth almost, and the dog turned his head and bit him in the cheek."

Other witnesses throw little light upon the question of veracity involved. The jury had the advantage of seeing the plaintiff and the defendant, and noting the many things affecting their credibility which the bald report of the evidence cannot reproduce. Whatever doubts the court may entertain, it cannot say, after a careful study of the whole evidence, that the jury were not justified in finding the facts as testified by the defendant.

Upon those facts can the verdict be sustained? So much of the statute as is material is as follows: "When a dog does damage to a person or his property, his owner . . . . forfeits to the person injured the amount of the damage done, provided said damage was not occasioned through the fault of the person injured." R. S., chapter 4, section 52. The proviso was added by chapter 109, section one of the public laws of 1903. Prior to that this court in *Hussey* v. *King*, 83 Maine, 568, held that the plaintiff need not allege and prove in the first instance his own due care in the matter, but declined to decide whether the plaintiff's want of care might be successfully shown in defense. Now, a right of recovery is given only in those cases in which the damage was not occasioned through the fault of the plaintiff. In legal literature the word "fault" is the equivalent of negligence, 19 Cyc. 460, note 11; 12 A. and E. Ency. of L. 2d Edition, 886, note 4. The burden, therefore, was upon the plaintiff to allege and prove that no want of due care on his part occasioned the injury. In determining the question of due care all the circumstances are to be taken into consideration, including the age and intelligence of the plaintiff. He is not to be held to the same judgment and thoughtfulness as an adult, but only to such as boys of his age and intelligence ordinarily exercise under the same circumstances. The mere fact that he was old enough to know that

striking the dog over the head and pulling his ears might cause the dog to bite him, would not bar his recovery if he was in the exercise of such care as would be due care in a boy of his age and intelligence. *Plumley* v. *Birge*, 124 Mass. 57. This question was for the jury to determine and it was submitted to them under instructions to which no exception was taken. No reason can be perceived why they should entertain any bias or prejudice against the infant plaintiff, or sympathy for the defendant. They saw the boy and had an opportunity to observe and note his intelligence. Certainly jurors ought to know as much as any tribunal about boys and the care they exercise in their conduct with dogs. The question was one which they were peculiarly qualified to decide, and they found the issue against the plaintiff. As has been often said the question presented by the motion is not what we would decide as jurors, not whether the court would have drawn a different inference and reached a conclusion more favorable to the plaintiff, but whether the finding of the jury is manifestly erroneous. We feel that we must answer in the negative.

Motion overruled.

RICKER CLASSICAL INSTITUTE *vs.* INHABITANTS OF MAPLETON.

Aroostook. Opinion September 12, 1906.

Tuition. Liability of Towns. Action for Tuition May be Maintained by Schools. R. S., c. 4, §§ 65, 66; c. 15, § 63.

A school receiving pupils under the provisions of section 63, chapter 15, of the Revised Statutes, may maintain in its own name an action against the town in which such pupils reside with their parents or guardians, to recover tuition for such pupils.

While the aforesaid statute fails to specify the remedy that shall be employed to compel the performance by a town of its statutory duty, and does not prescribe whether an action may be brought in the name of the parent or guardian of the pupil, or of the school which such pupil attends, yet it is a familiar principle that whenever a statute gives a right, the party shall by consequence have an action to enforce it.

On report. Judgment for plaintiff.

Action of assumpsit to recover tuition for three pupils living in the defendant town of Mapleton and attending Ricker Classical Institute, Houlton. Said pupils were attending said institute in accordance with the provisions of chapter 15, section 63, of the Revised Statutes. The declaration in the plaintiff's writ is as follows:

"For that the defendant, at said Houlton, on the day of the purchase of this writ, being indebted to the plaintiff in the sum of $55.50 according to the account annexed, in consideration thereof then and there promised the plaintiff to pay it said sum on demand.

Inhabitants of Mapleton to Ricker Classical Institute. Dr.

1904		
May 10	To tuition of Lee Ferguson 3 terms 1903-4 at $22 per year	$22.00
May 10	To tuition of Orin Higgins 3 terms 1903-4 at $22 per year	$22.00
May 10	To tuition of John Jones 1 1-2 terms 1903-4 at $22 per year	$11.50
		$55.50

"For that said defendants from first day of September, 1903, to the thirtieth day of June, 1904, did not support and maintain a free high school, giving at least one four years' course of study, properly equipped and teaching such studies as are taught in secondary schools of standard grade in the state of Maine. And that one Lee Ferguson a youth then and there residing with his parents in said town of Mapleton was then and there prepared to pursue said four years' course of study, and did then and there lawfully gain entrance to said Ricker Classical Institute, a school of standard grade approved by the State Superintendent of public schools, by the permission of those having charge thereof, and did then and there attend and receive instruction in such studies as are taught in said secondary schools during three terms, namely, the fall term of 1903, the winter and spring terms of 1904. That the reasonable and ordinary tuition then and there charged in said school was twenty-two dollars ($22) per year, by reason and in consideration whereof said defendants became liable and promised the plaintiff to pay said plaintiff said sum of twenty-two dollars ($22.)

"For that said defendants from first day of September, 1903, to the thirtieth day of June, 1904, did not support and maintain a free high school, giving at least one four years' course of study, properly equipped and teaching such studies as are taught in secondary schools of standard grade in the state of Maine. And that one J. Orin Higgins a youth, was then and there residing with his parents in said town of Mapleton was then and there prepared so pursue said four years' course of study, and did then and there lawfully gain entrance to said Ricker Classical Institute, a school of standard grade approved by the State Superintendent of public schools by the permission of those having charge thereof, and did then and there attend and receive instruction in such studies as are taught in said secondary schools during three terms, namely, the fall term of 1903, the winter and spring terms of 1904. That the reasonable and ordinary tuition then and there charged in said school was twenty-two dollars ($22) per year, by reason and in consideration whereof said defendants became liable and promised the plaintiff to pay said plaintiff said sum of twenty-two dollars ($22).

"For that said defendants from first day of September, 1903, to the thirtieth day of June, 1904, did not support and maintain a free high school, giving at least one four years' course of study, properly equipped and teaching such studies as are taught in secondary schools of standard grade in the state of Maine. And that one John Jones a youth, then and there residing with his parents in said town of Mapleton was then and there prepared to pursue said four years' course of study, and did then and there lawfully gain entrance to said Ricker Classical Institute, a school of standard grade approved by the State Superintendent of public schools by the permission of those having charge thereof, and did then and there attend and receive instruction in such studies as are taught in said secondary schools during one and one half terms, namely, the fall term of 1903, and one half of the winter term of 1904. That the reasonable and ordinary tuition then and there charged in said school was twenty-two dollars ($22) per year, by reason and in consideration whereof said defendants became liable and promised the plaintiff to pay said plaintiff one half of said sum of twenty-two dollars ($22) to wit, $11.50.

"And also, for that the defendant at said Houlton, on the day of the purchase of this writ, being indebted to the plaintiff in another sum of $200.00 for so much money before that time had and received by the defendant to the plaintiff's use in consideration thereof then and there promised the plaintiff to pay it that sum on demand. This count is founded wholly upon the matters alleged in the preceding counts, and under it will be introduced the account above declared upon and no other matter."

Plea, the general issue. The evidence was taken out at the April term, 1906, of the Supreme Judicial Court, Aroostook County, and at the conclusion of the same it was agreed to report the cause to the Law Court "for decision upon the declaration, plea, and so much of the evidence as legally admissible," the Law Court "to determine the rights of the parties and render such judgment as the law and the evidence require."

The case appears in the opinion.

Powers & Archibald and Madigan & Madigan, for plaintiff.

Ira G. Hersey and Geo. H. Smith, for defendant.

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

WHITEHOUSE, J. This is an action to recover tuition for three pupils living in the defendant town and attending Ricker Classical Institute.

Section 63 of chapter 15 of the Revised Statutes provides that "Any youth who resides with a parent or guardian in any town which does not support and maintain a free high school giving at least one four year's 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 year's course, attend any school in the state which does have such a four year's course and to which he may gain entrance by permission of those having charge thereof, provided said pupil 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; and towns shall raise annually, as other schools moneys are raised, a sum sufficient to pay such tuition charges."

It is admitted in the agreed statement of the parties that at the time the pupils for whose tuition this suit is brought were attending the plaintiff Institute the defendant town was not maintaining such a school as is mentioned in the statute; that the Ricker Classical Institute was such a school; that the pupils named in the plaintiff's writ were residing in the defendant town with their parents ; that they gained entrance to the plaintiff Institute by permission of those having that school in charge; that the tuition sued for in the writ is reasonable and the ordinary charge and that the same has not been paid.

It is not controverted by the defendant town that the permission given by those having the plaintiff Institute in charge for the admission of the pupils to that school was evidence that the pupils were "prepared to pursue such four year's course," sufficient to establish the liability of the defendant town to pay their tuition to the party

legally entitled to bring suit therefor. But it is contended in behalf of the defendant that under the statute in question the action to recover the tuition in such cases must be brought in the name of the parent or guardian, and that this action brought directly in the name of the Institute, to recover the aggregate sum due for the tuition of all the pupils residing in that town who attended the plaintiff school, cannot be maintained. This is the only ground of defense interposed by the defendant town.

It is the opinion of the court that this contention cannot be sustained. The statute declares that "The tuition of such youth . . . . . shall be paid by the town in which he resides." It is true that the statute fails to specify the remedy that shall be employed to compel the performance by the town of this statutory duty. It does not prescribe whether an action may be brought in the name of the parent or guardian of the pupil, or of the school which he attends. But it is a familiar principle that whenever a statute gives a right, the party shall by consequence have an action to enforce it. *Stearns* v. *At. & St. L. R. R. Co.*, 46 Maine, 115. "It is a vain thing," say the court in that case, "to imagine a right without a remedy, for want of right and want of remedy are reciprocal." In *Farwell* v. *Rockland*, 62 Maine, 296, it was held that an action of assumpsit was maintainable against the City of Rockland by the judge of the police court of that city for his salary though he had no contract with the city and no right of action was expressly given by statute. So in *Rackliff* v. *Greenbush*, 93 Maine, 99, under a statute (sects. 65 & 66, ch. 4, R. S.) providing that the municipal officers of the town in which an honorably discharged soldier resides at the time of his death, "shall pay the expenses of his burial," if he was in destitute circumstances at the time of his decease, it was held that the plaintiff, an undertaker, could maintain an action of assumpsit against the defendant town to recover the expenses incurred by him for the burial of such a deceased soldier, although the plaintiff was not expressly authorized by the municipal officers to incur the expense and no right of action was expressly given by the statute.

In the case at bar, however, it is suggested that prior to the enactment of the statute in question, the tuition of pupils admitted

to free high schools, under similar circumstances, was paid by the parents or guardians, and that it was not the design of the statute to make any change in the relation between the pupil and school respecting the method of payment, but to provide that the town should reimburse the parent or guardian for the tuition paid by him.

It should be a sufficient answer to this suggestion, however, that the statute says that the town shall pay the tuition, and does not say that it shall reimburse the parent or guardian for paying it. Under the statute the school is entitled to tuition for the instruction furnished, and the town is expressly required to pay for it.

It would seem to be the more reasonable and natural construction of the statute to hold that the legislature intended to establish the relation of debtor and creditor between the town and the school, and to require the town to pay the tuition directly to the school that rendered the service. By this direct method also the superfluous payment by the parent or guardian in the first instance and the multiplicity of suits that might be required to obtain reimbursement for several pupils in the same town, are both avoided, and the entire amount due from a town as tuition for all its pupils attending the same school may be collected in a single suit.

The entry must accordingly be

Judgment for plaintiff for fifty-five 50-100 dollars with interest from the date of the writ.

In re A. J. TOLMAN, Sheriff,

PETITIONER TO AMEND RETURN.

Knox. Opinion September 15, 1906.

Court Records Amendable. Amendment Within Judicial Discretion of Presiding Justice. Notice to Adverse Party Necessary, When. Practice.

A court has power to allow its records to be amended in accordance with the fact.

Whether the proposed amendment shall be allowed upon proof of the necessary facts, saving the rights of all persons theretofore acquired in good faith, is within the sound judicial discretion of the justice presiding at the hearing.

Where the record itself does not furnish the data for the amendment, but it depends upon extrinsic evidence, notice should be given to the adverse party that he may have an opportunity to be heard.

On exceptions by plaintiff. Sustained.

Petition by A. J. Tolman, sheriff of Knox County, asking to amend his return of the sale of an equity of redemption on an execution so as to make it conform to the facts.

At the hearing in the court of the first instance, and which hearing was without notice to those adversely interested, the presiding Justice ruled "as a matter of law that the petition could not be maintained, and that the officer could not amend his return in accordance with the facts." To this ruling the plaintiff excepted. The bill of exceptions further states that this ruling was made without regard to the question of notice.

The case sufficiently appears in the opinion.

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

Arthur S. Littlefield and Allan L. Bird appeared as "amici curiae."

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

POWERS, J. Petition by the sheriff to amend his return upon an execution so as to make it conform to the fact. At the hearing, which was without notice to those adversely interested, the presiding Justice ruled "as matter of law that the petition could not be maintained, and that the officer could not amend his return in accordance with the facts." To this ruling the petitioner excepted; and the exceptions further state that the ruling was made without regard to the question of notice.

The execution had been returned and had become a part of the records of the court. In effect the ruling denied the power of the court to allow its records to be amended in accordance with the fact. Such a doctrine cannot be supported upon either reason or authority. The power of a court to permit its records to be amended so that they shall conform to the fact, and speak not falsehood but the truth, has been so universally asserted, and exercised in such innumerable instances, that it must now be regarded as settled law requiring no citation of authorities in its support. Whether the proposed amendment shall be allowed upon proof of the necessary facts, saving the rights of all persons theretofore acquired in good faith, is within the sound judicial discretion of the justice presiding at the hearing; but we are aware of no instance, in which his want of power to allow such amendments upon notice, hearing and proof, has been successfully asserted. The very object of a court's records is to preserve proof of the fact, the truth; and it would be strange indeed, and subversive of justice itself, if the court had no power to prevent the perversion of its records to the perpetuation of error and falsehood.

This disposes of the case before us, but, as it must go back to nisi prius for further proceedings, it may not be improper to add that where the record itself does not furnish the data for the amendment, but it depends upon extrinsic evidence, notice should be given to the adverse party that he may have an opportunity to be heard.

Exceptions sustained.

S. D. ALEXANDER

vs.

JOHN E. SEGEE, & CANADIAN PACIFIC RAILWAY COMPANY, Trustee.

Aroostook. Opinion September 14, 1906.

Trustee Process. Foreign Plaintiff, Defendant and Trustee. No Service on Principal Defendant. Jurisdiction. Premature Exceptions.

In the case at bar, neither the plaintiff nor the defendant was a resident of Maine but both were residents of Frederickton in the Province of New Brunswick and Dominion of Canada and the personal services rendered by the principal defendant to the trustee were not rendered in the State of Maine but in the Province of New Brunswick. The Canadian Pacific Railway Company, the alleged trustee, is a foreign corporation having its principal office and place of business in Montreal, where its treasury is located from which its debts are paid, although it operates a line of railway in Maine and has stations in connection with its railway business in this state, among which is one at Houlton in the county of Aroostook. Service was made on the trustee by leaving the summons with the station agent of the company at Houlton, but no service was ever made upon the principal defendant, although service upon him was ordered by the court. To the ruling of the presiding Justice that the court had jurisdiction in the case, and charging the trustee, the trustee filed exceptions and the case comes to the Law Court on these exceptions.

Held: that the exceptions are not regularly and properly before the Law Court and must be dismissed. No service of the writ had been made upon the principal defendant and he had no opportunity to be heard upon the question of jurisdiction or the liability of the trustee. Without such notice and such opportunity to be heard, he could not be concluded by any decision adverse to him which might be made respecting either of these questions. The hearing at nisi prius was therefore premature and the exceptions were prematurely brought to the Law Court.

