"TROS TYRIUSQUE MIHI NULLO DISCRIMINE AGETUR"

MAINE REPORTS

102

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

SEPTEMBER 25, 1906—JULY 9, 1907

GEO. H. SMITH

REPORTER

PORTLAND, MAINE

WILLIAM W. ROBERTS

1908

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

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

---

[1] HON. ANDREW P. WISWELL, CHIEF JUSTICE
[2] HON. LUCILIUS A. EMERY, CHIEF JUSTICE
HON. WILLIAM PENN WHITEHOUSE
HON. SEWALL C. STROUT
[4] HON. ALBERT R. SAVAGE
[3] HON. FREDERICK A. POWERS
HON. HENRY C. PEABODY
HON. ALBERT M. SPEAR
[4] HON. CHARLES F. WOODARD
[5] HON. LESLIE C. CORNISH
[6] HON. ARNO W. KING

Justices of the Superior Courts

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

---

[1] Died Dec. 4, 1906. [2] Appointed Dec. 14, 1906. [3] Resigned in March, 1907.
[4] Appointed Dec. 14, 1906. Died June 17, 1907. [5] Appointed in March, 1907.
[6] Appointed June 28, 1907.

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1907

LAW TERMS

BANGOR TERM, First Tuesday of June.

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

PORTLAND TERM, Fourth Tuesday of June.

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

AUGUSTA TERM, Second Tuesday of December.

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

TABLE OF CASES REPORTED

TABLE OF OTHER MATTERS REPORTED

TABLE OF CASES CITED

BY THE COURT

FORMS.

"Pleadings and the entries of judgments and decrees ought to be in the language of the law."

CHIEF JUSTICE RUFFIN, in *Henry* v. *Henry*, 9 Iredell (N. C.), 286.

"One departure from the rule invites another, and this proceeds until no rule is left."

CHIEF JUSTICE RUFFIN, in *Henry* v. *Henry*, supra.

TRUTH.

"Truth is the handmaid of justice, freedom is its child, peace is its companion, safety walks in its steps, and victory follows in its train."

SIDNEY SMITH.

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

JAMES W. PEASLEY *vs.* SUMNER S. DRISKO.

SAME *vs.* BION TIBBETTS.

Washington. Opinion Sept. 25, 1906.

Deeds. Description. Construction.

1. The rule that a later specific description controls a prior general description in a conveyance of land is limited to the evident subject matter of the conveyance. It does not require the inclusion of other matter.

2. In the description of the land to be conveyed by a deed the expression "the same deeded to me by B." may only indicate the source of the grantor's title, or locate and identify the parcel intended to be conveyed. It does not necessarily adopt all and singular the boundaries named in the deed referred to.

3. In this case the land to be conveyed was described in the deed as follows: "Also one other lot of meadow land lying on the Main Indian River Stream the same deeded to me by John Burns, meaning and intending to convey all my right in fresh meadow lands on both streams." In the deed from Burns the land conveyed was described by metes and bounds which included meadow and upland.

The meadow was only about one-fifth of the parcel described and the line of demarcation between the upland and the meadow was plainly visible.

Held: that the subject matter of the conveyance was meadow land only; that the reference to the deed of Burns was merely to identify or show the location of the meadow land; and that the upland included in the boundaries named in the Burns' deed, did not pass by the deed in question.

On exceptions by plaintiff. Overruled.

Trespass quare clausum fregit alleging that the defendant broke and entered the plaintiff's close in Jonesport and picked and carried away and converted to his own use 200 quarts of blueberries growing in said close. Plea, the general issue.

Heard at the January term, 1906, of the Supreme Judicial Court, Washington County, by the presiding Justice, without the intervention of a jury, with the right to except.

The plaintiff's close is described in his writ as "the land lying on the Main Indian River Stream, within the limits of Lot numbered 12, as according to B. R. Jones survey and plan of Township No. 22." The defendant admitted that he picked the blueberries on said Lot numbered 12, but claimed that he picked them on upland, within the limits of the land described in the writ, to which upland the defendant claimed title as an heir of one Timothy Drisko. The plaintiff claimed title under a mortgage given by said Timothy Drisko to one Stephen Reynolds. (The description of the premises conveyed by said mortgage fully appears in the opinion.) The parties agreed that their rights depended "upon the interpretation of and the construction of the description" contained in the aforesaid mortgage given by said Timothy Drisko to said Stephen Reynolds. The presiding Justice ruled that the mortgage conveyed only the meadow land part of the lot and not the upland part. To this ruling the plaintiff excepted.

The gist of the case appears in the opinion.

A. D. McFaul, for plaintiff.

H. H. Gray, for defendants.

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

EMERY, J. In the granting clause of a deed of real estate from Timothy Drisko to Stephen Reynolds the description of the land is as follows: "A certain piece of meadow land situated, lying and being in the town of Jonesport in said county and bounded and

described as follows (viz) one lot on Steel Meadow Brook so called, being the same I bought of Isaac N. McCaslin. Also one other lot of meadow land lying on the main Indian River Stream, the same deeded to me by John Burns, meaning and intending to convey all my right in fresh meadow lands on both streams." In the granting clause of the deed last referred to (John Burns to Timothy Drisko) the description is as follows: "A certain piece or parcel of land situated in Jonesport in said county and State, bounded as follows: by Indian River Stream on the west a short distance below the Rogers Meadow Brook so called; on the south by land of the said Timothy Drisko and Barnabas B. Leighton; on the east by Lot 12 in the Third Range; and on the north by land of Joseph Emerson in No. 11 in the Second Range; containing 50 acres more or less." The boundaries named in this last named description (Burns to Drisko) include both upland and meadow land. It appears from the evidence that there is a distinct line of demarcation between the two, and that the meadow land is not over one-fifth of the whole. The determining question is whether the language of the whole description in the deed from Timothy Drisko to Stephen Reynolds shows an intention to convey the whole of the 50 acre lot described in the deed from John Burns to Drisko, or only the meadow land part of it.

The plaintiff contends (1) that the description in the deed Burns to Drisko is to be read as a whole into the deed Drisko to Reynolds, and (2) that when so read into the latter deed, it fixes the boundaries of the lot to be conveyed, under the rule that a later specific description controls a prior general description. But the reading into the description the words in the deed referred to does not read out of it the other words in the description. The reference to another deed does not necessarily make the boundaries named in that deed the boundaries of the lot named in the first deed. The language may show that the reference was only to state the source of the title, or to identify the lot, and not for statement of boundaries. *Brunswick Sav. Inst.* v. *Crossman*, 76 Maine, 577, at p. 585; *Lovejoy* v. *Lovett*, 124 Mass. 270. Again, the rule invoked is limited to the evident

subject matter of the conveyance. It does not require the inclusion of other matter. Thus, if A. writes: "I grant White acre, the same deeded to me by B," and the deed of B. included Black acre with White acre, it does not follow that A. has granted Black acre also. So if A. should write "I grant a certain parcel of flats, the same deeded to me by B." and the deed of B. included upland and flats in one description it would not follow that A. had granted the upland as well as the flats especially if the upland was five times the extent of the flats.

In this case it seems evident to us that the subject matter of the deed Drisko to Reynolds was meadow land only, and that the reference to the Burns' deed in the description of the second lot was not to state its boundaries, but merely to identify it, to show its place on Indian River Stream. The first lot is specifically described as "a piece of meadow land." The second lot is also specifically described as "One other lot of meadow land." The description then closes with the words: "Meaning and intending to convey all my right in fresh meadow on both streams." The whole description is so plainly limited to meadow land, it should not be enlarged to include a much larger tract of upland merely because of the reference to a deed which conveyed meadow land and also upland. The language is not so explicit as to require it. Grammatically, the word "same" may refer to "meadow land" as well as to "lot," and even if it refers to "lot," that "lot" is still a "lot of meadow land."

Exceptions overruled.

CHARLES W. STEPHENS *vs.* CITY OF OLD TOWN.

Penobscot. Opinion September 26, 1906.

Public Officers. Superintendent of Streets. Compensation. Quantum Meruit. R. S., chapter 23, section 72.

1. A public officer for the performance of his official duties is entitled to such compensation only as is fixed by law for that office. If no compensation has been thus fixed he is not entitled to any.
2. A public officer appointed by a municipality, though subject in some respects to the orders of the municipality, cannot recover of the municipality any compensation for his official services unless a compensation thereof has been fixed by law for the municipality to pay, and then only to the extent so fixed. He cannot recover anything upon a quantum meruit count.
3. The Superintendent of Streets in Old Town in 1904-5 was not an employee or agent of the city entitled to damages for breach of contract for employment, but was a public officer possessing official powers and charged with public duties.
4. The Street Board of Old Town though authorized by law to "make all contract for labor" on the streets was not authorized to fix the compensation of the Superintendent of Streets.
5. The action of the City Council of Old Town in allowing from time to time as presented, bills of the Superintendent of Streets for services in the care of the streets did not fix any salary or compensation for that office.
6. Though the plaintiff may have been de jure Superintendent of Streets in Old Town from April, 1904, to Jan'y 26, 1905, it does not appear that any salary was fixed by law for that office to be paid by the city, hence he cannot recover any salary for that time.
7. The statute R. S., chapter 23, section 72, provides a per diem compensation "for every day of actual service" only. The plaintiff rendered no service during the time named and hence cannot recover under that statute, even though he was prepared and desired to perform all the duties of the office, but was prevented by the action of the City Council.
8. The plaintiff has included in his claim, however, an item of three dollars for services performed the preceding year, for which the defendant city consents that he may have judgment, and therefore the plaintiff may have judgment for that sum.