On exceptions by trustee. Dismissed.

Assumpsit on account annexed brought by the plaintiff against the principal defendant and the Canadian Pacific Railway Company as alleged trustee.

The plaintiff and the principal defendant were both residents in the Province of New Brunswick, the personal services rendered by the principal defendant to the alleged trustee were rendered in said Province, the alleged trustee is a foreign corporation having its principal office and place of business in Montreal, although operating a line of railway in Maine, and having a station at Houlton, Aroostook County, and no service was ever made on the principal defendant but service was made on the alleged trustee by a constable of the town of Houlton "giving in hand to Francis Dow, agent of said corporation, a summons for appearance at court of said trustee corporation." The alleged trustee admitted that it was indebted to the principal defendant to the extent of $47.25 as wages for personal services.

In the court of the first instance, the trustee contended that the court had no jurisdiction in the matter, but the presiding Justice ruled that the court had jurisdiction and charged the trustee for $47.25 less its costs. To this ruling that the court had jurisdiction and charging the trustee, the trustee excepted.

The case appears in the opinion.

Charles Carroll, for plaintiff.

Charles F. Woodard, for defendant trustee

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

WHITEHOUSE, J. In the trustee's disclosure which is made a part of the case, it is admitted that at the time of the service of the writ upon the company's station agent at Houlton, the trustee was indebted to the principal defendant in the sum of $47.25 for his personal services rendered to the company within one month prior to the service of the writ, but the trustee moved that the action be dismissed on the ground that the court had no jurisdiction in this state to charge the trustee. It appears that neither the plaintiff nor the defendant was a resident of this state but both were residents of Frederickton in the Province of New Brunswick and Dominion of Canada and that the personal services rendered by the principal defendant to the trustee were not rendered in the State of Maine but

in the Province of New Brunswick. It further appears that the Canadian Pacific Railway Company, the alleged trustee, is a foreign corporation, having its principal office and place of business in Montreal where its treasury is located from which its debts are paid, although it operates a line of railway in this state and has stations in connection with its railway business in this state, among which is one at Houlton in the county of Aroostook. Service was made on the trustee by leaving the summons with the station agent of the company at Houlton, but no service was ever made upon the principal defendant, although service upon him was ordered by the court on the 12th day of the term, and on the 13th day the trustee was charged by the court for $47.25 less its costs. To this ruling of the presiding Justice that the court had jurisdiction in the case and charging the trustee as stated, the trustee filed exceptions, which were duly allowed and the case comes to this court on these exceptions.

It is the opinion of the court that the exceptions are not regularly and properly before this court and must be dismissed from this jurisdiction. No service of the writ had been made upon the principal defendant and he had no opportunity to be heard upon the question of the jurisdiction of the court or the liability of the trustee. Without such notice and such opportunity to be heard, he could not be concluded by any decision adverse to him which might be made respecting either of these questions. The hearing at nisi prius was therefore premature and the exceptions prematurely brought to this court. The exceptions must accordingly be dismissed and the case remanded for further proceedings after service of the writ upon the principal defendant in accordance with the order of court.

Exceptions dismissed.

UNION WATER POWER COMPANY *vs.* INHABITANTS OF LEWISTON.

Androscoggin. Opinion September 17, 1906.

Water Contract. Grant of Water Rights. Construction of Such Grants. Disproportionateness of Consideration. Conflicting Intentions. Habendum Clause, Effect of. Words and Phrases. Actions of Tort, Not Obligatory to Add Interest to Damages. Evidence. Private and Special Laws, 1875, c. 107.

1. The owner of a dam lawfully maintained across a river to raise a head of water for generating power has the exclusive right to the use of such head for that purpose, though not for other purposes.
2. The right of any other person to draw water from a lawful dam for power purposes is derived solely from grant, and is defined and limited by the terms of the grant.
3. In construing written instruments of grant it should be assumed, unless the language used clearly indicates the contrary, that the purpose of the parties in reducing the terms to writing was to avoid future litigation by leaving as little as possible indeterminate. So far as the language is susceptible of such meaning it should be so construed.
4. The rule that when the language of a grant is susceptible of more than one meaning, that meaning should be adopted which is most favorable to the grantee, has less force, even if applicable, where the instrument of grant is in the form of an indenture signed by both parties and follows the language of a prior written contract agreed to by them. In such case the language of the grant is selected by the grantee as well as by the grantor.
5. While disproportionateness of consideration may be reason for reforming or cancelling an instrument of grant, it has little, if any, effect upon the meaning of the words of the grant.
6. When one intention appears in one clause in an instrument, and a different, conflicting intention appears in another clause in the same instrument, that intention should be given effect which appears in the principal or more important clause.
7. While the habendum clause in an instrument of grant may sometimes enlarge the estate in the thing granted, it cannot enlarge the thing itself.
8. A particular word, phrase, or term may express a meaning different from its common meaning when used in instruments concerning a subject mat ter in relation to which such different meaning is generally understood and accepted.
9. In actions of tort, it is not obligatory upon the court or jury in assessing damages to add interest from the time of the injury.

10. The Franklin Company, the then owner of a dam lawfully maintained across the Androscoggin River at Lewiston for raising a head of water for generating power, granted by an instrument of indenture to the City of Lewiston the right to draw from its dam "Water to the extent of 600 horse power for the purpose of pumping" &c., (the head of water being fixed at not less than 25 feet nor more than 30 feet.) After full consideration of the subject matter of the grant, the situation, the history and character of the negotiations, and all the language used by the parties in the instrument finally signed by them as defining their rights and obligations thereunder, *Held:*

a. The grant is not of water power, but only of water for power, and the city is entitled, not to a certain quantity of power, but only to draw a certain fixed quantity of water from which to extract as much power as it may by its own agents and appliances.

b. From the evidence and the admissions of the plaintiff it appears that the phrase "to the extent of 600 horse power" means in its connection, efficient, practical horse power upon a well understood and recognized basis of seventy-five per cent of efficiency, and hence the city is entitled to draw for pumping purposes water to the extent of 800 nominal or theoretical horse power and no more.

c. It appears from the evidence that the city has been drawing water in excess of its right under the grant, and that the value of such excess drawn for six years next before the date of the writ is $3468.55.

d. As the city seems to have drawn the excess under a claim of right made in good faith no interest should be allowed before the date of the writ.

On report. Judgment for plaintiff.

Action on the case against the defendant city to recover damages for diverting and drawing more water from the plaintiff company's dam for power purposes than the defendant city is entitled to draw for such purposes.

The declaration in the plaintiff's writ is as follows:

"In a plea of the case, for that the plaintiff, on the fifth day of November, 1878, was and ever since, down to the present time, has been and now is the owner of certain stone dams across the Androscoggin River, at the head of the falls on said river between Lewiston and Auburn and of the land on both sides of said river where said dams are located and along both sides of said river above said dams, and also of the right to hold and store, by means of said dams and the flashboards thereon, the waters flowing in said river, to the height to which the same can be held, retained and stored by means of said dams and flashboards for the purpose of creating and maintaining a

mill pond above said dams; and also of a certain mill pond and maintaining a mill pond above said dams; and of certain lands with the buildings, gatehouses, gates and other structures therein at the outlet of said mill pond, maintained and used for the purpose of controlling and letting out the waters from said mill pond and river; and also of certain canals in said Lewiston, by means of which the waters from said river and mill pond are supplied by the plaintiff through said gates and canals, to mills and factories in said Lewiston, located on said canals, for use for power purposes.

"And the plaintiff avers that by virtue of a certain lease or conveyance between the Franklin Company and said defendant, duly made and executed between said Franklin Company and said defendant, dated the fifth day of November, 1877, said Franklin Company did thereby and therein demise, let and lease unto said defendant as appurtenant to a lot of land owned by said defendant and known as the pumping station lot, the right, privilege and easement of drawing from said Androscoggin River and the mill pond above said dam in said Lewiston, water to the extent of 600 H. P. for the uses and purposes specified and defined in said lease or conveyance.

"And the plaintiff further avers that it now and during all the time aforesaid has owned, exercised and used the right to hold, store, manage and control, by means of said dams, flashboards and gates, the waters of said Androscoggin River, flowing into said mill pond and to draw off the same from time to time to supply the mills and factories in said Lewiston upon said canals with power to run and operate their machinery and to sell and dispose of the water so held and stored by it for power purposes and for which it receives compensation from said mills and other persons to whom it sells and disposes of said water for power purposes, and being so seized of said premises and appurtenances, water rights, water power and privileges, the defendant, knowingly and with intent to wrong and injure the plaintiff and to deprive it of the use and benefit of said premises and appurtenances, water rights, water power and privileges and the sale and use of the waters of said river as above set forth, and without any authority or right so to do, at said Lewiston, on the first day of December, 1893, and on divers other days and times between the

time aforesaid and the day of suing out this writ, by means of a certain covered canal leading from a point on the banks of the mill pond aforesaid, above dam No. 4, in said Lewiston and across the plaintiff's land to the pumping station lot, so called, belonging to the said defendant, did draw and divert during all the time aforesaid and still does draw and divert great quantities of water from said river and mill pond aforesaid, in excess of the 600 H. P. leased and conveyed under said lease or conveyance of November 5, 1877, and by means of gates and other structures belonging to said defendant and situated wholly upon said pumping station lot, and controlled and operated by the servants and agents of said defendant, does discharge the water so unlawfully drawn and diverted by it as aforesaid, into the Androscoggin River below the plaintiff's dams, so that all use, benefit and enjoyment of the water so drawn, diverted and discharged is lost to the plaintiff and its supply of water in said Androscoggin River and said mill pond is depleted and greatly diminished thereby.

"And the plaintiff avers that said defendant has no lawful right to draw and divert the water as aforesaid from said river and from said mill pond of the plaintiff in excess of 600 H. P. in the manner above set forth and described, and that by reason of such unlawful drawing and diversion of said water as aforesaid, the plaintiff is deprived of the natural flow of the same and of the use, enjoyment and benefit of the same in supplying the mills and factories of the income and profit which it is of right entitled to receive and have from the use and sale thereof — to the damage of the said plaintiff (as it says), the sum of ten thousand dollars."

Plea, the general issue, with the following brief statement:

"And for a brief statement of special matter of defense to be used under the general issue above pleaded, the said defendant further says:

"(1) That the defendant had license and authority to do all acts in the using of water set out in the plaintiff's writ.

"(2) That whatever water was used in conformity with authority granted by the plaintiff's predecessor in title and right, the Franklin Company and by mutual agreement between the parties, and by lease and other writings between the parties.

"(3) That whatever water was used was for the purpose of carrying out the agreement between the parties whereby the sum of $200,000 was paid for such use, and the same was in conformity with the spirit and intent of such agreement, or lease, or both, and other deeds or writings, and the votes of the City and the City Council, and Water Board.

"(4) Defendant will rely upon the statute of limitations to any claim the plaintiff may have set out in its writ and declaration."

Tried at the April term, 1905, of the Supreme Judicial Court, Androscoggin County. After the evidence had been taken out, it was agreed to report the case to the Law Court with the stipulation that "upon so much of the foregoing evidence as is legally admissible and competent" the said "Law Court to render such judgment as the rights of the parties require."

The case appears in the opinion.

White & Carter, for plaintiff.

Foster & Foster and George S. McCarty, for defendant city.

SITTING: WISWELL, C. J., EMERY, WHITEHOUSE, SAVAGE, POWERS, SPEAR, JJ., WISWELL, C. J., concurring in the result.

EMERY, J. This action is for drawing more water from the plaintiff company's dam for power purposes than it concedes the defendant city is entitled to draw for those purposes. We have no occasion to enter upon any inquiry as to either party's legal rights to the water apart from the terms of a grant by written indenture made to the city by the plaintiff's predecessor in title, since for reasons hereinafter stated the amount of water the city is entitled to draw for power is fixed and limited by the terms of that indenture. The problem, therefore, is to ascertain what amount of water is named or specified in that indenture for the city to draw for power purposes.

It is sometimes said that the problem in such cases is to ascertain the intention of the parties, or what the parties meant by the language named. This is hardly accurate, for sometimes, as was not improbable in this case, when the parties have agreed upon the language of

their contract they may have each a different understanding of the meaning of that language. The real problem is to ascertain what meaning the language itself gives out, what intention or purpose is expressed by the words and phrases used. It is that meaning by which the parties are bound, even though one or the other honestly believed the language to have a different meaning.

Words and phrases, spoken or written, usually have a common, uniform meaning understood by speaker and hearer, or writer and reader, alike. It is this consensus of understanding that makes social and business intercourse possible. When, therefore, the words and phrases used by the parties are known, they are usually to have effect according to this common meaning, whatever either party may have supposed they meant. But while this is generally true, it is not universally true. The same word or phrase may have different meanings in different instruments and in different contexts in the same instrument. It may have different meanings as applied to different subject matters and also in different situations of the same subject matter. So its common meaning may be overborne by other words or phrases in the same instrument. Hence it is not enough to read only the specific words or phrases in which the grant in this case was made. The then situation and prior rights of the parties, the nature and situation of the subject matter, the object or purpose of the parties in making the contract, or in putting its terms in writing, are to be learned, and the whole contract or instrument is to be studied, to ascertain how far the common meaning of the particular words or phrases is modified by surrounding circumstances and by other words and phrases in the same instrument. All these have been done in this case. But, after all, the problem still is to ascertain the real meaning of the words used, the purpose or intention expressed by those words, for they must be presumed to express what the parties had in mind.

In this case the situation and circumstances are as follows: As early as 1875 the Franklin Company (the predecessor in title of the present plaintiff, the Union Water Power Company) owned and lawfully maintained a dam across the Androscoggin River at Lewiston Falls to raise and store a head of water for generating power. While

the company did not own the water thus stored and even was obliged to submit to its use for some purposes by others and the public and was obliged ultimately to let it flow to riparian owners below, the company did own exclusively the use of the water for generating power at that place except so far as granted to others. No other party could lawfully divert a gallon of that water for that purpose without the consent of the company. The water for such use could be granted or leased in whole, or in part, or divided and distributed in such manner and upon such terms and conditions as the company saw fit except so far as limited by prior grants. *Butman* v. *Hussey*, 12 Maine, 407; *Matteson* v. *Wilbur*, 11 R. I. 546; *Green Bay Co.* v. *Kaukauna Co.*, 112 Wis. 323. (87 N. W. 964.)

In 1875, by chap. 107 of the Special Laws of that year, the City of Lewiston was authorized to establish and operate a system of municipal water works to supply itself and its citizens with water for domestic and other purposes, and to take such water from the Androscoggin River. The difference in level was so great that it was to the evident advantage of the city to take this water from some part of the river above the dam instead of below it. Negotiations were soon afterward begun between the company and the city as to the terms and conditions on which the company would consent to the city's taking water from above the dam for distribution for the purposes named in the statute cited, and also other water for propelling the necessary pumps and other machinery of the water works plant to be established by the city under the statute. The company made certain tentative propositions. Amendments were proposed by the committee on the part of the city which were accepted. Later, in August, 1877, a formal written instrument was executed by the officers of the company and those of the city as expressing the terms agreed upon by the two parties. This instrument covered the quantity of water to be taken from above the dam for distribution under the statute, the quantity of water to be taken for propelling the city's pumps and machinery, and the terms and conditions under which each portion of water was to be taken. It also provided that the company should convey to the city a small lot of land near and just below its dam upon which the city could (and afterwards did)

locate and construct the necessary canals, structures, water wheels and machinery for pumping purposes. Further provision was also made that the company should take certain measures to secure an increased supply of water at its dam for the use of the city and for the benefit of manufacturing establishments in the city. In the amendments proposed by the city to the company's proposals, this latter provision was asked "for the promotion of the general interests of the city." The price to be paid by the city for all this was the lump sum of $200,000 for all time.

Subsequently various large manufacturing corporations, which had prior grants of water from the company's dam and pond, executed to the city a written waiver of all priority of right to use the water over the right to be granted to the city under the above named instrument.