On report. Judgment for plaintiff for $3.00.

Assumpsit on account annexed to recover the sum of $610.13, for salary connected with the office of Superintendent of Streets of the defendant city. The writ also contained a quantum meruit count as follows:

"Also, for that the said defendant, at said Bangor, to wit, at said Old Town, on the 4th day of April, A. D., 1905, in consideration that the plaintiff, at its request, had done and performed certain labor and services for it, the said defendant, promised the plaintiff to pay him on demand, so much money as he reasonably deserved to have therefor; and the plaintiff avers that he reasonably deserved to have the sum of six hundred and ten dollars, and thirteen cents therefor, ($610.13) of which the defendant then and there had notice."

This action came on for trial at the January term, 1906, of the Supreme Judicial Court, Penobscot County, at which said term an agreed statement of facts was filed, and then by agreement the case was reported to the Law Court "for decision upon the agreed facts."

The agreed statement of facts is as follows:

"1. That, at the annual election of officers in said city, held on the first Monday in April, 1903, plaintiff was duly elected to the office of superintendent of Streets of said city, by the Street Board, under the amendment to the City Charter of 1903 as provided by chap. 197 of the Private and Special Laws for the year 1903, and acted in that capacity during the municipal year ending the first Monday in April, 1904, and that the balance of three dollars as specified in the account annexed to plaintiff's writ, was, and is due to him on his salary for the municipal year ending April 3, 1904.

"2. That, at the annual election of officers in said city, held on the first Monday in April, 1904, said plaintiff was re-elected to the office of Superintendent of Streets, by the Street Board, and that plaintiff duly qualified for that office and immediately entered upon the discharge of the duties of said office.

"3. That, at the regular meeting for election of officers held on the first Monday in April, 1904, as aforesaid, the regularly elected and qualified City Council of said city for said year, proceeded to, and did elect an entire new Street Board of five members, and this Board so elected, proceeded to, and did elect one George W. Griffin

to the office of Superintendent of Streets; that said Griffin thereafterward, namely, on April 6th, 1904, forcibly seized the team and other property pertaining to the Street Department, and assumed the office of Superintendent of Streets, and entered upon the performance of the duties thereof, thereby ousting the plaintiff from said office; that the said City Council refused to recognize said Stephens as the rightful incumbent of the office of Superintendent of Streets, but did recognize said Griffin in said office, and paid to him from month to month the salary fixed for that office by the de facto Street Board; that said Griffin, on and after April 6th, 1904, performed all the duties, and exercised all the functions of that office until, and including the 26th day of January, 1905, on which said date the said Street Board, elected in 1903 was declared to be the legally elected Street Board, and the said plaintiff the rightful incumbent of said office of Superintendent of Streets, and thereupon all the property pertaining to the Street Department was surrendered and turned over by said Griffin to the parties legally entitled to possession thereof, and said plaintiff was then and there re-instated in, and assumed the said office.

"4. That, from and after his election to said office as aforesaid, on the said first Monday in April, 1904, and before any payments had been made to said Griffin, as aforesaid, said plaintiff gave notice to said City Council that he claimed to be the legally elected Superintendent of Streets, and that from said 6th day of April, 1904, to and including said 26th day of January 1905, said plaintiff repeatedly gave notice as aforesaid of his claim to said office, and held himself at all times in readiness to assume and perform the duties thereof; that he never resigned from said office nor was he discharged by the Street Board which elected him to that office; that during said period said plaintiff regularly presented to the said City Council of said city, monthly bills for the amount of the per diem salary due and payable to him from said office at the end of each month, according to the annexed schedule, payment of which was refused by said City Council.

"5. That, after assuming said office, on January 27th, 1905, as aforesaid, plaintiff performed all the duties and exercised all the functions pertaining thereunto for the remainder of the current

municipal year, and during that time, namely, from January 27th, 1905, to April 3rd, 1905, was paid by said City Council of said city, on monthly bills rendered therefor to that body, the per diem salary of $1.50 per day, as fixed for said office by said Street Board, as hereinafter specified.

"6. That the yearly salary or emolument fixed for the office of Street Superintendent by the Street Board for the years 1903 and 1904 consisted of two parts, namely: a flat sum of two hundred dollars, and $1.50 per day additional.

"7. That no salary for the office of Superintendent of Streets was fixed by the City Council for either of the years 1903, 1904 or 1905; that no special appropriation for salary for this office was made for either of said years 1903, 1904 and 1905, nor for several years previous to 1903; that for several years the salary of the Superintendent of Streets has been paid out of the appropriation for roads and bridges; that the usual method of payment of this salary has been by presentment of bills for the per diem salary for each month to the City Council, which body approves and orders payment thereof monthly, and the flat salary is usually paid semi-annually, in September and February, and this is the usual manner of payment of salary and compensations in all similar cases; that since the passage of the said amendment of 1903, the Superintendent of Streets has been elected and the salary for that office has been fixed by the Street Board each year.

"8. That said plaintiff is the present incumbent of said office of Superintendent of Streets, and the aforesaid method of fixing his salary and the payment thereof has been followed during the current municipal year by the City Council of said city.

"9. That the amount claimed to be due by the plaintiff is correctly stated in the account annexed to writ, but the defendant does not hereby admit that anything is due from defendant city to the plaintiff."

Clarence Scott, for plaintiff.

F. J. Whiting, for defendant.

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

EMERY, J. From the first Monday in April, 1904, to January 26, 1905, the plaintiff was de jure, though not de facto, superintendent of streets in the city of Old Town, holding an office created by the charter of the city, and he was willing and prepared to perform the duties of the office, but was prevented from doing so by the city council's wrongful recognition of another person as superintendent of streets who did perform the duties of the office. The plaintiff now brings this action to recover the salary or emoluments of the office accruing during that time.

The superintendent of streets in Old Town was not, under the city charter, an employee or agent acting under contract with the city and entitled to damages for breach of a contract for employment. He was a public official possessing official powers and charged with public duties and hence, according to the well settled law, can recover only the salary or emoluments established by law for that office to be paid by the city. The question, therefore, is whether any such salary or emoluments were established for the office of superintendent of streets in Old Town.

The only statute cited is R. S., ch. 23, sec. 72, which provides that the compensation of the road commissioners of towns "shall be such sum as the town shall annually vote therefor, which sum shall in no case be less than one dollar and fifty cents a day for every day of actual service." Even if this statute includes the superintendent of streets provided for in the charter of the city of Old Town, it does not avail the plaintiff, since it limits the per diem compensation to days of actual service, and the plaintiff did not perform any service.

No such salary was established in terms by the city council. No appropriation was made for it, the compensation to the superintendent of streets being paid from time to time out of the general appropriation for roads and bridges upon bills presented therefor and allowed by special order of the council. The Street Board, however, a Board charged by the charter with general

superintendence of the streets and with the election of the superintendent, assumed as in preceding years to fix the salary at $200 per year and $1.50 per day additional. It is not claimed that the Street Board had any express authority from the legislature or city council to establish such salary, but it did have legislative authority to "make all contracts for labor." This power, however, cannot be stretched to include the power to establish an official salary for a public office.

The plaintiff contends that by allowing and paying for the municipal year 1904-05 and for several years next preceding the bills of the superintendent for salary as thus fixed by the Street Board, the city council impliedly adopted that act of the Board as its own act, and thus, by implication at least, established that salary for the office. This contention must be overruled. The payment of a claim made by an official for a specific sum as his official salary only disposes of that particular claim. It does not oblige the payment of any similar claim afterward made. It does not establish a salary for the office.

The plaintiff also counts upon a quantum meruit, and contends that, even if no stated sum has been established by law for the office, the sum claimed by him is a reasonable sum and what the responsibilities and duties of the office are reasonably worth. As already stated, there was no contractual obligation upon the city to make any compensation, hence there can be no recovery upon a quantum meruit. The city's obligation was only to pay such salary or make such compensation as should be established by law for the office. The government is not obliged to provide any salary or emoluments for the incumbent of any public office. If an office unprovided with compensation is accepted, the incumbent has no legal claim for compensation. The plaintiff's office does not appear to have been provided by competent authority with any compensation to be paid by the city, hence he cannot recover any for the time named. He has included in his claim, however, an item of three dollars for services actually performed the preceding year, for which the city consents he may have judgment.

Judgment for the plaintiff for three dollars.

ELISHA S. MARTIN, et al.

vs.

BENJAMIN L. SMITH AND ABBIE R. SMITH.

Washington. Opinion September 25, 1906.

Deeds. Prior and subsequent mortgages. Exception in covenant of freedom from incumbrances. Prior unconditional grant not limited thereby. Reformation of written instruments in action at law not authorized by R. S., chapter 84, sections 17 et seq. Action at law may be stayed. Equitable defenses. R. S., chapter 84, sections 16, 17.

1. In a deed of conveyance of land an exception in the covenant of freedom from incumbrances does not limit the extent or effect of the prior unconditional grant.
2. The statute R. S., ch. 84, sec. 17 et seq. does not authorize the court in an action at law to reform a written instrument to correct mistakes of the scrivener, and such mistakes cannot under that statute be held a legal or equitable defense to the action.
3. The court, however, may stay an action at law for a reasonable time to enable a party to procure a reformation of the instrument by appropriate decrees in equity.

On report. Report discharged and action remitted to nisi prius.

Real action to recover possession of certain real estate in the town of Marion, Washington County.

Tried at the January term, 1906, of the Supreme Judicial Court, Washington County. The plaintiffs introduced in evidence a mortgage of the demanded premises, given by the defendants to the plaintiffs dated December 11, 1902, of the following tenor, to wit:

"Know all men by these presents, That we, Benj. L. Smith and Abbie R. Smith, both of Marion in said County and State, in consideration of four hundred twenty-five dollars paid by E. S. Martin & Son of Eastport in said County and State, the receipt whereof we do hereby acknowledge, do hereby give, grant, bargain, sell and convey, unto the said E. S. Martin & Son, their heirs and assigns forever, a certain lot of land situated in said Marion, containing about seventy

acres with the building and improvements thereon, described and bounded as follows:

(Description of premises here follows.)

"To have and to hold the aforegranted and bargained premises with all the privileges and appurtenances thereof to the said E. S. Martin & Son, heirs and assigns to their use and behoof forever.

"And we do covenant with the said grantee, their heirs and assigns, that we are lawfully seized in fee of the premises; that they are free of all incumbrances; except a mortgage to the said Abbie R. Smith that we have a good right to sell and convey the same to the said grantee to hold as aforesaid; and that we and our heirs shall and will warrant and defend the same to the said grantees, their heirs and assigns forever, against the lawful claims and demands of all persons.

"Provided nevertheless, that if the said Benj. L. Smith and Abbie R. Smith, heirs, executors, or administrators pay to the said E. S. Martin & Son, their heirs, executors, administrators or assigns, the sum of four hundred and twenty-five dollars in three years from this date, viz. $150.00, Dec. 11th, 1903, $150.00, Dec. 11th, 1904, $125.00, Dec. 11th, 1905 in settlement of the notes of B. L. Smith, from the day of the date hereof, with interest on said sum at the rate of five per centum per annum, payable annually, then this deed shall be void, otherwise to remain in full force.

"In witness whereof, we the said Benj. L. Smith and Abbie R. Smith, have hereunto set our hands and seals this eleventh day of December in the year of our Lord one thousand nine hundred and two."

This mortgage was duly executed, delivered and recorded, and was duly foreclosed for nonpayment as shown by the record.

The defendants also introduced in evidence a mortgage of the demanded premises given by the defendant, Benjamin L. Smith, to Thomas W. Wood, dated January 1, 1900, of the following tenor, to wit:

"Know all men by these presents, that I, Benj. L. Smith of Marion, in the county of Washington and State of Maine, in consid-

eration of the sum of one thousand dollars paid by Thomas W. Wood of City of Boston and State of Massachusetts, the receipt whereof I do hereby acknowledge, do hereby give, grant, bargain, sell and convey, unto the said Thomas W. Wood, his heirs and assigns forever, a certain lot of land situated in said Marion, containing about seventy acres with the buildings and improvements thereon, described and bounded as follows, viz:

(Description of premises here follows.)

"To Have and to Hold the aforegranted and bargained premises with all the privileges and appurtenances thereof to the said Thomas W. Wood, his heirs and assigns, to his use and behoof forever;

"And I do covenant with the said Wood, his heirs, and assigns, that I am lawfully seized in fee of the premises; that they are free of all incumbrances; except twelve hundred mortgage to Charles E. Capen, that I have good right to sell and convey the same to the said Thomas W. Wood to hold as aforesaid; and that I and my heirs shall and will warrant and defend the same to the said Wood, his heirs and assigns forever, against the lawful claims and demands of all persons.

"Provided Nevertheless, That if the said Benjamin L. Smith, his heirs, executors, or administrators pay to the said Thomas W. Wood his heirs, executors, administrators or assigns, the sum of one thousand dollars in six months from this date, then this deed as also one certain note bearing even date with these presents, given by the said Benjamin L. Smith to the said Thomas W. Wood, to pay the sum and interest at the time aforesaid shall both be void, otherwise shall remain in full force.

"In witness whereof, I the said Benj. L. Smith and Abbie R. Smith wife of the said Benj. L. Smith in testimony of her relinquishment of her right of dower in the above described premises, have hereunto set our hands and seals this first day of January in the year of our Lord one thousand nine hundred."

This mortgage was also duly executed, delivered and recorded.

Thomas W. Wood to whom this last mentioned mortgage was given was the father of the defendant Abbie R. Smith who is the wife of the other defendant, Benjamin L. Smith. Said Thomas W.

Wood, a resident of Boston, Mass., at the time of his death, died testate July 22, 1902, bequeathing the last aforesaid mortgage to the said Abbie R. Smith and also naming her as the sole executrix of his last will and testament which was duly probated and allowed and letters testamentary issued to her.

At the conclusion of the testimony, it was agreed to report the case to the Law Court "for that court to pass upon and decide all questions of law and fact involved, upon so much of the evidence as is legally admissible."

The pith of the case appears in the opinion.

J. H. Gray and E. B. Jonah, for plaintiffs.

J. F. Lynch and A. D. McFaul, for defendants.

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

EMERY, J. This action is reported to the Law Court for decision of "all questions of law and fact involved." There is no limitation of the defense to any pleadings, and hence the court can give effect to any contention in defense which is supported by the evidence and could have been pleaded in the action. The action is a writ of entry or real action, and the plaintiff's title and right of possession are apparently sustained by a foreclosed mortgage of the demanded land from the defendants themselves. The defendants contend, however, and only contend, (1) that the mortgage by its terms is subject to a prior mortgage now held by one of the defendants and which both claim under as the older and better title, and (2) that if the mortgage to the plaintiffs is not in terms subject to the prior mortgage it does not express in that particular what was intended by both mortgagors and mortgagees, viz: that it should be subject to the prior mortgage and hence it should now be held to be subject to that mortgage.

The first contention cannot be sustained. The only mention of a prior mortgage in the mortgage deed to the plaintiffs is in the covenant of freedom from incumbrances as follows: "they" (the premises) "are free of all incumbrances except a mortgage to the said Abbie R. Smith." The granting clauses, the habendum, and

the covenant of full warranty are unconditional and without exception and operate to convey all the title of each grantor without exception. The exception in the covenant of freedom from incumbrances does not limit the effect of the prior unconditional grant. *Maker* v. *Lazell*, 83 Maine, 562.

The second matter set up in defense, if true in fact, is not an available defense in this action even since the statute allowing equitable defenses to be pleaded in an action at law. R. S., ch. 84, sec. 17. True, the statute declares that the defendant may plead in defense "any matter which would be ground for relief in equity," but the context shows that the only relief to be granted is "against the claims of the plaintiff," that is, the claims made in the action. "The statute does not go so far as to provide for the separate determination of a legal right and of a distinct, independent, equitable right in the same action at law, and then for setting off the judgment upon the equitable right against the judgment upon the legal right. The equitable matter to be pleaded in the action at law must be matter of defense to the plaintiff's claim, not matter of set off, not matter constituting ground for relief in equity apart from and independent of the action at law.

In this action the plaintiffs set up only a legal right and prima facie sustain it by an effective deed of conveyance from the defendants themselves. Without some matter, legal or equitable, to upset or avoid that deed, there is no defense to the action. The evidence does not disclose any such matter. The only claim made affecting the deed is that in drafting it there was omitted one provision the parties intended to have inserted. The validity of the deed as it stands is not questioned, and its effect to vest title and right of possession in the plaintiffs is clear. It is a muniment of title and must be given effect according to its terms in any action, legal or equitable, until duly reformed so that its terms shall have a different effect.

The procedure to reform a written instrument by changing its language to such as the parties intended to use, or to change its effect to accord with their intention, has always been exclusively in equity, and necessarily in equity, in those jurisdictions where the distinction

between legal and equitable procedure still prevails. *Winnipiseogee Paper Co.* v. *Eaton*, 64 N. H. 234. It is evident that any judgment at law though it might avoid the deed or refuse it effect, could not reform it. The nature of the right of reformation is such as to require for its enforcement the flexible decrees obtainable by suits in equity.

This right of reformation of a written instrument is not mere matter of defense to an action in which the instrument is set up as the basis or source of a right. It is an independent affirmative right arising as soon as the instrument is delivered. Being independent of any action at law and requiring decrees in equity for its enforcement, it should be enforced by a separate suit in equity and not interposed as an equitable defense to an action at law. In this case the sustainable claim of the defendants (if it should prove to be sustainable) is not that the deed is void, but only that in one particular its language fails to express an intention of the parties. If this be so, the deed is not to be declared void nor refused effect in an action at law, but is to be reformed so it can have the effect intended. For reasons above given such reformation can be effected only by suit and decrees in equity. The statute, R. S., ch. 84, sec. 17, does not go so far as to provide that it shall, or even may, be done in an action at law.