Finally, by deed dated Nov. 5, 1877, the Franklin Company conveyed to the city the lot of land named in the previous contract. It also by indenture of the same date granted to the city in perpetuam the right (as defined in the indenture) to take water from the river above and near its dam and also from Wilson Pond (a tributary above the dam) for distribution as named in the statute; and, as appurtenant to the land conveyed the same day, the right (as defined in the indenture) of drawing other water from above and near the dam for operating its pumping station to be established on that lot. This indenture was signed by the Mayor in behalf of the city, and the indenture and the deed were accepted as those contemplated by the contract of the previous August, and the city paid the $200,000 as stipulated in the contract.

The lot of land conveyed was near but not on the river, the Franklin Company still owning a strip of land between. After the conveyance and indenture were executed the city established its pumping station on this lot, excavated wheel pits and tail race and a canal to lead the water from the dam to the wheels, installed water wheels, pumps, &c., and constructed the necessary flumes, gates, penstocks, racks, &c., for holding, controlling and using the water. When completed, the city began by means of these works to pump water for distribution, at first from the river above the dam but later from

Wilson Pond, and has been doing so ever since. The amount so pumped has been increasing gradually from year to year with the growth of the city and the new and increasing uses of the water.

The title and rights of the Franklin Company in the dam and water power created thereby, not granted to the city or others, have come to the Union Water Power Company, this plaintiff. No complaint is made in this suit that the city has been pumping more water for distribution than it has a lawful right to do. The complaint is only that the city is, and has been for some time, taking more water for power to work its pumps than was granted to it in the indenture of Nov. 5, 1877.

Much was said, in the argument for the city, about the common law and statutory rights of the city to take water from the river and ponds above the dam for distribution under the enabling statute independent of any grant from the Franklin Company, but as no complaint is yet made of the amount of water taken for those purposes, we have, as already stated, no occasion to consider the source or extent of the city's rights to such water. But, for reasons stated in the first part of this opinion, the right of the city to take water from the dam for the propulsion of its pumps or other machinery is derived solely from the grant of Nov. 5, 1877, and is measured and limited by the terms of the indenture by which that grant was made. We have, therefore, to address ourselves only to the question what quantity of water to be taken for power was fixed by the terms of that indenture?

In the indenture, after reciting the previous contract and the conveyance of the lot, the parties used this language as to the amount of water to be pumped for distribution, and as to the amount to be drawn for power for such pumping, viz:—

"Now, therefore, in consideration of the premises and the sum of money hereinafter named, the said Franklin Company hath demised, let and leased, and doth hereby demise, let and lease to said City of Lewiston and its successors, the right to take so much water every twenty-four (24) hours, for domestic, fire, mechanical, manufacturing and other purposes, as six hundred (600) horse-power, at a head of twenty-five (25) feet will pump from the Androscoggin River above

the dam, near the Lincoln Mill, so called, in said Lewiston to a height of two hundred and twenty (220) feet twelve (12) hours in such twenty-four (24;) said City of Lewiston and its successors to have the right to pump said above stipulated quantity of water during any part of or all of the twenty-four (24) hours.

. . . . . .

"And for the same consideration, the said Franklin Company hath demised, let and leased and doth hereby demise, let and lease, to said City of Lewiston and its successors, as appurtenant to the said land conveyed as aforesaid by said Franklin Company to said City of Lewiston, the right, privilege and easement of drawing from said Androscoggin River, above the dam, near the Lincoln Mill, so called, in said Lewiston, water to the extent of six hundred (600) horse power for the purposes of pumping and distributing the water aforesaid from said river; provided, however, that for said six hundred (600) horse-power, the head shall not be less than twenty-five (25) feet, nor exceed thirty (30) feet."

While the term "horse power" designates a definite amount of mechanical force, it may also, when used in connection with a given head of water, designate a definite quantity of water. Given the head and the mechanical power to be produced in terms of "horse power," the equivalent quantity of water can in theory be ascertained by mathematical calculation. In practice, however, allowance must be made for inevitable leakage, friction and other inevitable losses in converting the water into mechanical force. We find from the evidence that some percentage of allowance for the difference between the theoretical or gross, and the practical or net, is understood in all grants of water for power unless the contrary affirmatively appears. It was admitted at the argument that in the grants by this plaintiff and its predecessors at Lewiston Falls the allowance has been understood, and usually expressed, to be upon a basis of 75 per cent efficiency out of the theoretical 100 per cent. We also find that the plaintiff in presenting to the city its claims for excess of water drawn for power has thus understood and interpreted the grant. We think, therefore, that the language used in the grant does not necessarily limit the city to 600 theoretical horse power,

but that, in its place with reference to the subject matter and attendant circumstances, it fairly imports 600 efficient horse power which of course would require more water than would 600 theoretical horse power. Indeed at the argument the plaintiff's counsel frankly conceded this. In this respect the case is somewhat like the familiar rabbit-warren case, *Smith* v. *Wilson*, 3 B. & Ad. 728, where the word "thousand" as there applied to rabbits, was held to mean one hundred dozen.

It being thus conceded and settled that the language of the grant means efficient horse power, we come to the real controversy in the case. The plaintiff contends that the efficient horse power meant, has a fixed ratio to the theoretical horse power, a ratio fixed by custom and common understanding between vendors and vendees of water power at Lewiston Falls, whatever the amount of net power the vendee may from time to time actually extract from the gross power granted. This fixed ratio of efficiency is 75 per cent as above stated. In other words, the plaintiff's contention is that the grant is of such quantity of water only as at a head of 25 feet will produce 600 net horse power, reckoning the efficiency of the power at 75 per cent. This would be the equivalent of 800 theoretical or gross power.

On the other hand, the city does not contend for any other fixed ratio than the above but denies that any ratio is fixed. It contends that the grant is of such quantity of water as, at the head of 25 feet, shall actually produce from time to time 600 horse power on the shafts of its water wheels, with fairly good water wheels and plant in fairly good condition and operated with due care and skill.

Upon the former theory, the quantity of water that may be drawn from the dam for power is fixed and definite since it can be mathematically computed from the given data. It is only the actual power that the city may from time to time extract from that water that is left indefinite, a matter to be determined by the city itself. Upon the latter theory, the quantity of water to be drawn is left indefinite, varying from time to time with the changes in the efficiency of the water wheels, in the condition of the plant and in the skill and care of operation. Upon the one theory the quantity of water

to be drawn is fixed, not to be exceeded or diminished by either party. Upon the other theory the quantity of water to be drawn is, within limits, such as the city may choose to draw,— less with first class wheels and plant and operation, more with inferior wheels, plant and operation. This variation of efficiency according to the evidence may vary from 45 to 80 per cent. Which of these two theories is supported by the language of the indenture of grant is the question.

Recurring now to the language of that clause containing this specific grant, we think that, taken by itself, it means a fixed, definite quantity of water (to be varied only by a change in the head between 25 and 30 feet) and expressed in terms of horse power, instead of cubic inches or gallons, as is not unusual in grants or leases of water for power. The language is, "the right &c. . . . . of drawing from the Androscoggin River &c. . . . . water to the extent of 600 horse power." . . . . Read by itself, this language does not import a grant of power to be delivered by the grantor on the machinery of the grantee, but does import a grant of water to be drawn and converted into power by the grantee with such wheels and appliances and workmen as he may choose to use. The water is to be drawn by the grantee from and at the grantor's dam, not delivered by the grantor on the grantee's premises and machinery.

This literal meaning does not appear to us to be changed by a consideration of the circumstances under which the indenture was drawn, the purpose of the grant and the purpose of putting its terms in writing, so far as they relate to water for power. At that time water power at Lewiston Falls was valuable and steadily increasing in value. The city officials executing and accepting the indenture had required a contract that the Franklin Company should take measures to increase the supply of water not only for distribution through the city, but also for use as power by then present and future mills in Lewiston "for the promotion of the general interests of the city." (Quotation from the amendment proposed by the city officials to the proposition of the Franklin Company.) An increased demand for water for power was evidently anticipated by both parties up to and even beyond the then capacity of the river and dam. The

various mills already using large quantities of water for power under prior grants had been asked to waive their priority of right and had done so by deed of the same date as the indenture. The grant itself was to be in perpetuam.

Under these circumstances we think one great purpose of the parties in framing and executing the formal instruments setting forth the terms of the contract and grant agreed upon, was to make certain for all time the quantity of water to be drawn by the city for power, so that no real question could arise whether the quantity being drawn at a given time was in excess of the quantity granted. Adhering to the literal meaning of the language of the granting clause in the indenture, that purpose is practically accomplished. The amount of water to be drawn is constant. Whether the city is at any time drawing more than that amount can be easily determined with practical accuracy by measurement and calculation. There will be no question left for court or jury. On the other hand under the construction contended for by the city, that purpose is not accomplished. The quantity of water necessary to be drawn from the dam to produce 600 horse power on the shaft can never be constant. It will vary, and sometimes widely, with changes in the character and condition of the conduits, flumes, gates and wheels and with changes in the degree of the skill and care of operation, all of which were to be, and are, under the exclusive control of the city. It is common knowledge that there is often a difference in the efficiency of water power plants under the same head according to the plan and workmanship of their construction, and the ability of management. There is also an appreciable difference in the efficiency of different makes of the water wheels under the same conditions. It also appears from the evidence that the same wheel under the same head will produce more or less power according to the skill and watchfulness of its operator. Further, it is a familiar fact in hydraulics that the efficiency of water wheels diminishes with use from a roughening of the interior surfaces.

It is evident, therefore, that under the city's contention doubtful and troublesome questions may repeatedly arise as to whether the city's water wheels and plant were of the character and in the condi-

tion they should have been, and were being operated with the care, skill and watchfulness they should have been. These are questions for the jury and no one, nor several, verdicts can settle them for the future, since the conditions as to wheels, plant and management may be continually changing, and the verdict of one jury is not binding on another jury. A wide door is thus left open for repeated and indecisive litigation, whereas contracts and grants are put in writing to close the door against litigation.

The city, however, urges several arguments against the proposition that the language of the grant, in its place and with its history, signifies a fixed, definite quantity of water rather than a definite amount of mechanical force on the shaft. It invokes the rule that where the words of a grant are fairly susceptible of two different meanings, the meaning most favorable to the grantee will be presumed to be the real meaning. Even if the language of this grant was susceptible of the meaning contended for by the city, the rule is not applicable, for not only is the grant by an indenture executed by the city as well as by the company, but it is in pursuance and follows the language of the prior contract of August 1877, mutually agreed upon by the parties. The language is that of the city, as much as that of the company.

The city further urges that the large sum paid by the city, $200,000, shows that it was to have at least 600 actual horse power on its shafts; — that the interest even at 4% on $200,000 is much more than the usual rental of water power on Lewiston Falls. This might be a cogent argument for reforming the indenture if water for power was the only consideration for the $200,000, but inadequacy of consideration, if it exists, does not of itself change the meaning of words in a grant. In this case, however, the city bargained for more than water for power. It bargained for water for distribution, for a lot of land, and for expensive work to be done by the company "for the promotion of the general interests of the city." It cannot be known what part of the sum paid was for these other matters. If it be said that the city could take water for distribution without paying for it, the answer is that the city officials of 1877 evidently

thought the company's consent should be obtained and incorporated in the writings.

Attention is also called by the counsel for the city to the description of the grant of water for power "as appurtenant to the said lot conveyed as aforesaid by said Franklin Company to said City of Lewiston." This language simply limits the right of the city to draw water to such as it shall utilize on that lot. It cannot lead the water elsewhere for power purposes.

The principal argument of the city, however, is drawn from the language of the next prior clause, that defining the quantity of water the city might take for distribution under the enabling statute. That quantity is there defined to be "so much water every twenty-four hours . . . . as six hundred (600) horse power at a head of twenty five (25) feet will pump from the Androscoggin River above the dam near the Lincoln Mill so called in Lewiston to a height of two hundred and twenty (220) feet twelve (12) hours in every twenty four (24)." The counsel argues that this language means as much water as six hundred horse power on the shaft will pump, and hence the term "six hundred horse power" must have the same meaning in the clause granting water for power. It is said that the words "will pump" imply practical horse power, net horse power, that actually exerted on the shaft. This may be conceded without affecting the argument for the construction heretofore stated. The issue, it should be remembered, is not between theoretical horse power and practical horse power. It is simply between a fixed, constant ratio of efficiency and an uncertain, varying ratio; between a fixed definite quantity of water, and a comparatively indefinite and changing quantity. The words "will pump" may as well refer to a fixed, agreed ratio of efficiency, as to an uncertain, varying ratio.

But whatever the term "six hundred horse power" taken by itself in this prior clause may seem to mean, it does not follow that it must have the same meaning in the next subsequent clause. The subject matter of the former clause was of trifling account compared with that of the latter. The quantity of water to be taken for distribution was scarcely five per cent of the quantity to be drawn for power. The latter quantity was the great consideration of the

contract. The most care would naturally be taken to fix that quantity. It was important for that to be fixed and definite, as that was the valuable right affecting many prior grantees as well as the Franklin Company, and concerning which litigation was most likely to arise. The former quantity was almost negligible in comparison. If either clause controls the other, the more important controls the less important.

In this connection the city also cites the habendum clause in the indenture. The language is, "To have and to hold said water and water power and the right, privilege and easement to draw and use the same as above described." The argument is that this language means a grant of water power in contra-distinction from a grant of water for power. The answer is that while the habendum may sometimes enlarge the estate in the thing granted, it can never enlarge or extend the thing itself, the subject matter of the grant. *Manning* v. *Smith*, 6 Conn. 289. It is also a familiar rule that anything in the habendum repugnant to the terms of the granting clause, must give way.

We have carefully considered the whole evidence and every argument advanced by either counsel, but we think there is no need to extend the already great length of this opinion in order to state more of them than we have. We believe we have stated enough to show the grounds of our decision. Our conclusion from them all, is that the language of the clause in the indenture of Nov. 5, 1877, granting the right to draw water for power purposes, defines the quantity of water and not the amount of power or mechanical force, and fixes that quantity of water to be that which will produce 600 practical horse power reckoning the practical efficiency to be 75 per cent of the theoretical, or in other words 800 theoretical horse power. Arriving at this conclusion, we find in it no hardship upon the city. It appears from the evidence and books on the subject, that with the best modern water wheels and a well planned and thoroughly built plant, carefully adjusted and operated by capable and careful workmen, it is feasible and not difficult for the city to obtain an efficiency of 75 per cent and even more, and thus obtain in the future a full

six hundred horse power on its wheel shafts without extra payment even under this decision.

That the city has drawn water for power in excess of the amount granted under the above construction of the grant is not questioned. The amount of such excess is not in dispute as the engineers employed by each party to measure the water practically agree as to the amount of water drawn. The preponderance of the evidence is that water for power from the plaintiff's dam at Lewiston was fairly worth $12.50 per horse power. Upon this basis the computations of the engineers show the value of the excess water diverted for the six years prior to the date of the writ to be $3468.55. The plaintiff urges that interest on the value of each year's excess should be added. In actions of tort, however, as this is, interest is not recoverable as of right but only in the discretion of the court or jury. *Lincoln* v. *Claflin*, 7 Wall. 132. *Moulton* v. *Scruton*, 39 Maine, 287. In this case we think it enough to add interest from the date of the writ. The city seems to have acted in good faith.

Judgment for the plaintiff for $3468.55 and interest from the date of the writ.

LAMKIN & FOSTER *vs.* PIERRE LeDOUX.

York. Opinion September 17, 1906.

Contracts. Sales. Infancy. Ratification. Repudiation of Contract by Infant. No Action Can be Maintained, When. R. S., c. 113, § 2.