Nor can such reformation be effected under sec. 16 of the same statute; ch. 84, which provides for the transformation of an action at law into a suit in equity "when it appears that the rights of the parties can be better determined and enforced by a judgment and degree in equity." This provision applies only to the rights of the parties which are made the subject matter of the action at law, not to other and independent rights. In this action the only right in question is that of the plaintiffs, to the possession of the demanded land. That right, if it exists, is a pure legal right to be enforced by judgment and execution at law. Should the action be transformed into a suit in equity in order to have the deed reformed, the right of possession under the deed as reformed is still to be determined and enforced by judgment and execution at law. In *Lewiston* v. *Gagne*, 89 Maine, 396, begun and decided after the passage of the statute, (secs. 16 and 17) the action was at law upon a tax collector's

bond, and it was heard on report as in this case. It appeared in evidence that the bond was intended to cover the year 1893, but by mistake had been written to cover the year 1894. The court said that the bond must be reformed by process in equity, unless the parties would agree to have the damages assessed as if the bond were written for the correct year.

Though we cannot consider in this action the question of how or whether the deed should be reformed, we think the defendants should have reasonable opportunity to present that question by suit in equity before judgment in this action. They should not be deprived of that opportunity because of this opinion that it could not be presented here. The statute is not so clear as to make the contrary opinion evidence of ignorance or carelessness. The report will therefore be discharged, and this action remitted to nisi prius to be continued for a reasonable time to enable the defendants to present by suit in equity their claim to have the deed reformed.

So ordered.

MAUD S. LOGUE

vs.

THE GRAND TRUNK RAILWAY COMPANY.

Cumberland. Opinion September 29, 1906.

Negligence. Evidence. Burden of Proof. Uncontradicted testimony not binding, when.

1. When it is proved that a mechanical appliance had at one time been broken and thereby had become dangerous, the burden of evidence is upon the party alleging that the danger was afterward removed.
2. In such case the testimony of one witness that he had done what would have removed the danger is not binding on the jury, though uncontradicted by any other witness, when circumstances tend to show that in fact the danger was not removed.

On motion 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 in allowing its semaphore wire across a public street to sag down into the street thereby causing the horse which was drawing the carriage in which the plaintiff was riding, to stumble and fall down, in consequence of which the plaintiff was thrown into the street and injured.

Tried at the October term, 1905, of the Supreme Judicial Court, Cumberland County. Plea, the general issue. Verdict for plaintiff for $3000. The defendant then filed a general motion for a new trial.

The material facts appear in the opinion.

Foster & Foster and J. M. Libby, for plaintiff.

C. A. & L. L. Hight, for defendant.

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

EMERY, J. At the Grand Trunk Railway station at Mechanic Falls, the semaphore wire rope, composed of five or six strands and nearly half an inch in diameter, passed, when in order, high over a public street out of the way of travelers. This wire rope had parted near one end, so that across the street, unless held up, it would sag down in the way of travelers. The break was not repaired for several days. In the meantime on one occasion the rope was down across the street, and the plaintiff traveling along the street was injured thereby without any fault on her part. So far the liability of the railroad company is clear.

It was in evidence, however, that immediately after the rope was broken some measures were taken by the company's servants to so fasten it up that where it crossed the street it should not sag down in the way of travelers. A signalman in the company's employ testified that he drew the rope taut, up out of the way of travelers, and then tied the end around a post with two or three half hitches which held the rope in place. Immediately after the accident he went to this post and found the rope unfastened, or, to use his own words, "the half hitch was taken out." The station agent testified that at the time of the breaking of the rope he went to see if the signalman had effectually fastened it up and found it had been "securely" tied around the post, but he did not describe how it had been tied. This testimony was uncontradicted by any oral evidence, and the rope had been thus held up for a time. The defendant company contends that this testimony being uncontradicted must be taken as true; that it shows that the company had exercised due care; and that until the plaintiff traces the undoing of the tie around the post to some agency of the company (which it is contended she has not done) she has not overcome the defense thus set up.

On the other hand, the plaintiff adduces various circumstances shown in evidence as sufficient to overcome the testimony of the signalman and station agent, and as sufficient to authorize the jury to find in fact that the rope had not been properly fastened up. The

signalman had but one hand; the wire rope was very stiff, so stiff that a piece one foot long could hardly be bent at all by the two hands; there was a heavy strain on the rope during the process of tying and afterward, a strain liable to be increased at times by various causes; the rope did come down. The testimony of the signalman was really uncorroborated. The station agent did not corroborate him as to the mode of fastening, but simply gave an opinion that the fastening was secure, an opinion on the very question for the jury. Again, the fact that the wire was broken having been established and its dangerous condition as to travelers being manifest, the burden of evidence, at least, was upon the company to show that afterward and before the injury the rope had been in fact securely fastened up.

The case turns upon the question whether the broken rope was in fact so securely fastened up that its possible falling down across the street was not to be apprehended by ordinarily careful men bound to know the full situation and the danger. It is not enough that the company's servants believed the fastening to be sufficiently secure to prevent the falling of the rope. The question is one of fact, not of belief. How the rope was fastened up and whether that fastening was a compliance with the duty of the company were questions for the jury. The issue before us is therefore narrowed down to this: Was the jury bound by the testimony of the signalman to find that the rope was in fact fastened up as he stated, and that such fastening was such as should have been made under all the circumstances? We think not. It is not an unreasonable inference from all the evidence that the fastening the signalman in fact did make was not sufficient to hold the rope up in place.

Motion overruled.

INHABITANTS OF CASCO *vs.* INHABITANTS OF LIMINGTON.

Cumberland. Opinion October 10, 1906.

Judgment of jury will not be revised, when. Insane paupers. Expenses. Pauper statute. Contagious diseases statute. R. S., chapter 18, section 51; chapter 27, section 37.

1. When the only evidence to fix a date is the recollection of witnesses, the court will not revise the judgment of the jury as to whose recollection is the better.
2. Expenses incurred by a town to protect its inhabitants or the public from danger of injury by insane paupers are not recoverable under the pauper statute R. S., chapter 27, section 37, nor under the contagious diseases statute R. S., chapter 18, section 51.

On motion by defendant. Sustained unless plaintiff files remittitur within thirty days.

Action to recover for pauper supplies furnished by the plaintiff town to one Osgood Nason and his family, whose pauper settlement was alleged to be in the defendant town.

Tried at the October term, 1905, of the Supreme Judicial Court, Cumberland County. Plea, the general issue. Verdict for plaintiff town for $600. The defendant then filed a general motion for a new trial.

The material facts appear in the opinion.

W. C. Whelden and W. G. Chapman, for plaintiff.

A. F. Moulton, for defendant.

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

EMERY, J. The proper determination of the main issue, the settlement of the pauper, depended upon the date of his removal from the Lane house in Hollis to the Came house in Standish. He moved in the July next before, or next after, the death of Lane at the Lane house in December, 1883. Perhaps more witnesses testified that the

removal was in the July before Lane's death, but several witnesses testified with more or less positiveness that it was in the July thereafter. Unfortunately neither party produced any contemporaneous written entries or memoranda to fix the date and the jury were obliged to depend upon the recollections of witnesses. It is plain, therefore, that the verdict as to the main issue must prevail since the jury saw and heard the various witnesses and we have not.

The jury further found all the items charged by the plaintiff town for the support of the pauper and his family to be reasonable in amount and proper in character. Some of these items were for payments to watchers over an insane son of the pauper, and it appears plainly from the evidence that the main purpose in employing these watchers was not the better care of the patient but to prevent his doing harm to the neighbors and others. The pauper statute authorizes the recovery only of the expenses of relieving persons destitute, and of their removal or burial. R. S., ch. 27, sec. 37. Expenses incurred by a town to protect its inhabitants or the public from danger of hurt by paupers are not recoverable under the pauper statute. *Kennebunk* v. *Alfred*, 19 Maine, 223. The statute authorizing recovery of expenses of preventing the spread of contagious diseases by paupers (R. S., ch. 18, sec. 51) is not applicable to a case of insanity.

While the insanity of the son may have required some extra care for him, much of the expense charged on that account was clearly not for that purpose. It is difficult to determine the amount of the excess, but upon the present evidence it appears to be at least $200.

New trial ordered, unless the plaintiff within thirty days after the filing of the certificate of decision shall remit all of the verdict over four hundred dollars, in which case judgment is to be entered on the remaining verdict.

SAMUEL G. DAMREN et al. *vs.* GEORGE E. TRASK.

Androscoggin. Opinion October 11, 1906.

Covenant broken. Assignment of breaches. Evidence.

It is a well settled general rule respecting the assignment of breaches of covenants that the plaintiff may allege the breaches generally by simply negativing the words of the covenant, special averments being required only when such a general assignment would not necessarily show a breach.

In an action of covenant broken upon a contract under seal for the purchase of a quantity of clapboards, the plaintiffs in their declaration set out the covenant according to its terms, and alleged performance and breach as follows: "And the plaintiffs aver that, pursuant to such deed, they have done and performed all things by them according to the covenants aforesaid to be performed. Yet said defendant has not taken away from said mill the clapboards as aforesaid, and has not paid the plaintiffs therefor the sum of forty dollars per thousand, but wholly refuses and neglects to do so, and so has not kept his covenant aforesaid, but has broken the same."

Held: that the language of the plaintiffs' assignment may reasonably be construed to signify a refusal to pay for the clapboards taken, as well as a refusal to pay for those not taken; and inasmuch as a breach of the contract would be established by evidence of a partial failure, as well as by evidence of a total failure in the respects named, it was a sufficient general assignment of the breach to allege an entire failure to take the clapboards, although a portion had in fact been taken, and to allege an entire failure to pay for them, although a portion had in fact been paid for.

It is a well settled and familiar rule that in cases of negligence the evidence must be confined to the time and place and circumstances of the injury, and the fact that the same person had been guilty of negligence on certain other specified occasions can have no legitimate bearing upon the question of his carefulness or competency at the time in controversy.

Evidence of a self serving character is uniformly held to be inadmissible. This is a branch of the general rule that a man shall not be allowed to make evidence for himself.

On exceptions both by plaintiffs and by defendant. Sustained.

Action of covenant broken upon a contract under seal for the purchase of a quantity of clapboards of certain specified kinds and dimensions.

Tried at the April term, 1906 of the Supreme Judicial Court, Androscoggin County. Plea inferred to be non est factum with a

brief statement alleging performance of the contract on the part of the defendant and a failure on the part of the plaintiffs to perform a condition precedent. Verdict for plaintiffs for $1119.97. Exceptions to rulings made by the presiding Justice during the progress of the trial, were taken both by plaintiffs and by defendant.

The case sufficiently appears in the opinion.

Oakes, Pulsifer & Ludden, for plaintiffs.

Arthur S. Littlefield and C. L. Macurda, for defendant.

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

WHITEHOUSE, J. This is an action of covenant broken upon a contract under seal for the purchase of a quantity of clapboards of certain specified kinds and dimensions. The verdict was for the plaintiffs for $1119.97, and the case comes to this court on exceptions by both parties.

The plaintiffs' exceptions.

By the terms of the contract, the clapboards were to be taken by the defendant from the plaintiffs' mill when dressed and bundled according to the contract, and paid for at the rate of forty dollars per thousand, thirty days after delivery. Up to June 13, 1904, about 40,000 clapboards were taken by the defendant, amounting at the contract price, to $1604, and a portion of these had been paid for.

The plaintiffs in their declaration set out the covenant according to its terms, and allege performance and breach as follows: "And the plaintiffs aver that, pursuant to such deed, they have done and performed all things by them according to the covenants aforesaid to be performed. Yet said defendant has not taken away from said mill the clapboards as aforesaid, and has not paid the plaintiffs therefor the sum of forty dollars per thousand, but wholly refuses and neglects to do so, and so has not kept his covenant aforesaid, but has broken the same."

On the thirteenth day of June, 1904, the defendant refused to take any more clapboards, claiming that the plaintiffs had failed to perform the contract, and that the clapboards were not of the proper quality.

The plaintiffs claimed to recover for the clapboards delivered up to and including June 13, 1904, and damage for refusal to take clapboards thereafter; but the defendant claimed that under the allegations of breaches in the declaration, the plaintiff could not recover for the clapboards delivered but not paid for.

The court sustained the position of the defendant, and ruled that the plaintiffs, under their declaration, could not recover for any amount, which the defendant owed them on account of the forty thousand clapboards actually received by him.

The plaintiffs asked leave to amend by alleging specifically the breach of the defendant, by his refusal to pay for the clapboards so delivered, but on objection by the defendant the court ruled that this would have the effect of introducing a new cause of action, and that as a matter of law such amendment could not be allowed. To these rulings the plaintiffs have exceptions.

It is a well settled general rule respecting the assignment of breaches of covenants that the plaintiff may allege the breaches generally by simply negativing the words of the covenant, special averments being required only when such a general assignment would not necessarily show a breach. *Glover* v. *O'Brien*, 100 Maine, 551. "A common law method for assigning a breach of covenant is to negative the words of the covenant and this is generally sufficient. And it may be assigned in other words which are co-extensive with the import and effect of the covenant and as general as those in which the covenant is expressed; or by stating its legal effect. But it must distinctly appear by express words or by necessary implication that the facts stated in the declaration cannot be true when the covenant is broken." Encyc. Pl. & Pr. Vol. 5, 369; Cyc., Vol. 11, p. 1144, and cases cited; 1 Chit. Pl. (16 Ed.) 175.

In *Brown* v. *Stebbins*, 4 Hill, 154, there was a covenant "to sell and dispose of said lots of land to the best advantage that he can obtain for the same and to pay the proceeds of said sales to the said Brown; "and the breach assigned was that the defendant "did not sell and dispose of the lots to the best advantage or for the most he could obtain for them." A special demurrer to this assignment was sustained. In the opinion the court say; "Does the pleader mean

that Stebbins did not sell at all, or that he did not sell for the best price which could have been obtained? It is impossible to say which. If there was no sale, that fact should have been directly alleged; and if the complaint be that Stebbins sold, but did not get the best price which could have been obtained, the pleader should have said so in explicit terms. Without such an averment the defendants can neither know how to plead, nor what evidence they may expect to meet on the trial.

The breach is not assigned in the words of the joint covenants, or either of them. And when the pleader undertakes to assign a breach coming within the substance, effect or intent of the covenant, he is held to a more strict rule than when he follows, either negatively or affirmatively, as the case may be, the words of the contract. (Com. Dig. Pleader, C. 47.)

The remaining breach is, that Stebbins did not use all necessary care and diligence in the sale of the lots. Here the pleader has followed and negatived the words of one of the joint covenants, and as a general rule that is sufficient."

In the case at bar it is to be inferred from the exceptions that the defendant's plea was non est factum with a brief statement alleging performance of the contract on his part, and a failure on the part of the plaintiffs to perform a condition precedent. No question was raised by the pleadings in regard to the sufficiency of the declaration. The plaintiffs' allegation that the "defendant has not taken away from said mill the clapboards as aforesaid, and has not paid the plaintiffs therefor the sum of forty dollars per thousand" negatives the words of the contract. True, it does not inform the defendant specifically whether the plaintiffs complain that the contract was broken by a refusal to accept or a refusal to pay for the clapboards, or a refusal to pay for some and a refusal to accept others. It is not a particular and explicit statement of the plaintiffs' claims. It might perhaps have been held objectionable on special demurrer; but errors which might be deemed fatal on a special demurrer will be disregarded when the demurrer is general, or when the defendant sets up the general issue, or a plea equivalent to the general issue. *Blake* v. *M. C. R. R. Co.*, 70 Maine, 60; *Crocker* v. *Gilbert*, 9

Cush. 134; and all objections to the form of a declaration, or that it does not sufficiently set forth the ground of the plaintiffs' claim, must be raised by demurrer. 1 Chit. Pl. 693, and cases cited. Only when no cause of action is stated in the declaration is the defendant justified in pleading the general issue and raising the objection upon the trial. *Fuller* v. *Jackson,* 82 Mich. 482. But the language of the plaintiffs' assignment may reasonably be construed to signify a refusal to pay for the clapboards taken, as well as a refusal to pay for those not taken; and inasmuch as a breach of the contract would be established by evidence of a partial failure, as well as by evidence of a total failure in the respects named, it was a sufficient general assignment of the breach to allege an entire failure to take the clapboards, although a portion had in fact been taken, and to allege an entire failure to pay for them, although a portion had in fact been paid for. It is accordingly the opinion of the court that, if otherwise entitled to prevail, the plaintiffs are not precluded by any insufficiency in their declaration from recovery for the clapboards actually delivered, and that the plaintiffs' exceptions must be sustained.

This conclusion renders it unnecessary to consider the question of the plaintiffs' right to amend the declaration as proposed in their motion; but see *Wilson* v. *Widenham,* 51 Maine, 566, where it was held that if the covenants are set out in full, but a breach of only one is alleged, an amendment is allowable adding a new count alleging the breach of another covenant.

The defendant's exceptions.

Inasmuch as the question of the admissibility of the evidence relating to the character of the bundles of clapboards sawed prior to May 15, but not finished and sorted until after June 13, 1904, will necessarily arise upon the second trial of the case, it becomes the duty of the court to consider the exceptions taken by the defendant to the admission of this evidence at the first trial.

On the fifth day of April, 1904, the defendant agreed to purchase all of the clapboards of certain kinds and dimensions then sawed and all that the plaintiffs might saw at their mill in Sheepscot, Maine, prior to May 15, 1904. It was in evidence at the trial that on the 13th day of June, 1904, the defendant having then hauled away

about forty thousand of the clapboards, refused to take or pay for any more on the ground that the quality was not in accordance with the requirements of the contract. The plaintiffs claimed damages on account of such refusal of the defendant to take and pay for the clapboards finished by them after June 13, but the defendant sought to justify his refusal by evidence tending to show that the clapboards finished and bundled up to the time of such refusal, were not in accordance with the contract. On the other hand for the purpose of showing that the clapboards were in accordance with the contract, the plaintiffs were permitted, subject to objections and exceptions, to introduce testimony as to the quality of the clapboards sawed prior to May 15, but not finished or sorted until after the defendant's refusal to receive any more.