1. When merchandise is sold and delivered unconditionally upon credit without any stipulation that the title shall remain in the vendor until payment, the fact that the vendee is a minor under the age of twenty-one years does not prevent the property passing to and vesting in the vendee.
2. The fact that such vendee after coming of age neglects or refuses to pay for the merchandise does not revest the property in the vendor.
3. The fact that such vendee after coming of age sells the merchandise does not make him liable to an action by the vendor either in tort or for money had and received.
4. At common law no action could be maintained upon a promise made by one when a minor, even to pay for merchandise sold and delivered to him upon credit, unless he ratified the promise after coming of age. By statute R. S., c. 113, § 2, such ratification (except as to necessaries) must be in writing or no action can be maintained on such promise.
5. The signing a bond to release the merchandise from attachment at the suit of the vendor is not a ratification of a promise to pay made while a minor.
6. In this case the action, being on account annexed for merchandise sold and delivered to the defendant when a minor, is an action on the original promise made during his minority, and the merchandise not being necessaries and the promise to pay for the same not having been ratified in writing, the action cannot be maintained.

On report. Judgment for defendant.

Assumpsit on account annexed to recover the sum of $1097.92 for merchandise sold and delivered to the defendant. Plea, the general issue with brief statement as follows:

"And for a brief statement of special matter of defense to be used under the general issue pleaded, the said defendant further says: that at the several times of the making of the said several promises in the plaintiff's declaration mentioned, he the said defendant was an infant within the age of twenty-one years, to wit, of the age of nineteen years, and no more and that the said several promises have not been

ratified by himself nor by any person lawfully authorized, after he arrived at the age of twenty-one years."

Tried at the May term, 1905, of the Supreme Judicial Court, York County. At the conclusion of the plaintiffs' evidence it was agreed to report the cause to the Law Court "for decision upon so much of the evidence as is legally admissible" and the Law Court "to enter such judgment as the legal rights of the parties require," and the cause was so reported.

The case appears in the opinion.

Charles W. Ross and Benjamin F. Hamilton, for plaintiffs.

Charles T. Read, for defendant.

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

EMERY, J. The plaintiffs sold and delivered to the defendant merchandise (boots and shoes) to the amount of $1,000. The sale and delivery were upon credit, but there was no stipulation that the title to the merchandise should remain in the plaintiffs until payment, and no fraud is shown; hence the title passed to the defendant with the delivery of the merchandise to him. At the time of the sale and delivery the defendant was a minor under the age of twenty-one years, though he was engaged in business as a retail trader and purchased this merchandise to sell again in his business. He sold part of the merchandise before he came of age and continued selling from it after coming of age and had some of it in his store at the time of the attachment in this action begun after he was of age. He has never ratified his contract in writing. The action is upon one count only, that upon account annexed for merchandise sold and delivered. The defendant pleaded his infancy in bar.

The plaintiffs concede that as to the merchandise sold by the defendant before he came of age his infancy is a bar, since as to that there was no ratification in writing after coming of age as required by the statute, R. S., ch. 113, sec. 2. They contend, however, that as to the merchandise sold or retained by him after attaining his majority, he is liable as upon an implied promise then made by him

to pay for them. They further contend, as an alternative proposition, that, by refusing to pay for the goods after coming of age and by pleading his former infancy in support of that refusal, he repudiated the contract made with him while a minor, and that such repudiation related back to the time of his coming of age, whereby the property in the merchandise then remaining in his possession reverted to the plaintiffs, and the defendant became liable for disposing of or retaining their property. They argue that the defendant could not repudiate the contract without restoring the consideration, and hence the property in the remaining merchandise must be considered as having been restored by the repudiation. They contend that the case is thus taken out of the purview of the statute.

If, during his minority, the defendant had paid for the merchandise and was now seeking to recover back the money so paid on the ground of his infancy when the contract was made, he would be repudiating the contract and would be obliged to restore the consideration (the merchandise) before such repudiation could be allowed. The statute would not avail him. *Hilton* v. *Shepherd*, 92 Maine, 160. This case, however, is entirely different. The contract of sale was completely executed by the unconditional delivery of the merchandise. The defendant's neglect or even refusal to pay the agreed price does not rescind that transaction any more than if he had given his promissory note for the price and failed to pay the note when due. The merchandise became the defendant's property upon the unconditional sale and delivery to him, and it all remained his property though he failed or refused to pay for it.

After all is said that can be said in support of the plaintiffs' contentions, the fact remains that this action is based solely upon the defendant's promise to pay made while he was an infant. The action is to enforce that promise and nothing else. There is nothing else to be enforced. The sale was made, the goods were delivered, the property in them passed to the defendant. The only thing left to be done or enforced was the defendant's contemporaneous promise to pay for them.

Unfortunately for the plaintiffs that promise or contract to pay was made by the defendant while a minor. Even at common law a

minor's contract was not enforceable unless ratified by him after coming of age. Our statute goes further and makes such contract unenforceable by action unless it is ratified in writing by the maker after coming of age. The defendant's conduct after coming of age may have shown a sufficient ratification at common law, but there was no ratification in writing, and hence the statute bars the action. If there be any doubt that such is the effect of the statute upon this action, we think it removable by a little study of the language of the statute which is as follows: "No action shall be maintained on any contract made by a minor unless he, or some person lawfully authorized, ratified it in writing after he arrived at the age of twenty-one years, except for necessaries, or real estate of which he has received the title and retains the benefit." R. S., ch. 113, sec. 2. The prohibition is absolute. The statute does not impose any conditions to be complied with before the defendant can have the shelter of the statute. It does not require him, before or afterward, to return the consideration as a condition. In *Bird* v. *Swain*, 79 Maine, 529, the defendant retained the consideration while successfully interposing the statute.

The only two exceptions named in the statute also show its application to this case. The statute provides that it shall not apply to a contract made by a minor (1) for necessaries, or (2) for "real estate of which he has received the title and retains the benefit." It seems a necessary inference that the statute does apply to a contract made for other kinds of property (not necessaries nor real estate) "of which he has received the title and retains the benefit." *Exceptio probat regulam.* The rule is stated and the exceptions are stated. The contract in this case is not within the exceptions. It is therefore within the rule of the statute.

One other argument of the plaintiffs remains to be noticed. Upon the attachment of his property in this action the defendant signed a bond in the usual form for a release of the attachment. We find nothing in that instrument indicating a ratification of the original contract upon which the action is based.

The plaintiffs finally urge the hardships of this construction of the statute upon parties who in good faith have sold valuable

merchandise to minors, and also its encouragement of dishonesty and worse upon the part of minors purchasing merchandise. This might be a valid argument in a doubtful case, but it cannot avail against language so plain and unqualified as that in this statute. The consequences feared can be easily avoided by refusing credit to minors, the fact of minority being easily ascertainable.

In view of many judicial opinions cited contra to this, including some in this state, it should be noted in conclusion that in none of them was the effect of this or a similar statute involved, and hence they are not in point. No decision of this court since the enactment of this statute is at variance with our decision here.

Judgment for the defendant.

In Equity.

AETNA LIFE INSURANCE COMPANY *vs.* PATRICK F. TREMBLAY AND ARTHEMISE D. TREMBLAY.

Androscoggin. Opinion September 17, 1906.

Actions at Law. Equitable Defenses Thereto. Same Should be Interposed. Effect if not Interposed, Stated. Subrogation. R. S., c. 84, § 17.

1. A judgment for the plaintiff in an action at law concludes the defendant not only as to defenses actually made, but also as to defenses which could have been made and were not.
2. The court cannot afterwards afford relief in equity against a judgment at law because of matter which was a defense to the action and could have been interposed therein.
3. By R. S., c. 84, sec. 17, equitable as well as strict legal defenses may be pleaded in an action at law. Hence if equitable defenses are not so pleaded they cannot afterward be invoked as cause for relief in equity against the judgment.
4. A life insurance company by paying the full amount of the policy of life insurance to one holding an assignment of the policy as security only, is

thereby subrogated to all the rights of such assignee upon the insurance money as against any claim therefor by a subsequent assignee of the policy; and is entitled to have the amount due the first assignee under his assignment deducted from the claim of the second assignee. Such right by subrogation exists without any formal assignment of his claims by the first assignee to the insurance company.

5. Such right by subrogation is at least equitable matter of defense to an action at law upon the policy by the second assignee and under the statute, (if not at common law) it can and hence should be interposed in such action. It is not ground for subsequent relief in equity against the judgment.

In equity. On report. Bill dismissed.

Bill in equity. The facts upon which this bill was founded are fully stated in the opinion. After the hearing in the court of the first instance, the cause was "reported to the Law Court upon bill, answer, demurrers and proof, the Law Court to render such judgment, upon so much of the evidence as is legally admissible and competent, as the rights of the parties require."

The attention of the profession is especially called to the rules laid down in the first three paragraphs of the head notes, and also in the opinion, in relation to the necessity of pleading equitable defenses in actions at law. The point in this case is that the plaintiff in a former action at law against it did not interpose an alleged equitable defense which it had, and not having interposed such defense, it cannot now maintain its bill in equity, founded on the same facts as in the action at law, but is concluded by the judgment in the action at law.

The case fully appears in the opinion.

Ralph W. Crockett, for plaintiff.

Oakes, Pulsifer & Ludden, for defendants.

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

EMERY, J. The material facts are these: The plaintiff company, through its Canadian branch, issued a policy of life insurance for $2,000 to Jean O. Tremblay, then of Quebec Province, payable to his wife Arthemise or, in the event of her prior death, to his own

representatives. In 1891 Tremblay, with his wife's consent, assigned the policy to Mr. Cloutier of Quebec as security for advances made and to be made by Cloutier for Tremblay. The policy was delivered to Cloutier with the assignment and retained by him till after Tremblay's death at Quebec January 24, 1901, during which time Cloutier, at the request of Tremblay and wife, paid the annual premiums on the policy. A few days previous to his death Tremblay and his wife had assigned all their interest in the policy to their son, Patrick F. Tremblay of Lewiston, Maine, (one of the defendants in this suit) subject to Cloutier's rights under his prior assignment. Upon the death of the insured, Mr. Cloutier and Mr. Patrick F. Tremblay each claimed the whole insurance money, Patrick insisting that little, if anything, was due Cloutier under the assignment to him. The company thereupon, on April 9, 1901, paid into the Provincial Treasury of Quebec, under a law of that Province, the amount due on the policy, $1959.49. On the 22nd of the same April Cloutier began proceedings in the Superior Court of Quebec to establish his claim to the insurance money thus deposited, and, on June 8 following, obtained a judgment for the whole amount. The Provincial Treasurer thereupon paid over the entire sum to Cloutier June 25th, 1901.

Patrick F. Tremblay, however, on May 22, 1901, began in the Supreme Judicial Court of this state for Androscoggin County an action at law against the insurance company to recover the amount of the insurance policy under the assignment to him. This action came on for trial at the January term, 1902, when it was reported to the Law Court upon the evidence without any stipulation as to pleadings, that court to render such judgment as the rights of the parties required. The Law Court, in June, 1903, rendered judgment against the company for the full amount of the policy, $1959.49, and interest (see 97 Maine, 547.) The company thereupon procured from Cloutier a formal assignment of his claim upon the insurance money, and then brought this bill in equity against Patrick F. Tremblay, the plaintiff in that action at law, for the ascertainment of the amount due Cloutier out of the fund and for the deduction of that amount from the judgment.

Patrick F. Tremblay, the plaintiff in that action and the defendant in this suit, contends that all the facts necessary to sustain this bill were available to the company in defense of the action at law, and hence that the rights of the parties on those facts were adjudicated in that action and cannot be litigated again in this suit.

If the material facts now alleged were matters of defense to the action at law and could have been interposed in defense in that action, this bill cannot be sustained. It is common learning that the judgment in an action at law is conclusive as to defenses actually made and also as to defenses which might have been made but were not. In *Milliken* v. *Dockray*, 80 Maine, 82, it was expressly decided that "a defense which may be interposed in an action at law cannot be invoked as a cause for relief in equity." The only question, therefore, upon this contention of the plaintiff is whether the material facts now brought forward show any right in the insurance company against Patrick F. Tremblay or the insurance money which was not a matter of defense to his action or could not have been interposed in defense to that action.

The evidence does not disclose any new right in the company arising since the judgment or even since the trial of the action at law. True, the formal assignment by Mr. Cloutier to the company of all his claim upon the insurance money was made after that judgment, but that assignment did not create any new right in the company. The right of the company to enforce for its own benefit the claim of Cloutier upon the insurance money (if valid) came into being as early as June 25, 1901, when the treasurer of Quebec paid the insurance money to Cloutier in pursuance of the order of the Quebec court, and long before the trial of the action at law in this state. The company then became subrogated to the right of Cloutier to any part of the insurance money, and could then interpose that right against any claim or action by Patrick F. Tremblay or any one else for that money. The latter formal assignment from Cloutier added nothing to that right of the company.

It should be borne in mind here that this equity suit is to have the claim of Cloutier upon the insurance money adjudicated and the amount thus adjudicated deducted from the judgment against

the company in the action at law. The question, therefore, is narrowed to this: Was the claim of the company thus acquired from Cloutier by subrogation a matter of defense to the action at law, and could it have been interposed in defense in that action?

The Cloutier claim was clearly a matter of defense. It was not a separate, independent claim against Patrick F. Tremblay which the company could file in set off in Tremblay's action, or bring a separate action upon it as it might elect. The claim was only upon the insurance money, and, as against Tremblay, could only be used to reduce his claim upon that money. It could not be enforced against Tremblay personally.

It is also clear, we think, that the Cloutier claim could have been effectually interposed in defense of the action at law. Whatever might have been the difficulty, if any, at common law, we see none under our statute. By R. S., ch. 84, sec. 17, "any defendant may plead in defense to any action at law in the Supreme Judicial Court any matter which would be ground of relief in equity and shall receive such relief as he would be entitled to receive in equity against the claims of the plaintiff." This language is clearly broad enough to include the Cloutier claim. Nor was there any difficulty in pleading the matter, for under the same statute it could have been "pleaded in the form of a brief statement under the general issue." See *Miller* v. *Packing Co.*, 88 Maine, 605. Further, the action at law was reported upon the evidence without any limitation of the court to the pleadings, and hence the Law Court could have given effect to any matter of defense disclosed by the evidence even if not pleaded.

It is suggested that the desired relief was not the company's right in the action at law, but was rather a matter of grace; that to have obtained the relief would have required a transformation of the action at law into a suit in equity as provided by statute, and that the court had the power to refuse to order such transformation. No such transformation was necessary. There was no difficulty in affording the desired relief in the action at law. The question of the validity and amount of the Cloutier claim could have been determined in that action, with or without the assistance of an auditor or jury, as fully

and accurately as in an equity suit. It was the right of the company to have that question determined in that action.

The company urges that the relief now asked for is solely of an equitable nature and has long been recognized as peculiarly for equity courts to grant through equity suits, and it invokes the doctrine that the power and duty of the court to afford relief by decrees in equity are not affected by legislation enabling the court to afford such relief in actions at law. True, the statute does not in the least abridge or limit the equity powers of the court, but it does provide how and when those powers may be exercised. It commands the court to afford equitable relief to a defendant when asked for in an action at law as a defense to that action, if, as in this case the relief can be thus afforded. The statute makes the grounds for such relief available as matters of right in defense in an action at law. It thus became the duty of the defendant in such action to present in that action all the defenses he can and desires to make, whether legal or equitable in their nature. It follows that a defendant cannot now withhold an available defense, even though equitable in its nature, in the trial of an action at law, and after judgment against him bring forward that defense in a new suit, and require the court to give it effect by amending or modifying its former judgment. We think one purpose of the statute was not only to remove the necessity of, but to prevent, such procedure.

If, as is suggested, the Cloutier claim was before the court in the action at law but was not considered, or, if considered, was erroneously disallowed, or if for any reason justice was not done in the action at law through accident, mistake or misfortune, and a further hearing would be just and equitable, the company's remedy is by a petition for a review of that action, not by a new original suit alleging matters that were or could have been interposed in defense of the first suit.

Bill dismissed with one bill of costs for defendants.

GEORGE E. SHEPARD *vs.* LEWISTON, BRUNSWICK AND BATH STREET RAILWAY.

Androscoggin. Opinion September 21, 1906.

Negligence. Contributory Negligence. Jurors. "Free Railroad Tickets." Statute, R. S., c. 84, § 104, Permissive Only. R. S., c. 84, § 104.

In the case at bar, which was an action to recover damages for personal injuries, the verdict was for the defendant. *Held:* that the jury was authorized by the evidence to find that the plaintiff was guilty of contributory negligence and that the verdict cannot be set aside because the jury so found.

After the trial it appeared that at the time of the trial, the foreman of the jury, was in possession of a "blue book" of free tickets for carriage on the defendant's railroad. The plaintiff claimed that this fact was not known to him at the time of the trial but that it was known to the defendant's treasurer who was present during the trial. *Held:* that the mere fact of the possession of the "blue book" by a juror under the circumstances as shown by the evidence and stated in the opinion, is not fatal to the verdict without proof aliunde that the plaintiff was prejudiced thereby, and that there is no such evidence in this case.

Revised Statutes, chapter 84, section 104, provides as follows: "If either party, in a cause in which a verdict is returned, during the same term of court, before or after the trial, gives to any of the jurors who try the cause, any treat or gratuity, or purposely introduce among the papers delivered to the jury when they retire with the cause, any papers which have any connection with it, but were not offered in evidence, the court, on motion of the adverse party, may set aside the verdict and order a new trial." *Held:* that this statute is mainly in affirmance of the common law powers of the court and is permissive only. It is expressive of the strong purpose of the law making body that litigants shall have jurors free from all improper influences. But were it mandatory, it is difficult to see how it could apply to this case. It has reference to the misconduct of parties during the term of court, and not to acts, innocent in themselves, which occurred months before the term.

On motions by plaintiff. Overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant. Plea, the general issue. Tried at the January term,

1906, of the Supreme Judicial Court, Androscoggin County. Verdict for defendant. The plaintiff then filed a general motion for a new trial, and also a special motion for a new trial, alleging in this last named motion in support thereof as follows:

"First: C. I. Barker the foreman of the jury which sat upon said case and rendered said verdict while sitting upon said case and deliberating thereon possessed and had a "blue book" so called in which were free tickets for passages on the defendant's electric railroad which book had been given to said foreman by said defendant corporation which fact was without fault or collusion on the part of the plaintiff and the information of the foreman's possession of said blue book has come to the knowledge of the plaintiff and his counsel since the close of the trial and that neither the plaintiff nor his counsel had any suspicion or knowledge of said fact prior to or during the progress of the trial.

"Second: The treasurer of said defendant corporation by whom said blue book was issued was present when the jurors in said case were about to enter upon the discharge of their duties and the presiding Justice stated that any stockholder in the defendant corporation would be disqualified to sit, thereby emphasing the court's desire to have an absolutely impartial jury and yet said treasurer did not disclose to the court that the juror Barker possessed said book."

After the filing of the special motion, testimony relating to the matters alleged in the motion was received by the court both from the plaintiff and the defendant.

The case appears in the opinion.

Tascus Atwood, for plaintiff.

Newell & Skelton, for defendant.

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

SAVAGE, J. Case for damages sustained on account of the alleged negligence of the defendant. The plaintiff, on the day in question, was engaged in moving a threshing machine loaded on wheels from a dooryard into the road. In so doing he crossed the defendant's track by the road side. He was on foot, driving the team, and was

by the side of the horses or load. On the other side of the load, at the same time, one of the defendant's electric cars was approaching. And it came into collision with the rear end of the plaintiff's load at the point of crossing, breaking down the rear wheels and causing the load to fall upon the plaintiff, so that he received the injuries complained of. The verdict was for the defendant, and the only question presented by the general motion is whether the verdict is shown to be so clearly wrong as to require the interference of the court.

The questions whether the defendant was negligent and whether the plaintiff was guilty of contributory negligence were both sharply contested. We do not, however, find it necessary to consider the first question, because we think the jury were authorized by the evidence to determine the issue of contributory negligence adversely to the plaintiff, and that is fatal to his motion.

The plaintiff claims that at a point in the dooryard about ninety feet from the railroad, the defendant's track in the direction from which the car was approaching, or at least a car upon the track, could be seen for about fourteen hundred feet. And he testified that at that point, while driving out of the yard, he looked at the track in that direction, as far as he could see, and that no car was in sight. He also testified that he did not look afterwards, and that he did not hear the sound of the approaching car, and was not aware of its whereabouts until the instant of collision. His contention is that having looked where he says he did, and no car being in sight or nearer than fourteen hundred feet, it was not negligence for him to proceed across the track, ninety or one hundred feet, at the rate of about two miles an hour, without looking again.

It does not seem to be disputed that from a point about thirty-four feet from the track and until the track was reached, an approaching car might all the time have been seen by the plaintiff for a distance of about fourteen hundred feet along the track, and that he could have seen this car in ample season to have stopped in safety, if he had then looked. But he did not look. The defendant claims that the point of view where the plaintiff says he looked was so obstructed by a hedge and trees, that he could not have seen the track

as he says he did, or a car, if one had been there. And from this the defendant argues that the jury were warranted in finding that the plaintiff did not look at all, at any place where he could see, and hence that he was clearly guilty of negligence. *Butler* v. *Railway*, 99 Maine, 149. Upon the question as to what the plaintiff could see, and how far, from the point where he says he looked, much evidence, pro and con, was elicited. And, besides, the jury were permitted to take a view. What they saw we have no means of knowing. From the evidence in the case we think that the jury were authorized to find, as claimed by the defendant, that the plaintiff could not see as he says he did, and so was negligent in not looking later when he could see in season to protect himself. Or, if as claimed by the plaintiff, he could see, they were authorized to conclude that if he had looked he must have seen the approaching car, and that he either did not look, or looked and saw the car approaching, and yet went on to the crossing without looking again, in either of which contingencies the jury might well find him negligent. The jury heard much and conflicting evidence as to the speed at which the car was running, and if from that evidence they concluded that the car was within fourteen hundred feet of the crossing when the plaintiff says he looked, and clearly within his vision, if he could see as he says he could, we find nothing in the case which requires their conclusion to be overruled. And if the jury found that he looked and saw the car approaching, or that he could not look or did not look, their verdict for the defendant cannot be set aside under the general motion.

The plaintiff has also filed a motion for a new trial on the ground that at the time of the trial, Mr. Barker, the foreman of the jury, was in possession of a "blue book" of free tickets for carriage on the defendant's railroad, alleging that this fact was unknown to the plaintiff at the trial, but was known to the defendant's treasurer, who was present during the trial.

The facts appear to be these: Mr. Barker was one of the trustees of the Maine State Agricultural Society in Lewiston, to the grounds of which one of the defendant's branches is extended. The defendant's directors voted to issue "blue books" to the secretary, treasurer

and trustees of the society. On September 11, 1905, a clerk in the office of the defendant's treasurer, issued the books. They were sent to the president of the society, who gave one to Mr. Barker. Mr. Barker testified that he used the book during the fair in September, 1905, and that after the fair he left it in the vest he wore at the fair, where it remained until after the trial of this case, and that at the trial he did not remember that he had the book. Up to that time he had used it nine times. After the trial at the January term, 1906, but during the term, he used the book twice. The defendant's treasurer testified in substance that he did not know Mr. Barker before the trial, and, as we think his testimony fairly implies, that he did not then know that Mr. Barker, the juror, and Mr. Barker, the trustee, were one and the same person. Mr. Barker was not drawn as a juror until several months after he received the book. And it is expressly disclaimed by the counsel for the plaintiff that the book was issued or received with any corrupt motive whatever.

It will thus be seen that questions of the misconduct of parties and the misconduct of jurors are not involved here. The question here is simply whether the mere fact of the possession of the "blue book" by a juror under the circumstances stated, is fatal to the verdict, without proof aliunde that the plaintiff was prejudiced thereby; for there is no such proof. The plaintiff contends that the juror *might* have been biased by the possession of the book, that he *might* have been influenced by "a grateful and kindly feeling" towards the defendant, on account of the book, even if he had forgotten that he had it, and that where it appears that the purity of a verdict *might* be affected by such an influence, the presumption is against its purity, and unless it is proven that the influence failed of its effect, that the verdict should be set aside.

It need not be said that courts are jealous of the purity of jury trials, and that they will use their full power to prevent partial and prejudiced verdicts, and to set them aside, if once obtained. It is necessary that litigating parties should be able to try their rights before jurors impartial, unbiased and unprejudiced by passion or affection. It is equally necessary, in the administration of justice

that the parties and the public should have reason to feel that the trial has been impartial, and that the verdict has not been clouded by the suspicion of prejudice. *Bradbury* v. *Cony*, 62 Maine, 225. The error in judgment of a merely human tribunal will be forgiven and forgotten, but not any taint of unfairness. Whenever it appears that a party has attempted to bias jurors by bringing improper influence to bear upon them, the court will not stop to inquire whether the attempt was successful, but will presume that a verdict in his favor was the product of vicious influence, and set it aside. So, in many cases the same result has followed when parties have, without corrupt motive or wrong intent permitted influences to bear upon jurors which might bias their judgments, at least when it has not been shown affirmatively that no harm resulted. But we are not aware of any case which goes so far as we are asked to go by the plaintiff here.

The plaintiff also calls our attention to R. S., ch. 84, sect. 104, which provides that "if either party in a cause in which a verdict is returned during the same term of the court, before or after the trial, gives to any of the jurors who try the cause any treat or gratuity . . . . the court, on motion of the adverse party, may set aside the verdict and order a new trial." He contends that the continued possession and use of the book after the trial should have the effect of making the original gift a continuing one, substantially a gift during the term. This statute is mainly in affirmance of the common law powers of the court, and is permissive only. It is expressive of the strong purpose of the law making body that litigants shall have jurors free from all improper influences. But were it mandatory, it is difficult to see how it could apply to this case. It has reference to the misconduct of parties during the term of court, and not to acts, innocent in themselves, which occurred months before the term.

We do not think the plaintiff has shown sufficient cause for setting the verdict aside. We cannot persuade ourselves that the gift of a "blue book" of free tickets on an electric railroad, of trivial value, as a favor, not particularly to the recipient, but rather to the society of which he was a trustee, months before the donee was or could have been expected to be drawn as a juror, should of itself be regarded

as evidence of bias or prejudice on the part of the juror, or as raising a presumption that his verdict was affected by improper influences, or that it might have been otherwise tainted. It is true, in human experience, that almost all things are possible, but the possibility of bias under such circumstances as these seems so remote as not to be worthy of consideration. Nothing further being shown, the verdict must stand.

Both motions for a new trial overruled.

MEMORANDUM

Honorable ANDREW P. WISWELL, of Ellsworth, Chief Justice of the Supreme Judicial Court, died on the fourth day of December, A. D. 1906. His death was wholly unexpected as he had been in his usual health up to within a few hours previous to his decease. By his death, the State lost an eminent and influential citizen and the Bench an able and upright Judge.

Honorable LUCILIUS A. EMERY, of Ellsworth, was appointed Chief Justice of the Supreme Judicial Court on the fourteenth day of December, A. D. 1906, and qualified as such on the same day before the Governor in the presence of the Executive Council and of Associate Justices Whitehouse, Savage, Powers, Peabody, Spear and several members of the Bar.

Honorable CHARLES F. WOODARD, of Bangor, was appointed a Justice of the Supreme Judicial Court on the fourteenth day of December, A. D. 1906.

The Augusta term, 1906, of the Law Court opened on the second Tuesday of December, A. D. 1906, senior Associate Justice Emery presiding. Immediately after the opening proclamation, Hon. Orville Dewey Baker, President of the State Bar Association of Maine, addressed the Court as follows:

"May it please your Honors:

"As President of the State Bar Association of Maine, I am charged with the painful duty of suggesting to the Court the death of its late Chief Justice, Andrew Peters Wiswell.

"Time nor place serves here to make fitting speech either of his great, or his endearing qualities. The grief in each one's heart is now too keen, too strong, for just expression. At a proper time the Bar of the State will doubtless ask the co-operation of the Court in framing and recording a suitable memorial of his life and services.

"My duty at the moment is discharged when, sorrowfully, I bring to the notice of the Court the death of its late Chief; and on behalf of the Bar of the State ask that the Court take such action as it deems appropriate to that deplored event.

To these remarks of Mr. Baker, Mr. Justice Emery responded for the Court as follows:

"We listen with bowed heads to the formal announcement by the President of the State Bar Association of the untimely death of our lamented Chief Justice. The blow is so sudden, severe and recent, that we feel we cannot at this term of court suitably express in memorial form our appreciation of his character and services, and that such sad office should be postponed until our next term at Bangor. We accordingly accept the suggestion from the Bar, and at this time signify our respect and sorrow by adjourning for the day without entering on any business. It is so ordered."

Thereupon the Court adjourned until the next day at ten o'clock in the forenoon.

Honorable PERCIVAL BONNEY, of Portland, Justice of the Superior Court, Cumberland County, died on the fourth day of August, A. D. 1906.

Honorable LEVI TURNER, of Portland, was appointed Justice of the Superior Court, Cumberland County, on the twenty-first day of September, A. D. 1906.

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Law book indices are guide posts on the highways of law.

ADOPTION.

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Under R. S., chapter 69, sections 32 and 33, a petition for adoption *held* insufficient in that it failed to disclose the written consent required by the statute necessary to confer jurisdiction on the Probate Court and that the decree of adoption based on such petition was unauthorized and void.

Taber v. *Douglass*, 363.

When both parents of a child are living, there can be no consent by guardian, next of kin or next friend, to the adoption of such child unless both parents have abandoned such child and ceased to provide for its support.

Taber v. *Douglass*, 363.

ADVERSE POSSESSION.

See REAL ACTIONS.

When an entry is made upon a specific lot of land (not being a wood lot pertaining to a farm under R. S., chapter 106, section 38) and a part is occupied without any recorded claim of title, a title gained by such occupation is limited to the part actually occupied; but when such entry and occupation are under a recorded deed of the whole lot showing a claim of title by record to the whole lot, a title gained by such occupation extends over the whole lot described in the deed, in the absence of controlling circumstances to the contrary. *Banton* v. *Herrick*, 134.

The rule of constructive disseisin was in force prior to the enactment of the statute section 38, chapter 106, R. S., and is not limited by the statute. It is not limited to farms and wood lots attached to farms.

Banton v. *Herrick*, 134.

A lot of 110 acres was entered upon and a part occupied under a line of recorded deeds of the whole lot. The occupation of the part was found by the jury to be of sufficient character and duration to constitute a title by disseisin to that part. There were no fences or other boundaries between that part and the rest of the lot. *Held:* that the title acquired by disseisin covered the whole lot. *Banton* v. *Herrick*, 134.

The tenant having set up a claim of title by adverse possession against the demandant's record title, *held*, assuming that all the other essentials of adverse occupation have been proved, that the tenant has failed to show occupation for any continuous period of twenty years. Accordingly the defense fails and the demandant is entitled to judgment.

Proctor v. *M. C. R. R. Co.*, 459.

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See PRINCIPAL AND AGENT.

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See COURTS. EXCEPTIONS. PROCESS.

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Section 19 of chapter 19 of the Revised Statutes reads as follows: "Whoever sells or disposes of any animal infected or known to have been exposed to infection, within one year after such exposure, without the knowledge and consent of the municipal officers, shall be fined not exceeding five hundred dollars or be imprisoned not exceeding one year." *Held:* (1) that this section describes two offenses; (2) that the action of the legislature, as read from the language of the section, shows a deliberate purpose to omit the element of scienter as an ingredient of the first named offense; (3) that knowledge on the part of a vendor in the sale of oxen infected with tuberculosis was not a necessary element in the first named offense.

Church v. *Knowles*, 264.

For damage to person or property by a dog a right of action against his owner is given, by R. S., chapter 4, section 52, only in those cases in which the damage was not occasioned through fault of the plaintiff.

Garland v. *Hewes*, 549.

The word "fault" as used in R. S., chapter 4, section 52 is the equivalent of negligence; and the burden in such an action is upon the plaintiff to allege and prove that no want of due care on his part occasioned the injury.