With respect to this evidence and the issue between the parties, the presiding judge instructed the jury as follows: "I propose to submit to you the simple question, whether or not, as to those forty thousand that were finished and sorted and bundled and delivered to Trask and taken by Trask up to and including the 13th day of June, 1904, they were in accordance with the contract as I have explained it. If they were not in accordance with the contract, if this defendant after having entered into this contract on the 5th day of May had taken clapboards delivered by the plaintiffs up to the 13th of June to the extent of forty thousand or thereabouts, and they had not been in accordance with the terms of the contract as written and as I have explained to you, then the defendant had the right to refuse to take any more."

"You have heard all these witnesses, you have heard testimony as to the identity of the various bundles that have been exhibited to you, as to where they came from, testimony upon both sides. And I also permitted testimony as to the character of the bundles that were finished and bundled after the 13th because it might throw some light upon the question, especially if no change had been made in the methods of finishing or sorting, would throw some light upon the question as to the quality of them."

Thus upon the question of fact whether the clapboards as finished sorted and bundled prior to June 13, were in accordance with the

contract, evidence was admitted "as to the character of the bundles that were finished and bundled" after the defendant's refusal on that date to accept any more of them, and the jury were allowed to consider it without proof that "no change had been made in the methods of finishing or sorting." They were instructed that such evidence "might throw some light upon the question especially if no change had been made in the methods" etc. While this instruction emphasizes the importance of the evidence if the methods of sorting had not been changed, it did not exclude it from the consideration of the jury, even if they were satisfied that the methods had been changed. They were authorized to understand that the evidence of subsequent bundling was entitled to more weight if there had been no change in the methods, but even if the methods had been changed, the evidence "might throw some light upon the question of the quality of them" as bundled before that time, and in any event it was to be considered by them.

It appears from the exceptions that the contract provided for the manner in which the clapboards should be dressed, sorted and bundled. These processes necessarily involved the exercise of personal care and skill and judgment on the part of the operators, and the possibility of a design on the part of the plaintiffs to produce results advantageous to themselves, even though at variance with the contract. Assuming, however, that it was practicable, under these circumstances, to show that the manner of "dressing, sorting and bundling" was in all respects the same after June 13, as before, and that there was evidence to warrant the jury in finding that fact and also that the result after June 13, was according to the contract, evidence of such subsequent operations would doubtless have been admitted without objection upon the question in dispute, whether the clapboards received were in accordance with the contract. But in the absence of evidence to establish such identity of process before and after June 13, and to show results according to contract after June 13, evidence of the manner of dressing, sorting and bundling after June 13, could have no legitimate tendency to prove that the clapboards dressed, sorted and bundled before June 13, were in accordance with the contract. It not only fails to meet the ordinary requirement and prac-

tical test of relevancy, but it is obnoxious to some of the rules of what Mr. Wigmore terms "auxiliary probative policy." In attempting to dispute or explain away the evidence thus offered, new issues will arise as to the occurrence of the instances and the similarity of conditions, new witnesses will be needed whose cross-examination and impeachment may lead to further issues; and thus the trial will be unduly prolonged, and the multiplicity of minor issues will be such that the jury will lose sight of the main issue, and the whole evidence will be only a mass of confused data from which it will be difficult to extract the kernel of controversy." 1 Wigmore on Ev. sec. 443, p. 526. "Moreover, the adverse party, having no notice of such a course of evidence, is not prepared to rebut it." 1 Greenl. Ev. sec. 52. It is therefore open to the objections of unfair surprise and confusion of issues.

With respect to the element of personal care involved in the process of sorting and bundling, for aught that appears, the work before June 13, may have been done by negligent and incompetent men, and after June 13, by careful and competent men; but if done by the same men before and after that date, it is a well settled and familiar rule that in cases of negligence the evidence must be confined to the time and place and circumstances of the injury, and the fact that the same person had been guilty of negligence on certain other specified occasions can have no legitimate bearing upon the question of his carefulness or competency at the time in controversy. *Parker* v. *Portland Pub. Co.*, 69 Maine, 173; *Maguire* v. *Middlesex R. R. Co.*, 115 Mass. 239; *Hatt* v. *Nay*, 144 Mass. 186; *Mayhew* v. *Sullivan Mining Company*, 76 Maine, 100.

If any departures from the contract were disclosed by the sorting and bundling before June 13, and they were the result of either negligence or design on the part of the plaintiffs, it might be expected that after complaint from the defendant in regard to the quality of the clapboards and refusal to accept any more, the plaintiffs would endeavor to change their methods in order to make the clapboards conform more nearly to the requirements of the contract, and evidence of the results of such sorting and bundling after June 13, would obviously be of the self serving character uniformly held to be inad-

missible. This is a branch of the general rule that a man shall not be allowed to make evidence for himself. Chamberlayne's Best on Ev. p. 478.

It is accordingly the opinion of the court that the entry must be

Plaintiffs' exceptions sustained.
Defendant's exceptions sustained.

In Equity.

MARY H. WHITMORE

vs.

SYLVESTER B. BROWN AND PEDRICK D. GILLEY.

Hancock. Opinion October 25, 1906.

Nuisance. Equity power to remove same will not be exercised, when. Erection of structures which may be a nuisance will not be enjoined, when. Structures which are nuisances not outlaws. Structures lessening value of other land not subject to abatement. Wharf cannot be lawfully erected on one's own flats in tide water without license. Legal rights not infringed because structures are unsightly. Wharf obstructing navigation on tide water is infringement of public right only. Owner of land on tide waters may have nuisance abated, when. Colonial Ordinances, 1641-1647; R. S., chapter 4, sections 96, 97, 98, 99; chapter 22, sections 5, 13.

1. Except in extreme cases, the court will not exercise its equity powers to compel the removal of existing structures alleged to be a nuisance, but will remit the plaintiff to his remedies at law which in this state are "plain, adequate and complete."
2. Nor will the court intervene with its equity powers to abate a nuisance which the plaintiff has long tolerated, but will require him in such case to establish his claim at law.
3. Nor will the court enjoin the proposed erection of a structure which may be a nuisance, unless the right threatened by such structure is clear, and the fact clearly established that the proposed structure will infringe such right; otherwise the plaintiff must first establish his claim at law.

4. The mere fact that structures are, or will be, erected and maintained on one's own land without the license required by statute or ordinance, does not make them outlaws, to be lawfully destroyed by any one, or abated at the private suit of any person.
5. Also the mere fact that structures upon the land of the person maintaining them, lessens the commercial value of other lands, or the enjoyment of them by the owners, does not make such structures subject to abatement by force or by suit.
6. No one can lawfully erect or maintain a wharf upon his own flats upon tide water without a license from the municipal officers of the town as provided in R. S., chapter 4, sections 96 to 99 inclusive, but if so erected and maintained, the wharf cannot be abated except at the suit of the public, or of some private person showing that it infringes some particular right of his own, distinct from his share in the public right.
7. That such a wharf is unsightly and obstructs the view from an adjoining residence lot, and thereby reduces the value of the residence, does not infringe any legal right of the owner or tenant of such lot, and does not give him any right to an abatement by suit or otherwise.
8. That the wharf obstructs the navigation, or boating facilities, on the tide water in front of an adjoining residence lot is an infringement of a public right only, and does not give the owner or tenant of such lot a right to an abatement even though the wharf thereby lessens the value of the lot.
9. Where a lot of land borders on tide waters the owner or tenant has the right of access to, and departure from, the lot by water, and such right is a private right peculiar to such owner or tenant distinct from the public right of navigation, and if the unlicensed wharf obstructs such right of access and departure, it is to that extent a nuisance which can be abated at the suit of such owner or tenant.
10. In this case no infringement of any private legal right of the plaintiff by the unlicensed wharf is shown, except possibly the right of access to, and departure from, her land by water. The infringement of that right, however, is not so clearly established as to authorize the court to issue an injunction even against a proposed extension of the wharf. Hence the plaintiff must be remitted to the usual legal remedies.

See *Whitmore* v. *Brown*, 100 Maine, 410.

In equity. On appeal by plaintiff. Bill dismissed.

Bill in equity alleging that a certain wharf and buildings thereon encroach upon the plaintiff's premises, that said wharf is a nuisance, &c., and praying that the defendants be perpetually enjoined from maintaining so much of said wharf and buildings as encroach upon the plaintiff's premises, that so much of said wharf and buildings as encroach upon the plaintiff's premises be declared a nuisance, and

that the defendants be perpetually restrained from enlarging said wharf and buildings, etc.

The plaintiff's bill, omitting the formal parts, is as follows:

"Mary H. Whitmore of Mt. Desert, in said county and state, complains against Sylvester B. Brown and Pedrick D. Gilley, both of Mt. Desert, and says:

"1. That subject to the rights of the public in and to the highway crossing the premises hereinafter described, and subject to a grant to William W. Vaughan under date of January 1, A. D. 1903, of the right to have the flats of your petitioner at Northeast Harbor, Maine, clear of any structure for three years from the date thereof, your petitioner is seized and possessed of certain real estate at said Northeast Harbor, in said town of Mt. Desert, particularly described as follows, to wit:

"Bounded northerly by land of Manchester heirs, westerly by Somes Sound, southerly by land of heirs of Nathan Smallidge and land of Helen Smallidge, Avelia Holmes and Annie E. Lindsay, and easterly by Gilpatrick's Cove, all as will more fully appear from original instruments of transfer or office copies thereof to be produced in court.