Garland v. *Hewes*, 549.

APPEAL.

See COURTS. EXECUTORS AND ADMINISTRATORS.

An appellant cannot appeal from a decree named, and sustain his appeal by showing that a decree not named was erroneous. *Gurdy, Aplt.*, 73.

An amendment, converting an appeal into an appeal from another and different decree from that appealed from, introduces a new cause of action and is not allowable. *Gurdy, Aplt.*, 73.

APPEAL AND ERROR.

See APPEAL. COURTS. EMINENT DOMAIN. EXCEPTIONS. EXECUTORS AND ADMINISTRATORS. TRIAL.

ASSAULT AND BATTERY.

In an action for assault, when damages for the indignity or punitive damages are claimed, the provocation, conduct and acts of the parties, which give character and color to the transaction and are clearly and really a part of it, may be shown, though not transpiring at the precise moment of the assault.

Lenfest v. *Robbins*, 176.

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In an action of assumpsit, or of special assumpsit upon a promissory note, the want or failure of consideration may be taken advantage of under the general issue. Failure of consideration is not a special matter of defense nor a matter of confession and avoidance, which before our statute had to be specially pleaded, or, since the statute set up in a brief statement of special matter of defense. *Clark* v. *Holway*, 391.

ASSUMPTION OF RISK.

See MASTER AND SERVANT. NEGLIGENCE.

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A father took money belonging to his two minor sons, without their consent and used it in making partial payments for a farm to which he took the title in his own name. Afterwards he sold this farm for more than the amount of the sons' money paid in, and purchased another farm and paid in $450 of the money received on the sale of the first, and had the title conveyed to his wife and one son, then of age, and with the consent of the other son still a minor, in recognition and settlement of the claims of the sons against him for the money taken by him as aforesaid. This conveyance to the wife and son was made more than four months before proceedings in bankruptcy were instituted against the father. *Held:* (1) that a resulting trust did not arise for the benefit of the sons in the first farm ; (2) that the sons had a valid claim against the father for the amount of their money taken by him ; (3) that the conveyance made to the wife and son was valid against the trustee in bankruptcy of the father's estate to the extent of the sons' claim against the father ; (4) that the surplus of the money received for the sale of the first farm, and paid into the second, must be regarded, as to creditors, as a voluntary gift or transfer, pro tanto, and for this surplus the wife and son must be adjudged to hold the second farm in trust for the trustee in bankruptcy. *Merrill* v. *Hussey*, 439.

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Where a promissory note is given for two or more independent considerations and there is a failure of any of such considerations such failure is a defense pro tanto to such note in an action between the original parties or between others standing in no better position than the original parties.

Tuttle v. *Tuttle Co.*, 287.

Evidence in a suit on a note for $3000 *held* to show a partial failure of consideration for the difference between the amount of a debt of $1400 which the defendant corporation agreed to assume in part payment of a business it was purchasing and the face of the note so as to render it error to assess damages at the full amount of the note. *Tuttle* v. *Tuttle Co.*, 287.

In an action of assumpsit upon a promissory note, the defendant filed a brief statement under his plea of the general issue, in which he set out facts, with reasonable certainty, which, if true, showed an utter failure of consideration for the note sued, but which concluded as follows, "So that the defendant claims that there was due him from the plaintiff's intestate at the time of the bringing of the plaintiff's action, and is still due him, the sum of $807.69 which the defendant presents in set off to the claims of the plaintiff." The presiding Justice, by whom the case was heard without the intervention of a jury, ruled that the plaintiff could not recover by reason of this failure of consideration, and ordered judgment for the defendant. *Held:* that it was not an error for the presiding Justice to order judgment for the defendant upon the ground of a failure of consideration, when the facts set up in the defendant's brief statement, and proved or admitted showed that there was such a failure, whatever the defense may have been called by counsel in the brief statement. *Clark* v. *Holway*, 391.

A promissory note generally does not become a liability until delivery. If the maker, having delivered a note to an agent for delivery to the payee, dies before delivery by the agent, the agent's authority is thereby revoked, and a subsequent delivery by him is ineffectual to create a liability.

Jones v. *Jones*, 447.

When a note is left with a third person to be delivered to the payee on the happening of a contingency the first delivery is complete and irrevocable.

Jones v. *Jones*, 447.

An instruction to a jury without limitation or qualification that if certain notes had been delivered as completed instruments by the maker to the agent for delivery to the plaintiff, that delivery might be perfected even after the death of the maker, is deemed to be exceptionable error. *Jones* v. *Jones*, 447.

In an action on certain promissory notes, assuming but not deciding that the jury were warranted in finding that the signatures of the defendants' decedent upon the back of the notes were genuine, and that the plaintiff, as she claims, was induced to surrender them and forgive the indebtedness by the falsehood and fraud of the defendants, the court is of the opinion that the jury was

CASES ON REPORT.

Where a case comes to the Law Court, on report, and the record shows that both parties introduced evidence on a certain issue and the question was argued although no pleadings necessary to raise the issue were filed, the Law Court will assume that such pleadings were waived, nothing to the contrary appearing. *Proctor* v. *M. C. R. R. Co.*, 459.

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COMMERCE.

Certain consignors entered into a contract with an express company for the transportation of a box of intoxicating liquors from Covington, Kentucky, to No. 4 Byron Street, Rumford Falls, Maine. It was a C. O. D. shipment, and it was the unquestioned duty of the express company either to make a personal delivery of the package to the consignee, or to leave it at his residence or place of business designated as No. 4, Byron Street. The liquors were intended for unlawful sale in Maine. While these liquors were in the office of the express company at Rumford Falls, they were seized by a deputy sheriff by virtue of a search and seizure warrant duly issued by a court of competent jurisdiction and taken away. *Held:* that the transportation of the liquor from the office of the express company at Rumford Falls, to No. 4 Byron Street, was a part of a continuous interstate shipment from Kentucky to the street and number designated at Rumford Falls, and the package was protected from the operation of the laws of Maine until the act of transportation was consummated by the delivery of the package at its place of ultimate destination in this state. The seizure was made before the transportation was terminated and was an interruption of an interstate shipment. It was therefore premature and unauthorized. *State* v. *Pembroke*, 430.

While intoxicating liquor continues to be recognized by federal authority as a legitimate subject of interstate commerce, section 31 of chapter 27 of the Revised Statutes of 1883 as amended in section 39 of chapter 29 of the Revised Statutes of 1903, so far as it applies to interstate commerce transportation, must be deemed incompatible with the interstate commerce clause of the Federal Constitution. *State* v. *Pembroke*, 430.

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See COMMERCE. INSANE PERSONS.

The constitutional right of the legislature to regulate or prohibit the sale and keeping of intoxicating liquors and to declare certain liquors intoxicating within the meaning of the law governing intoxicating liquors irrespective of the intoxicating character of such liquors as a matter of fact, both under the State and Federal Constitutions, have been so universally answered in the affirmative, both by the decisions in our own state and by the Supreme Court of the United States, that it is no longer a question for argument or even of doubt. *State* v. *Frederickson*, 37.

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A written contract may be waived either directly or inferentially and such waiver may be proved by express direction or by acts and directions manifesting an intent not to claim the supposed advantages; or by a course of acts and conduct, or by so neglecting and failing to act as to induce a belief that it was the intention and purpose to waive. *Hilton* v. *Hanson*, 21.

A court in equity may decree the rescision of a contract for a mistake which is unilateral, but the power should not be exercised against a party whose conduct has in no way contributed to or induced the mistake, and who will obtain no unconscionable advantage thereby. *Bibber* v. *Carville*, 59.

If the plaintiff was prevented or excused by the fault of the defendant from performing his contract he would be entitled to recover such sums as had become due at the date of his writ according to his account annexed or otherwise properly specified in his writ. *Seretto* v. *Railway*, 140.

When it is mutually covenanted that installments to be paid by a defendant to a plaintiff contractor for work done on a railroad shall be determined by an engineer of the defendant designated by name, and the defendant afterwards substitutes another engineer for the one designated and the plaintiff contractor acquiesces in such substitution, the estimate and certification of the work as it progresses made by the substituted engineer is binding upon the parties, and the defendant by whose acts the substitution is made is estopped from denying the authority of the substituted engineer.

Seretto v. *Railway*, 140.

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Usually it rests in the sound discretion of the court whether costs in equity shall be awarded to either or neither party. *Allan* v. *Allan*, 153.

In the absence of any statutory provision, or rule of court, if costs are awarded, the court will exercise its discretion as to the specific items which may be allowed. *Allan* v. *Allan*, 153.

In equity, costs for travel and attendance do not depend upon terms of court, but only upon hearings, whether they be held during a term or otherwise. *Allan* v. *Allan*, 153.

A party to whom taxable costs are awarded is entitled to an allowance of two dollars for each day's attendance at a hearing before a justice or a master, and of thirty-three cents for every ten miles' travel, to attend such a hearing, not exceeding forty miles, unless he makes affidavit that he actually traveled a greater distance for the purpose of attending such hearing. *Allan* v. *Allan*, 153.

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See CRIMINAL LAW. EQUITY. EXECUTION.

While technical precision of statement and pleading are not required in probate appeals, to the same extent as in actions at law, two things are indispensable: (1) The appeal must show what order, sentence, decree or denial of the judge of probate is appealed from. (2) Taking all allegations in an appeal and the reasons therefor to be true, it must appear that there was error. *Gurdy, Aplt.*, 73.

Jurisdiction of a subject matter alone is not sufficient to establish the validity of a decree of a Probate Court. If the preliminary requisites and the course of proceedings prescribed by law are not complied with jurisdiction does not attach and the decree will be, not voidable merely, but void. A petition to that court is the foundation upon which to base its jurisdiction and such petition must allege sufficient facts to show authority and power of the court to make the decree prayed for. The record of its proceedings must show its jurisdiction. *Taber* v. *Douglass*, 363.

A court has power to allow its records to be amended in accordance with the fact. *Tolman, Petitioner*, 559.

Whether a proposed amendment shall be allowed upon proof of the necessary facts, saving the rights of all persons theretofore acquired in good faith, is within the sound judicial discretion of the justice presiding at the hearing. *Tolman, Petitioner*, 559.

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ELECTION OF REMEDIES.

The plaintiff first brought an action of trover against the defendant for the alleged conversion of two cows. The judgment was for the defendant. The plaintiff then brought an action of assumpsit against the defendant for the price of the cows. *Held:* that if there had actually been two remedies open to the plaintiff, and he had elected one of them, he would have been precluded from subsequently resorting to the other form of action, but in this case his only remedial action was in assumpsit for the price of the cows, and having mistaken his remedy he is not precluded from bringing the proper action. *Clark* v. *Heath*, 530.

Mistake of remedies differs from an election between inconsistent remedies. The rule that "the definite adoption of one of two or more inconsistent

EQUITABLE ESTOPPEL.

See ESTOPPEL.

EQUITY.

See CONTRACTS. COSTS. DEEDS. INJUNCTION. TRUSTS. WATERS AND WATERCOURSES.

Equity does not relieve against mistakes which ordinary care would have prevented. Conscience, good faith and reasonable diligence are necessary to call the powers of a court of equity into activity. *Bibber* v. *Carville*, 59.

A bill in equity which charges (1) that certain real estate was bought for the plaintiff corporation by its president, and was paid for in whole or in part with its funds, or with the proceeds of its stock unlawfully issued and sold, and not properly accounted for, and that its president fraudulently caused the real estate to be conveyed to his son, one of the defendants through whom several other defendants, but not all the defendants, have legal or equitable titles, which they should convey to the plaintiff, (2) that a part of the aforesaid defendants, and two other defendants, have unlawfully received stock in the plaintiff corporation, which they should account for to it, and (3) that still another defendant has unlawfully received and sold the stock of the plaintiff, in part, at least, other than that mentioned in the preceding class, for the proceeds of which he should account to it, is bad for multifariousness. *Land Co.* v. *Lewis*, 78.

There are no terms of court in equity proceedings. On motion of either party a cause in equity is set down for a hearing at such time as the court shall order. *Allan* v. *Allan*, 153.

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In an action to recover the balance of an account, *held* that the jury was authorized to find that the evidence did not create an estoppel against the plaintiff, although it did warrant the conclusion that the plaintiff authorized the defendants to pay to a third party on the account of the plaintiff, any sum which in fact might be found due from the plaintiff to such third party. *Putnam* v. *Grant*, 240.

In an action on an account, *held* that it was incumbent upon the defendants to prove certain facts to sustain a plea of payment. *Putnam* v. *Grant*, 240.

The plaintiff as treasurer of a railroad company executed a mortgage of the road between certain termini to secure certain bonds. Within these bounds was that portion of the road which had been located and graded across the demanded premises with the knowledge and consent of the plaintiff. The defendant corporation represents, and is the successor in title of, the purchaser of the bonds.

EVIDENCE.

EXCEPTIONS.

In an action of debt brought by the plaintiff on a judgment recovered by one Albert A. Robbins against the defendant, it was alleged in the declaration that February 10, 1900, said Robbins for a valuable consideration assigned this judgment to "Alvah R. Hayes (the plaintiff) then the administrator de bonis of the Dingley Brothers' estate." The consideration for the assignment of this judgment was a note for $150 payable to F. B. Dingley, Admr., d. b. n. Dingley Brothers' estate surrendered by the plaintiff to the defendant. *Held:* that the plaintiff is not entitled to a judgment in his right and capacity as administrator, but that he may be allowed to take judgment in his individual capacity. *Hayes* v. *Rich*, 314.

If a plaintiff who is administrator of the estate of a deceased intestate, assumes the responsibility of employing the funds of the estate to purchase a judgment against the defendant he should be deemed to have done so in his individual capacity; and if an administrator thus changes the nature of a debt originally due the intestate by a contract made with himself he must sue for the new debt in his own name and not in his representative capacity. *Hayes* v. *Rich*, 314.

The assumption that a plaintiff who is administrator of the estate of a deceased intestate and who has employed the funds of the estate to purchase a judgment against the defendant, can maintain an action on such judgment and recover judgment thereon in his capacity as administrator is incompatible with the right of the defendant to testify as a witness in his own behalf respecting matters that happened before the death of the plaintiff's intestate. In an action on a judgment brought by the original judgment creditor or by an assignee in his individual capacity the defendant would be a competent witness as to all matters material to the issue. It would be the privilege of the defendant to give personal testimony that before the death of the plaintiff's intestate he had paid the judgment in full, but, under the provisions of section 112 of chapter 84 of the Revised Statutes, the fact that the plaintiff brings the action as the representative of a deceased party precludes the defendant from giving any such evidence in his own behalf, although the judgment creditor would be a competent witness for the plaintiff. Under the operation of such a rule any person could effectually close the mouth of his adversary as a witness by assigning his claim to an administrator of some estate. *Hayes* v. *Rich*, 314.

It was not alleged in the declaration of a plaintiff who was described as administrator of the estate of a deceased intestate that the cause of action accrued to the estate which he represented but for aught that appeared it might have been one accruing to him in his own right. The words describing him as administrator of the estate may therefore be stricken out as merely descriptio personae and he may be allowed to take judgment in his individual capacity. *Hayes* v. *Rich*, 314.

Under the provisions of section 146 of chapter 84 of the Revised Statutes, a judgment is deemed a chose in action upon which an action may be maintained by an assignee in his own name, and an assignment of the same in writing although without seal is sufficient. *Hayes* v. *Rich*, 314.

an irrefragable right of action by the ward against the sureties upon the guardian's bond. An equity court can nevertheless enjoin the prosecution of the action if the failure to settle the account was caused by the inequitable conduct of the ward. *Clark* v. *Chase*, 270.

A plaintiff who would be refused a decree in a suit in equity because of his laches or other inequitable conduct handicapping the defense, cannot now escape the equity powers of the court and the consequences of his laches by resorting to an action at law. When the defendant in an action at law has, without fault of his, been seriously handicapped in his defense by the laches or other inequitable conduct of the plaintiff, the court can in the exercise of its equity powers enjoin the plaintiff from prosecuting the action at law.

Clark v. *Chase*, 270.

A Probate Court minor ward delayed, apparently without reason, asking for an accounting by the guardian till the guardian's death eight years after the ward came of age. He then caused the administrator of the guardian to be cited to settle in the Probate Court an account of the guardianship, which the administrator was unable to do. The ward then brought an action at law against the administrator of a deceased surety on the guardian's bond for the failure to settle an account upon citation according to the terms of the bond. *Held:* that the laches of the ward, in his long delay till the death of the guardian, had given him an unconscionable advantage over the defendant, and that he should be enjoined from prosecuting the action. *Clark* v. *Chase*, 270.

INSANE PERSONS.

Section 42 of chapter 144 of the Revised Statutes, relating to the expense of the commitment of an insane person who has been unlawfully committed under the provisions of sections 39, 40 and 41 of said chapter, and then recommitted, comes clearly within the authority of the legislature in the exercise of the police powers of the state and is constitutional. In the exercise of this police power the legislature has an undoubted right to divide the state into as many political divisions as it sees fit, whether counties, cities, towns or plantations, and impose upon them the care and support of paupers in any manner it sees fit. *Rockport* v. *Searsmont*, 257.

Chapter 144 of the Revised Statutes is silent as to the requirement of any pauper notices, yet the entire scheme of the chapter is based upon the theory that the expenses and support incurred under it are in the nature of pauper supplies, while section 24 of said chapter expressly provides that these expenses shall be recovered "as if incurred for the expense of a pauper." It is therefore *held*: that proceedings under R. S., chapter 144, with respect to expense and support of a person committed to an insane hospital by the town committing and not the pauper residence of such person, come within the purview of R. S., chapter 27, with reference to the notice required by one town to another in case of furnishing pauper supplies.

Rockport v. *Searsmont*, 257.

An insane person was unlawfully committed to the insane hospital and then was afterwards recommitted the second commitment being a legal one. The

LIFE ESTATE.

See WILLS.

LIGHTNING.

See TELEGRAPHS AND TELEPHONES.

LIMITATION OF ACTIONS.

See ADVERSE POSSESSION. STATUTE OF LIMITATIONS.

LIQUOR SELLING.

See INTOXICATING LIQUORS. SEARCH AND SEIZURE.

LOGS AND LUMBER.

See NEGLIGENCE.

The practice of a log-driving company having two or more drives to insure greater expedition in driving must be deemed reasonable.

Log Driving Co. v. *Bryon*, 181.

Where a log-driving company makes a practice of having two or more drives, a difference in the rates of assessment for the first and second drives, based upon the result of experience with respect to the actual cost of driving, is reasonable and proper. *Log Driving Co.* v. *Bryon*, 181.

Under the charter of a log-driving company, an assessment on logs included in a second drive at a higher rate than required for logs of the same owner included in an earlier drive *held* binding upon the owner of the logs, irrespective of any question as to first and second drives.

Log Driving Co. v. *Byron*, 181.

Under the charter of a log-driving company, an assessment of the cost of a second drive at a higher rate than that of a first drive *held* proper, although owing to high water the second drive reached the boom while the first drive was still there, so that the two were turned out together.

Log Driving Co. v. *Byron*, 181.

Prior to 1901 by legislative charter The Penobscot Log Driving Company had the exclusive right and duty of driving all logs coming into the West Branch of the Penobscot between the head of Chesuncook Lake and the East Branch to any place at or above the Penobscot Boom where logs are usually rafted, at as early a period as practicable. In February, 1901, it contracted with the defendant to drive into said boom during the driving season of that year all the logs which the log company should have to drive under its charter. By section 1, chapter 293 of the Private and Special Laws of 1901 the legislature ratified and confirmed this contract and power and authority necessary to carry out its terms and for its execution was conferred upon the respective parties thereto. The plaintiffs' logs formed a part of the drive of 1901, and this suit was brought to recover damages alleged to have been sustained by the negligence of the defendant in making said drive. *Held:* that privity of contract was not essential to the maintenance of the action. By accepting the legislative act, as it did by accepting and undertaking to drive the logs, the defendant came under a

duty to the public, including the plaintiffs, to drive the logs in accordance with the contract. The duty was co-extensive with the contract, but as independent of it as if, instead of referring to the contract, the duties of the defendant had been set forth in the act itself. The defendant drove the plaintiffs' logs not only in the performance of the terms of its contract with the Log Driving Company, but also in the exercise of the powers conferred upon it by the state which carried along with them the corresponding duty to use due care and dilligence in the exercise of those powers. *Marsh* v. *Paper Co.*, 489.

In an action to recover for negligence in driving logs, a majority of the court were of the opinion that the evidence was sufficient to support a verdict in favor of the plaintiffs' contentions and allegations that on account of the defendant's mismanagement, either through negligence or misfeasance, this drive of logs was so unnecessarily delayed that it did not arrive at its destination in season to be cared for and secured before the river froze, that as a result of this delay the logs became separately frozen into the ice of the river, so that they could not be in any manner secured, that they there remained until a portion of the plaintiffs' logs were carried down river and out to sea during the December freshet of that year, and another portion of them were lost in the same manner in the freshet of the next spring. *Marsh* v. *Paper Co.*, 489.

In an action to recover for logs lost through the negligence of a log-driving company, the loss of the logs cannot be attributed to the magnitude of freshets as there was evidence from which a jury would be justified in finding that the logs would have been lost, unsecured as they were, during any ordinary freshet which might happen while they were in this condition. *Marsh* v. *Paper Co.*, 489.

In an action to recover for logs lost through the negligence of the defendant, the early freezing of the river, in conjunction with the defendant's negligence whereby the logs were delivered much later than might or should have been, caused the plaintiffs' loss. This, however, was not an independent intervening cause, but a natural condition, the chance of the occurrence of which should have been foreseen. Unusual climatic conditions occur so frequently that in important affairs, they must be anticipated and guarded against. *Marsh* v. *Paper Co.*, 489.

LORD'S DAY.

Revised Statutes, chapter 125, section 25, reads as follows: "Whoever, on the Lord's Day, keeps open shop, workhouse, warehouse or place of business, travels, or does any work, labor or business on that day, except works of necessity or charity; uses any sport, game or recreation; or is present at any dancing, public diversion, show or entertainment, encouraging the same, shall be punished by fine not exceeding ten dollars." The plaintiff performed certain plumbing work in a certain hotel, on the Lord's Day. This work was not a work of "necessity or charity." *Held:* that the plaintiff cannot recover for his labor so performed in violation of the aforesaid statute. *Carson* v. *Calhoun*, 456.

MALICIOUS PROSECUTION.

No action for the malice with which an act was done can be maintained while another action for the act itself is pending undetermined.
Williams v. *Ellis*, 247.

MASTER AND SERVANT.

Master and servant do not stand upon the same footing. The servant's duty is obedience. He has a right within reasonable limits, to rely upon his master's knowledge, skill and ability and is not bound to set his judgment against the judgment of his superior. Specific orders and assurances of safety, coming from such a source, have a natural tendency to throw him off his guard and lull him into a feeling of security. *Jensen* v. *Kyer*, 106.

In determining the question of contributory negligence of a servant, who is injured while acting in obedience to the specific orders of the master present, and under his assurance of safety, such order and assurance constitute a part of the attendant circumstances to be considered.
Jensen v. *Kyer*, 106.

The order of a master to his servant and assurance of safety are immaterial on the question of the contributory negligence of the servant, unless such order and assurance are the operating influence which induces the servant to do the act that is the immediate cause of the injury.
Jensen v. *Kyer*, 106.

To constitute an order of a master it is not necessary that the language used should be of a formally imperative character. *Jensen* v. *Kyer*, 106.

If the danger is so patent and serious that no prudent man would incur it, the servant cannot plead the master's order or assurance of safety as a justification for placing himself in a position of such obvious peril.
Jensen v. *Kyer*, 106.

Negligence on the part of the master is not one of the ordinary risks which the servant assumes as a part of his contract of employment.
Jensen v. *Kyer*, 106.

Upon the question of voluntary assumption of risk by the servant, he is chargeable with the full consequences of what he ought to have known in the exercise of ordinary care and prudence, but the specific command of the master and his assurance of safety are to be weighed as a part of the attendant circumstances. *Jensen* v. *Kyer*, 106.

When a competent mechanic, while attempting to install machinery to be used in connection with a powerful motor, by error of judgment in an emergency does an act which causes damage to the property of the owner, his principal is not made liable by his act.
Lombard Co. v. *Paper Co.*, 114.

Where on the sale of a certain automatic water wheel governor, the vendor agreed to furnish a competent man to install the same, and did furnish such a man, and while attempting to adjust it to the water wheel connected

MUNICIPAL CORPORATIONS.

See ACTIONS. INSANE PERSONS. STREET RAILWAYS. TOWNS.

The Augusta Water District is a public municipal corporation, and by virtue of Revised Statutes, chapter 9, section 6, its property, appropriated to public uses, is exempt from municipal taxation.

Augusta v. *Water District*, 148.

R. S., chapter 21, section 18, provides that "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. . . . 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." *Held*: that for damages not arising from a failure of the defendant city to maintain and keep in repair a certain sewer, the defendant city was not liable. The case comes directly within the principles laid down in *Keeley* v. *Portland*, 100 Maine, 260.

Davis v. *Bangor*, 311.

Municipal corporations are authorized by statute to pass ordinances "not inconsistent with law," for the purpose, among other things, of regulating the use of their streets. *State* v. *Barbelais*, 512.

A municipal ordinance of the city of Auburn, providing that "no person shall in any part of a public street carry on any trade or business," unless the same is authorized in the manner therein provided, is not inconsistent with law, and is not unreasonable nor oppressive, when reasonably construed. *State* v. *Barbelais*, 512.

A municipal ordinance of a city providing that "no person shall in any part of a public street carry on any trade or business," unless the same is authorized in the manner therein provided, should not be construed as prohibiting persons who happen to be upon the streets from commencing and consummating business transactions, nor that one person may not make a sale of an article to another upon a street, as the result of private negotiation, but it was intended to prohibit a person from offering articles for sale to the public in a public manner either from a permanent stand or from a cart which he drives or pushes along the street with frequent stops whenever any one on the street desires to make a purchase of him. A person who is offering for sale articles in the street in this manner is using the streets of the city, not for the public purpose of travel, for which purpose streets are located and constructed, but for the private purpose of trade or business. *State* v. *Barbelais*, 512.

A respondent was selling strawberries, pineapples and bananas out of a push cart in one of the streets of a city but was not blocking the highway or making any disturbance, but was going from place to place disposing of fruit to whoever expressed a desire to purchase the same. *Held:* that these acts of the respondent were within the letter and the spirit of an ordinance prohibiting any person from carrying on any trade or business in any part of a public street. *State* v. *Barbelais*, 512.

MUNICIPAL OFFICERS.

See EMINENT DOMAIN.

NEGLIGENCE.

See ANIMALS. DAMAGES. INSTRUCTIONS. LOGS AND LUMBER. MASTER AND SERVANT. RAILROADS. TELEGRAPHS AND TELEPHONES.

RAILROADS.

See COMMON CARRIERS. ESTOPPEL. INSTRUCTIONS. STREET RAILWAYS.

When passengers for hire, riding in a public carriage, are about to cross a railroad track it cannot be said as a matter of law that it is negligence on their part if they are not as alert as the driver of the team over which they have no direct control in looking and listening for an approaching train before attempting to cross the track, but it is a question of fact for a jury, under all the circumstances, to determine whether or not such passengers were in the exercise of ordinary care. *Wood* v. *M. C. R. R. Co.*, 469.

When a passenger for hire, riding in a public carriage, is about to cross a railroad track, and he fails to look and listen for an approaching train, it is a question of fact for the jury to determine under all the circumstances of the case whether or not such failure to look and listen is negligence on the part of such passenger. *Wood* v. *M. C. R. R. Co.*, 469.

The fact that a railroad train was running across a highway near the compact part of the town at a greater speed than allowed by the statute is not conclusive evidence of negligence, but it is a question of fact for the jury. But the fact that a railroad company is found violating the statute is always material and often important evidence tending to show negligence. *Wood* v. *M. C. R. R. Co.*, 469.

RAILROAD COMMISSIONERS.

See STREET RAILWAYS.

RATIFICATION.

See CORPORATIONS. INFANTS.

REAL ACTIONS.

See ADVERSE POSSESSION. DEEDS. QUIETING TITLE. WRIT OF ENTRY.

In a real action where the defense was adverse possession, nothing can be deemed an "improvement" for which compensation may be allowed, which does not benefit the land, and increase its value to the true owner. Under this rule a tenant's claim for ties, rails and equipment must be disregarded. *Proctor* v. *M. C. R. R. Co.*, 459.

In a real action where the defense was adverse possession, *held*, that the filling on the defendant's flats by the tenant, did add somewhat to the value of the flats, and that the tenant is entitled to be allowed for the increased value. *Proctor* v. *M. C. R. R. Co.*, 459.

In a real action, *held* that the value of the demanded premises had been increased by the tenant to the amount of $400, and that the value of the demanded premises without the improvements was $200. *Proctor* v. *M. C. R. R. Co.*, 459.

In a real action, *Held:* that the demandant was entitled to judgment for so much of the demanded premises as consists of flats which were embraced in the Deborah Mills grant, the boundaries to be determined from the plan used at the trial. But the issuing of a writ of possession to be governed by

STATUTES CITED, EXPOUNDED, ETC.

See APPENDIX.

STATUTE OF FRAUDS.

See INFANTS.

STATUTE OF LIMITATIONS.

See CRIMINAL LAW.

A defendant made a common law assignment for the benefit of his creditors to C. B. D., and the plaintiff wrote to the assignee in reference to his claim against the defendant, and received the following reply :

" Machias, Me. Apr. 17, 1900.

CHARLES SARGENT, ESQ., Portland, Me.

Brother Sargent :

Thank you for your letter of 13th inst. relative to Perry's matters. I have not yet had time to submit it to George, but will do so very soon. Of course, he must do the square thing by you.

Yours truly,

C. B. DONWORTH."

Held : that this letter contained no element of contract or waiver of any prerequisite for the enforcement of the plaintiff's demand, and it was not an act which could operate to suspend the statute of limitations, or to estop the defendant from pleading the statute of limitations in defense to the action.

Sargent v. *Perry*, 527.

STREET RAILWAY.

See DAMAGES. EMINENT DOMAIN. NEW TRIAL.

The determination of the railroad commissioners in regard to the change of location of a street railroad is final. The omission of the clerk of the railroad commissioners, within five days after the filing of the certificate of their decision, to give notice of such determination to all parties of record, does not deprive the railroad corporation of its right to construct and operate its road, or make that a public nuisance which would otherwise be a lawful use of the street. *Parsons* v. *Railway*, 173.

The operation of a street railroad for other purposes than street traffic, before the railroad commissioners have granted a certificate of its safety for public travel, is not forbidden by R. S., chapter 53, section 20.

Parsons v. *Railway*, 173.

Such inconveniences as are inseparable from the use by the public of a public way, cannot be made the foundation of an action for damages.

Parsons v. *Street Railway*, 173.

That a street railway company was authorized by the Railroad Commissioners to run cars before its track was finished and put in proper condition, does not exempt the company from liability for injuries resulting from the imperfect condition of the track. *Haynes* v. *Railway*, 335.

TICKETS.

See COMMON CARRIERS. EVIDENCE.

TITLE BY RECORDED DEEDS.

See VENDOR AND PURCHASER.

TORTS.

See ASSAULT AND BATTERY. DAMAGES. MALICIOUS PROSECUTION. MASTER AND SERVANT. NEGLIGENCE. TROVER.

TOWAGE.

See NEGLIGENCE.

TOWNS.

See INSANE PERSONS.