"2. That the said respondents are maintaining a wharf and buildings thereon upon the shore or flats in the tide waters at the head of said Gilpatrick's Cove, which said wharf and buildings, as your complainant is informed and believes and therefore alleges, are wholly or in part situated upon the premises hereinabove in paragraph one of this bill described.

"3. That on February 14, A. D. 1903, a hearing was held by the selectmen of said town of Mt. Desert, in the building upon said wharf, upon petition by the said respondents under (then) section 60 of chapter 3 of the Revised Statutes of said state of Maine, for permission to extend and enlarge said wharf, which application and petition was by said selectmen then and there refused and denied.

"4. That on March 24, A. D. 1903, a second hearing was held by said selectmen of said town of Mt. Desert, in the said building upon said wharf, upon another petition by the said respondents, under said section 60 of chapter 3 of the Revised Statutes of said

State of Maine, for permission to extend and enlarge said wharf, which application and petition was then and there not granted by said selectmen, but leave to withdraw said petition without prejudice was by said selectmen to said respondents granted.

"5. That your complainant is informed and believes and therefore alleges, that the said respondents are illegally and without proper authority, maintaining said wharf and buildings, as above set forth, in said tide waters of said Gilpatrick's Cove, in that no license or permission to erect or maintain any wharf in the tide waters of said Gilpatrick's Cove has at any time ever been granted by the municipal officers of said town of Mt. Desert, as required by the provisions of said section 60 (now section 96) of chapter 4 of said Revised Statutes, or by other proper authority, and that said wharf and buildings, as at present maintained, obstruct or impede, without legal authority, the passage of the harbor or collection of water known as Gilpatrick's Cove aforesaid, and therefore constitute a public nuisance under the provisions of section 5 of chapter 22 of said Revised Statutes.

"6. That your complainant is informed and believes and therefore alleges, that notwithstanding the said illegal existence of said wharf and buildings, and notwithstanding the said refusal of the municipal officers of said town of Mt. Desert to grant permission to said respondents to enlarge or extend said wharf, the respondents illegally and without authority, threaten to construct, and are about to construct, erect, build, maintain and extend the said wharf into said tide waters of said Gilpatrick's Cove.

"7. That the said wharf and buildings, as at present constructed and maintained, are not only an encroachment physically upon the property of your complainant as herein above particularly set forth in paragraph two, and a public and common nuisance as hereinabove set forth in paragraph five but also especially infringe otherwise upon the private rights of your complainant in that the said wharf and buildings in their entirety injure and depreciate the market value for purposes of sale or rent of said real property of your complainant so situated upon said western shore of said Gilpatrick's Cove, and in the immediate vicinity of said wharf, and destroy and

materially injure many rights and privileges of your said complainant to which she is lawfully entitled in connection with the use and ownership of her said real estate, and are in fact an actual nuisance to your complainant, depriving her of her property for private uses, and without compensation.

"8. That any extension or enlargement of said wharf will add to and increase the injuries to your complainant as above recited.

"9. That your complainant is informed and believes and therefore alleges, that she has no plain, complete and adequate remedy at law.

"Wherefore your complainant prays:

"1. That the said respondents, their servants, agents and employes, be perpetually enjoined and restrained by writ of injunction from maintaining so much of said wharf and buildings as stand or encroach upon the premises of said complainant as described in paragraph one of this bill, and that such portion of said wharf and buildings be declared a nuisance to your complainant, and that said respondents be ordered and required to remove the same forthwith, and that any orders, decrees and necessary processes issue from this court to secure the abatement of the same.

"2. That the said respondents, their servants, agents and employes, be perpetually enjoined and restrained by writ of injunction from extending or enlarging said wharf or buildings.

"3. That upon hearing, said respondents, their servants, agents and employes may be temporarily enjoined pending these proceedings, from constructing, erecting, building or maintaining any extension of said buildings or wharf into said tide waters of said Gilpatrick's Cove.

"4. That subpœna in the usual form may issue to said respondents, commanding them to appear and answer this bill of complaint, as provided by law, but not under oath, answer under oath being hereby expressly waived.

"5. And for such other and further relief as the nature of this case may require, and to this Honorable Court may seem fit and proper."

The defendant's answer, omitting formal parts, is as follows:

"The answer of Sylvester B. Brown and Pedrick D. Gilley, who say:

"1. That they have not information in regard to the allegations contained in the first paragraph of the plaintiff's bill. They therefore deny the allegations of said first paragraph.

"2. They admit that they are maintaining a wharf and building thereon at the head of Gilpatrick's Cove, so called, which said wharf with the building thereon, is partly above and partly below the line of high water mark in said Cove, and which said wharf is constructed entirely upon the land and shore owned by and belonging to them the defendants. They deny all other allegations in the second paragraph of said plaintiff's bill.

"3. They deny the allegations contained in paragraphs three, four and five of the plaintiff's bill.

"4. They admit that in the fall of 1903 they were preparing to and intended to enlarge their said wharf by building a portion on to the easterly side thereof, but they deny all the other allegations contained in paragraph six of said bill.

"5. They deny all the allegations contained in paragraph seven of said bill.

"6. They deny the allegations contained in paragraph eight of said plaintiff's bill.

"7. They deny the allegations contained in paragraph nine of said plaintiff's bill.

"8. Further answering the said defendants say that they are and have been for several years the owners of a small tract of land at the head of Gilpatrick's Cove, conveyed to them by Arthur Gilpatrick by his warranty deed dated February 1, 1902, and recorded in Vol. 378, page 332 of the Registry of Deeds for Hancock county, Maine, described in said deed as follows:

"A certain lot or parcel of land situated at North East Harbor in said Mount Desert bounded and described as follows, to wit:

"Beginning at a stone post set in the top of the bank at the Gilpatrick's Cove, so called, on the south side of the town road and in the eastern line of land conveyed to said grantor by Samuel N. Gilpatrick, (here follows the technical description of the prem-

ises,) containing one and twenty-one hundredths (1.21) acres more or less, exclusive of ways. Together with the building and wharf located thereon.

"That said wharf with the building thereon, mentioned in the plaintiff's bill, is the same wharf and building thereon so conveyed to the defendants in said deed from Arthur Gilpatrick, that said wharf is entirely constructed upon the land described in said deed; that said wharf extends over the line of high water mark of said Gilpatrick's Cove in a southerly direction about two hundred feet, and is about forty feet in width; that the distance from the outer end or head of said wharf to mean low water mark is about six hundred feet; that the highway road passes by and adjoins the northerly end of said wharf and building; that the building on said wharf covers only a portion of it and contains two stores, one of which is occupied by one of the defendants as a stove store, and the other is occupied by one of the defendants for a grocery store with furniture, hardware, etc.; that said wharf and building thereon do not in fact impede or obstruct the passage of the waters of said Gilpatrick's Cove, being situated at the extreme northern point of said Cove, and more than five hundred feet above low water mark and at that point where the waters of said Cove are not, and have never been used for purposes of navigation, and could not practically be so used.

"And the defendants further say that in the fall of 1903, they did intend and undertake to construct upon the easterly side of said wharf a small addition thereto which was to be entirely upon their own shore and flats, and within the boundaries of their said deed, and which said addition was not to extend southerly beyond the outer end of said wharf as it has existed for many years past, and that they had, being the owners of the said land and shore, a perfect right so to enlarge their said wharf as contemplated, which said contemplated extension is that complained of in the said plaintiff's bill.

"Wherefore, the defendants pray that they may be hence dismissed with their reasonable costs in this behalf most wrongfully sustained."

To this answer the plaintiff filed the usual replication. The cause then came on to be heard before the Justice of the first instance upon bill, answer, replication and proof, and after hearing and argument, such Justice ordered, adjudged and decreed that the bill be dismissed with costs. Thereupon the plaintiff, in accordance with the provisions of section 22 of chapter 79, R. S., appealed to the Law Court.

All the material facts appear in the opinion.

Hale & Hamlin, for plaintiff.

Arno W. King and John A. Peters, for defendants.

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

EMERY, J. From the bill, answer and evidence we find the following facts: On the south side of Mt. Desert Island is a small cove of tide water called "Gilpatrick's Cove." The defendants have a warranty deed of a lot of upland on this cove at its head or extreme northern end, and also of so much of the shore or flats of the cove as is included within the extension of the side lines of their upland across the shore or flats so as to include the structures hereinafter described. The plaintiff owns a lot of upland bordering on the cove next south-west of the defendants' upland, but, so far as appears in this case, she does not own any part of the shore or flats of the cove. (100 Maine, 410.) The defendants, being in possession under a warranty deed, must therefore be held to have a prima facie title to the flats named in their deed, at least as against the plaintiff. The defendants' grantor some twelve years ago erected on the land included in his deed to them a wharf extending from the upland out upon their flats in front, and also erected upon this wharf a building for trading purposes. This wharf and building have been maintained ever since, and are now maintained by these defendants and are wholly upon their land. They are now proposing to widen the wharf by an addition to its eastern side within the side lines of their flats and not extending any further out from the upland. The present wharf was erected and has ever since been maintained without

the license required therefor by the statute, R. S., ch. 4, secs. 96 to 99 inclusive, and no such license has been obtained for the proposed extension. The statute prohibits the erection and maintenance of an unlicensed wharf. The plaintiff by her bill asks the court to enjoin the proposed extension of the wharf and also the further maintenance of the present structures on the flats upon the ground that being forbidden by the statute they are a nuisance in law, and injure the plaintiff "in her comfort, property and the enjoyment of her estate," (R. S., ch. 22, sec. 13) her land being used and valuable as a summer residence.