The present town of Skowhegan was incorporated in 1861, by the Private and Special Laws of 1861, chap. 34, by the union of the old towns of Skowhegan and Bloomfield, the former comprising what is now the north side of the river, the latter side, including an island. The act of 1861 provided that "whenever the new town of Skowhegan shall vote to build a town house, it shall be located on Skowhegan Island unless a majority of each town, as now constituted, shall otherwise decide." *Held:* that the phrase "as now constituted" was intended to apply not to the inhabitants, but to the geographical limits of the two old towns. *Anderson* v. *Parker*, 416.

In 1866, five years after the passage of the Act of 1861 incorporating the present town of Skowhegan by the union of the old towns of Skowhegan and Bloomfield, the two old towns in town meeting legally called, acting separately in accordance with said Act, voted as follows: "Voted by those that constituted the town of Bloomfield at the time the town was united with the town of Skowhegan, that we consent to have a Town Hall in a place other than on Skowhegan Island." "Voted by those constituting the town of Skowhegan at the time it was united to Bloomfield that we consent to have a Town Hall in a place other than on Skowhegan Island." *Held:* that under the warrant calling the town meeting of 1866 and the aforesaid votes in pursuance thereof, the town meeting of 1866 and the votes taken in pursuance of the warrants issued therefor were legal, that the statute of 1861 under which they acted, then became a dead letter, and that the old towns are forever barred from having any voice as separate towns, upon the location of any future Town House to be erected in the town of Skowhegan, that the town of Skowhegan, as constituted in August, 1905, when their special town meeting was held, had then and has now full authority to act in the matter of locating and erecting a Town House or Town Hall under any special or general statute then or now existing, with entire independence of chapter 34 of the Private and Special Laws of 1861. *Anderson* v. *Parker*, 416.

TRIAL.

See BILLS AND NOTES. COSTS. CRIMINAL LAW. ESTOPPEL. EVIDENCE. EXCEPTIONS. JUDGMENT. NEW TRIAL. RAILROADS.

A verdict on conflicting evidence and not shown to be unwarranted by the weight of evidence cannot be set aside. *Morrison* v. *Morrison*, 131.

In a trustee process, the plaintiff and the principal defendant were both residents of the Province of New Brunswick, the personal services rendered by the principal defendant were rendered in the Province of New Brunswick, and the alleged trustee is a foreign corporation although it operates a railway in Maine and has stations in Maine and service was made on the alleged trustee by leaving a summons with a station agent of the defendant trustee in Maine. No service of the writ had been made on the principal defendant although service had been ordered. *Held* : that the principal defendant having had no opportunity to be heard could not be concluded by any decision adverse to him and that the hearing at nisi prius charging the trustee was premature. *Alexander* v. *Segee*, 561.

TRUSTS.

See BANKRUPTCY. CORPORATIONS. GIFTS. MONEY HAD AND RECEIVED. PARENT AND CHILD.

When trust funds of a personal character have been changed into real estate they can be followed, and the rights of the cestui que trust can be maintained, if the rights of third parties have not intervened. *Land Co.* v. *Lewis*, 78.

In the "Camden Land Cases," *held* that the proceeds of treasury stock unlawfully issued to the president of the corporation and sold by him, and the proceeds of treasury stock lawfully issued and sold by him so far as not accounted for, are traced $3,000 into one farm, and $1,000 into another, and are charges upon those farm respectively, so far as concerns the interests of such defendants as have no other or greater rights than the president would have had, had he purchased those farms in his own name.

Land Co. v. *Lewis*, 78.

Evidence *held* to show that depositor of money in a savings bank to her own order and that of a non-resident sister did not intend a gift to her sister to take effect until after her death. *Savings Institution* v. *Fogg*, 188.

The clause in a will of a testatrix whereby a trust was created is as follows: "Second. I do hereby give, bequeath and devise unto John H. Blanchard, in trust, all of my estate, personal and mixed, wherever found and however situated. Said trust is for the benefit of my daughter, Elvira L. Kimball, wife of Daniel Kimball. I do hereby request my said trustee to convert into cash all my estate, and to invest the same where it will be secure, and keep same invested. . . . . I do hereby direct my trustee to pay to my daughter, said Elvira L. Kimball, such sums from time to time as she may need for her comfortable support and maintenance so long as she lives. I desire my trustee to take into consideration (in) making said payment that it is the duty and obligation of her husband to support and maintain her, but if for any cause her husband does not provide suitable support and maintenance for her, then I request my said trustee shall see that the same is provided out of the funds in his hands as trustee. It is my desire that all of said property, if necessary shall be used for the benefit of my daughter as herein set out." By the next clause of the will the testatrix devised and bequeathed to the children of the complainant whatever might remain of this trust fund at the time of the death of their mother. *Held:* that by the language of this will above quoted the testatrix vested in the trustee the discretion of determining upon the amounts and the times of the payments to be

WAIVER.

See CASES ON REPORT.

WARRANTY AND GUARANTY.

See SALES.

WATER CONTRACTS.

See DEEDS.

WATERS AND WATERCOURSES.

See DAMAGES. DEEDS.

A court in equity has jurisdiction to determine the respective rights of the owners of water power developed by a dam. *Woolen Co.* v. *Gas Co.*, 198.

When the owner of a dam and water privilege grants a part of the water power thereby developed, the right of the grantee is superior, to the extent of the grant, to that of the grantor. Thereafter the grantor has no right to interfere with the grant, or to diminish the quantity of water which has been granted. Nor have those holding under the grantor any such right. The rights of the owner of the dam are thereafter subject to the grant. *Woolen Co.* v. *Gas Co.*, 198.

If the grantee of a water power is not using, or has no wish or preparation to use the water, the grantor or those holding under him may use the whole or allow it to flow down stream. *Woolen Co.* v. *Gas Co.*, 198.

All grants of water power are subject to the rights of riparian proprietors below to have the natural flow of the stream transmitted to them, after reasonable use or detention. *Woolen Co.* v. *Gas Co.*, 198.

A grant of the right to take water from a flume or dam "for carrying on every branch of the tannery business" is not a grant of an indefinite quantity of water, but only of such quantity as would develop the power necessary to carry on every branch of the tanning business, either as it existed at the time of the conveyance, or was then contemplated by the parties. And their conduct afterwards, the use by one and the acquiescence by the other, would furnish satisfactory evidence of what was in contemplation by them. *Woolen Co.* v. *Gas Co.*, 198.

When a grant is made by a dam owner, of the right to draw water from a flume or dam for the purpose of creating the power required for specified purposes, and the grant is silent as to the head of water to be maintained, and there is no evidence of explanatory conditions affecting the grant, it should be held that a definite head was intended, and that it was the head customarily and ordinarily used at the time of the grant. The grantee becomes entitled to water at that head, sufficient to produce the power required. *Woolen Co.* v. *Gas Co.*, 198.

When the amount of water in an ancient grant was measured by the power required at its date, and there now remains no evidence of the power then required, the continued, unvarying use by the grantee for a long period of time, acquiesced in by those in the line of title of the grantors, will furnish very satisfactory evidence of the extent of the original grant, both as to head and quantity. *Woolen Co.* v. *Gas. Co.*, 198.

the right to draw from its dam " water to the extent of 600 horse power for the purpose of pumping " &c., (the head of water being fixed at not less than 25 feet nor more than 30 feet.) After full consideration of the subject matter of the grant, the situation, the history and character of the negotiations, and all the language used by the parties in the instrument finally signed by them as defining their rights and obligations thereunder, *Held:*

a. The grant is not of water power, but only of water for power, and the city is entitled, not to a certain quantity of power, but only to draw a certain fixed quantity of water from which to extract as much power as it may by its own agents and appliances.

b. From the evidence and the admissions of the plaintiff it appears that the phrase " to the extent of 600 horse power " means in its connection, efficient, practical horse power upon a well understood and recognized basis of seventy-five per cent of efficiency, and hence the city is entitled to draw for pumping purposes water to the extent of 800 nominal or theoretical horse power and no more.

c. It appears from the evidence that the city has been drawing water in excess of its right under the grant, and that the value of such excess drawn for six years next before the date of the writ is $3468.55.

d. As the city seems to have drawn the excess under a claim of right made in good faith no interest should be allowed before the date of the writ.

Water Power Co. v. *Lewiston*, 564.

WAYS.

See EMINENT DOMAIN.

By virtue of Revised Statutes, chapter 9, section 61, a prima facie title in a party claiming under a tax sale for non-payment of road taxes assessed upon lands in unincorporated places is made out by producing in evidence the county treasurer's deed duly executed and recorded, the assessment signed by the county commissioners and certified by them or their clerk to the county treasurer, and by proving that the county treasurer complied with the requirements of law in advertising and selling. *Greene* v. *Martin*, 232.

To establish his title under R. S., chapter 9, section 31, it is not necessary for a claimant under the tax sale to affirmatively prove (1) that the agent appointed to expend the money on the roads gave the bond required by law, or (2) that the sum assessed was expended on the roads, or (3) that the land owners themselves had not repaired the roads and so superseded the tax, or (4) that the sum assessed was ordered to be expended on the roads, or (5) that the agent in fact repaired the roads. *Greene* v. *Martin*, 232.

It is not essential to a valid assessment of a road tax upon lands in unincorporated places that the commissioners should specifically in terms assert in their record and certificate of assessment (1) that the divisions they made of the townships and tracts " were equitable, conforming as nearly as was convenient to known divisions or ownerships," or (2) that the sum so assessed was " proportionate to the value thereof," or (3) that it was not burdensome on the land owners to assess all the repairs on them instead of part on the county. It is enough if their findings to such effect can be inferred from their action. *Greene* v. *Martin*, 232.

WILLS.

See EXECUTORS AND ADMINISTRATORS. TRUSTS.

(4) *Held:* that the wife took only a life estate in the Laconia stock, and had only a life estate in the Pepperell stock, and that upon her death that stock which she then held became a part of the estate of the testator as a part of the trust estate created by his will. *Richards* v. *Morrison*, 424.

A testator by the ninth article of his will gave the residue of his estate to trustees for certain uses, the only one involved being that which directed the trustees "pending the settlement of my estate and until final division" to pay to his wife ten twenty-sevenths portion of the income "during her lifetime or until final setlement of my estate" for her sole use and benefit, and, after disposing of the balance of income to other parties, he provided that "upon final settlement of my estate or distribution thereof my trustees shall convey and deliver to my wife ten twenty-sevenths parts of this my residuary estate, and she may herself select such portion from any parcels of my residuary estate at the appraised value thereof. It is my will that my wife have the entire use and income, during her lifetime, of all said portion of my residuary estate; and, in addition thereto I do authorize and empower her to sell and convey by her own grant or deed any of said estate, real or personal, which she may in the exercise of her own discretion, elect to sell and convey for her sole use and benefit without license of Probate Court." Then followed a gift over to other parties of what "at her death shall remain unused, unexpended or unsold and unconveyed by her." In the distribution the wife received various stocks and bonds, and among them were 1,000 Trenton and Passenger Railroad bonds, 2,000 City of Superior and 500 Brunswick and Chillicothe bonds which she held at her decease. *Held:* that these bonds belonged to the estate of the testator and not to the estate of the wife. *Richards* v. *Morrison*, 424.

The familiar rule in the construction of wills frequently recognized and stated by this court, that if a testator makes a testamentary disposition of the whole estate in any property a devise over of any remainder in that property is inoperative, because nothing is left which can be the subject of a devise over, is not applicable when the inconsistent devises are contained, one in the original will and the other in a subsequent codicil, as then the testator is presumed to have changed the intention which he had at the time of making the first testamentary disposition of the property in question, and his last will, that is, the codicil, will take effect. *Williams* v. *Dearborn*, 506.

A testator devised and bequeathed all of his property of every description, after the payment of debts and expenses, to his wife in fee. Some sixteen years later he made the following codicil: "Be it remembered, that I, Alonzo B. Dearborn of Corinna, a farmer and lumberman, do make this my codicil hereby confirming my last will made on the nineteenth day of February, 1881 and do hereby give, devise bequeath my estate and property real and personal to my legal heirs after the decease of my beloved wife, Julia A. Dearborn who will have the use and management during her lifetime should she survive my decease the balance if any to be disposed of as aforementioned." *Held:* that the language of the codicil, "hereby confirming my last will made on the nineteenth day of February, 1881," should not be construed as showing an intention upon the part of testator to confirm that will in full, since if such had been his intention he would not have made the codicil. That what he did mean was to confirm the will except as modified by the codicil. That

under the will and codicil the wife took an estate for life in all of the property left by the testator, with the power to dispose of any portion of the same during her lifetime, and that at her decease all of the property of the testator remaining at that time went to his heirs at law.

Williams v. *Dearborn*, 506.

"WILSON ACT."

See COMMERCE.

WITNESSES.

See TRIAL.

When impeaching conduct of a witness is drawn out upon cross-examination, which is indicative of a deep-seated hostility and bias on his part against one of the parties, it is error to exclude all explanation of such conduct upon re-direct examination. *Lenfest* v. *Robbins*, 176.

WORDS AND PHRASES.

WORK AND LABOR.

See LORD'S DAY.

When a written contract has been waived, an action of quantum meruit will lie for work and labor done. *Hilton* v. *Hanson*, 21.

In an action to recover on a quantum meruit, evidence *held* to show that the written contract under which the work was begun was waived by the defendants. *Hilton* v. *Hanson*, 21.

In addition to the "account annexed," a plaintiff's writ contained the general money counts with the following specification: "Under the money counts the plaintiff will claim to recover the sums named in the first count of his writ being money earned by said plaintiff for labor performed by said plaintiff at White Oak Spring Hotel at Poland, Maine." *Held:* that the claim of the plaintiff is restricted and his right to recover limited by his specification, and under the pleadings he cannot avail himself of evidence of money had and received. *Carson* v. *Calhoun*, 456.

WRITTEN INSTRUMENTS.

See DEEDS.

WRIT OF ENTRY.

See DEEDS. REAL ACTIONS.

Where a writ in a real action contains no claim for mesne profits, none can be recovered. *Stubbs* v. *Railway Co.*, 355.

WRITS.

See EXCEPTIONS. EXECUTION. HABEAS CORPUS. INJUNCTION. PROCESS REAL ACTIONS. TRUSTEE PROCESS. WRIT OF ENTRY.

APPENDIX.

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF UNITED STATES.

CONSTITUTION OF MAINE.

ENGLISH STATUTES.

STATUTES OF HAWAII.

STATUTES OF UNITED STATES.

STATUTES OF NEW YORK.

COLONIAL ORDINANCES OF MASSACHUSETTS.

SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES OF MAINE.

ERRATA.

On page 62, the sentence in the opinion next to the last should read as follows: "It does not appear that the grantee will obtain an unconscionable advantage by the deed or that the grantor will not be fairly compensated for his liability on his covenants by the purchase money which the grantee paid him."

On pages 161 to 172 inclusive, the abbreviated title "*State* v. *Pennell*" should read "*State* v. *Intoxicating Liquors.*"

On page 257, the sentence above the head notes "Constitutionality of Section 40 of R. S., c. 144" should read "Constitutionality of Section 42 of R. S., c. 144." Also the sentence "R. S., c. 144, §§ 24, 39, 40" should read "R. S., c. 144, §§ 16, 17, 24, 39, 40, 42."

On page 332, the sentence above the head notes "R. S., c. 79, §§ 37, 44, 59," should read "R. S., c. 79, §§ 37, 44, 55."

On page 355, the sentence above the head notes "R. S., 1883, c. 61, § 16" should read "R. S., 1883, c. 51, § 16."

On page 358, in line 8 from the top, the words "R. S., 1883, chapter 61" should read "R. S., 1883, chapter 51."

On page 416, the sentence above the head notes "Private and Special Laws, 1861, c. 24" should read "Private and Special Laws, 1861, c. 34." Make same correction in the head notes. Also same correction on pages 418 and 423.

On page 431, in second and third lines of last head note, the words "section 31 of chapter 29 of the Revised Statutes of 1883," etc. should read "section 31 of chapter 27 of the Revised Statutes of 1883," etc.