If the existing structures alone were the subject matter of this suit, the bill would need be dismissed under the settled doctrine of this court that it will not, except in extreme cases, exercise its equity powers to compel the removal of existing structures upon the land of the defendant though they may be a nuisance in law, but will leave the plaintiff to his remedy at law which in this state is "plain, adequate and complete." See the statute on nuisances, R. S., c. 22; *Davis* v. *Weymouth*, 80 Maine, 310; *Tracy* v. *LeBlanc*, 89 Maine, 304; *Sterling* v. *Littlefield*, 97 Maine, 479. In *Prop. Maine Wharf* v. *Custom House Wharf*, 85 Maine, 175, the structure was not on the defendant's land and the rights had been settled at law. No such hurt or danger of hurt is shown by the evidence in this case as would take it out of that rule.

The bill would also need be dismissed under the general principle of equity jurisprudence that an equity court will not intervene where the plaintiff has long tolerated the alleged nuisance, but will leave him to establish his claim at law. These present structures had been tolerated for ten years, during all which time they were as much nuisance as now, having the same effect on persons and property at Gilpatrick's Cove. The danger of future hurt from them is no more imminent now than at first. After ten years the claim of the plaintiff for their removal is much too stale for the court to enforce by decrees in equity.

But the claim of the plaintiff for an injunction against the proposed extension is cognizable in equity and hence requires consideration in this suit; and the already extensive and increasing occu-

pation of lands bordering on the tide waters of the Maine coast for summer residences by citizens of this and other states and countries justifies, we think, a somewhat elaborate exposition of the law governing cases like this. The wharf extension, if erected, will, so far as appears, be wholly on flats owned by the defendants. Under our law, based on the Colonial Ordinance of 1641-1647, their ownership of their flats is as full and complete as their ownership of their upland, except that it is subject to some extent to certain public rights. *State* v. *Wilson*, 42 Maine, 9; *Moore* v. *Griffin*, 22 Maine, 350; *King* v. *Young*, 76 Maine, 76. In this case, however, we have to do only with the public right of navigation since no complaint is made of infringement of any other public right. Prior to the statute cited (R. S., ch. 4, secs. 96 to 99, inclusive,) the owner of flats could erect wharves on them as freely as upon his upland, provided he did not thereby actually interrupt or impede navigation. *Com.* v. *Charlestown*, 1 Pick. 180; *Com.* v. *Alger*, 7 Cush. 53; *Low* v. *Knowlton*, 26 Maine, 128; *State* v. *Wilson*, 42 Maine, 9. Whether a wharf did actually obstruct or impede navigation and thereby become a nuisance at common law or under R. S., ch. 22, sec. 5, was a question of fact, and sometimes a difficult one, to be determined in each case upon the evidence in that case. The legislature has now intervened and created a tribunal to determine that question, viz: the municipal officers of the town, and has prohibited the erection of wharves in tide waters without a license from that board (R. S., ch. 4, secs. 96 to 99, inclusive). If that license is duly granted, the wharf cannot under the state law be abated as an obstruction to navigation, even if it be such in fact, though, of course, the license will not protect the wharf from complaints for infringement of private rights. If the license is not obtained, the wharf erected without it is an unlawful structure even if it does not in fact obstruct navigation. That the legislature has the power to thus require a license for the erection of wharves on flats is not questioned. *Com.* v. *Alger*, 7 Cush. 53.

Such being the rights of the defendants and of the state in and over their flats, we proceed to consider what right the plaintiff may have to an injunction against the proposed extension of the defendants'

wharf and also to an abatement of the existing structures, assuming for convenience of statement and argument the present suit to be appropriate for that purpose.

The mere fact that the structures are, or will be, erected and maintained without the required statutory license does not make them outlaws, to be lawfully assailed and destroyed by anyone, or abated at the private suit of any person. *Brightman* v. *Bristol*, 65 Maine, 426. Indeed the statute does not declare them to be a nuisance in law. An equity court will not at the suit of a private party restrain the erection of a building, not in fact a nuisance, merely because its erection is forbidden by statute or ordinance. *St. John Village Corp.* v. *McFarlan*, 33 Mich. 72; *Mayor of Manchester* v. *Smith*, 64 N. H. 380. Again, the mere fact that the existence of these structures upon the defendants' flats do or will lessen the plaintiff's enjoyment of her lot, even as a summer residence, and lessen its commercial value, does not give her a right to an abatement or even to damages. A neighbor's building on his own land, by its ugliness of architecture or by its mere proximity, may lessen one's enjoyment of his own residence and lessen its market value; or a competing, neighboring factory may lessen one's business profits and the value of his own factory, and yet no legal right be infringed. It is not enough, therefore, for the plaintiff to show that the structures on the defendants' flats are there without the required statutory license and that they lessen the enjoyment and market value of her land. She must go further and show that they infringe some individual right recognized by the law as a legal, private right of hers. That they infringe the legal rights of others gives her no cause of action against them.

The present structures and the proposed extension are forbidden by statute, and to that extent are, and will be, illegal. Do they or will they infringe any individual legal right of the plaintiff? There is no evidence nor complaint that they do or threaten any injury to the plaintiff or her land by vitiating the air or water, by unhealthy or offensive odors, by disturbing noises, or by obstructing the passage of light or air, or by otherwise unfavorably affecting her health or physical comfort. The plaintiff practically advances but three propositions, viz: (1) that the structures are in law and in fact an obstruc-

tion to the navigation of the cove and thereby reduce the value of her land in the cove; (2) that the structures are unsightly and also obstruct the view of the scenery from her land, and thus lessen the enjoyment and value of her estate; and (3) that the structures materially impede the passage by water to and from her land, and thus lessen its value.

As to the first proposition, whatever the damage to the plaintiff or her land, the right infringed, that of the unimpeded navigation of the cove, is a public right common to all the people of the state and not a right peculiar to owners and occupants of land bordering on the cove. It is the settled law of this state that structures which only infringe public rights can be dealt with only by the public, that is, by proceedings in the name of the state or some authorized person in behalf of the public. An individual affected has no separate right of action in his own name. To enforce the public right for his benefit he must set the public agencies in motion. It is only when the structures inflict upon him some special legal injury different in kind as well as degree from that suffered by others that he has an individual right of action against them. *Holmes* v. *Corthell*, 80 Maine, 33; *Penley* v. *Auburn*, 85 Maine, 281; *Taylor* v. *P .K. & Y. St. Ry. Co.*, 91 Maine, 193.

The plaintiff contends, however, that boating privileges in and about the cove are attached to her lot, that these are a large and peculiar element in its market value and constitute a legal right appurtenant thereto apart from the public which has no right to make use of it to facilitate their use of their public right, and that the structures restrict and abridge these privileges. There may be appurtenant to her lot a right of passage by boats, &c., to and from it, *Maine Wharf* v. *Custom House Wharf*, 85 Maine, 175, but that is only the right of access to and departure from her land by water. Any other use of the water for boating or other navigation would be under the public right alone.

But the plaintiff further urges that, conceding the right violated to be a public right only, the violation of that public right has damaged the value of her land, and that this damage is individual and peculiar, one not suffered by the public at large. The question,

however, is not whether the plaintiff's land has been damaged, but whether any of her legal rights have been infringed. The land owner has no legal right that the market value of his land shall not be disturbed.

Though by reason of her land being on this cove the plaintiff may have more need or occasion than other persons to make use of the public right to the unimpeded navigation of the cove, and her land may be more damaged by the violation of that right, the right itself is still public and not private. Her ownership of land on the cove gives her no greater nor different right to navigate it. Every other citizen has the same right in kind and degree. The plaintiff may have a greater interest than others in the right and a greater need of its enforcement, but that does not change the public right into a private right. *Frost* v. *Wash. Co. R. R. Co.*, 96 Maine, 76. It may be that an individual actually obstructed by an unauthorized structure while in the actual exercise of the public right may maintain an action for damages resulting, as was held in *Brown* v. *Watson*, 47 Maine, 161 ; but that is a different case from this where the only complaint is of the unfavorable effect upon the enjoyment and value of the land.

The plaintiff further urges the hardship of her being left to the action of public officials to enforce the public right and relieve her from the damage done her by these unlicensed structures. She suggests that the officials, influenced by local, political, or other immaterial considerations, may improperly neglect and even refuse to act upon application and thus leave her helpless. Even if this apprehension be well founded, the court cannot afford relief in this suit. Her remedy against recalcitrant public officers is in some other procedure.

To the second proposition there are two answers. The law of this state does not recognize any legal right to an unobstructed view of scenery over and across the lands, even the flats, of others unless acquired by grant ; nor does the law recognize as a cause of action the annoyance caused by the proximity or ugliness of otherwise harmless structures upon the land of another. The pleasure of an unobstructed view and of a prospect free from unsightly objects may

be great, but in the present state of the law it is too refined for legal cognizance. Again, the annoyances complained of, and the consequent loss in value of land, were not caused by the fact that the structures are or will be erected and maintained without the required statutory license. The plaintiff must prove that her damage was caused by the particular element in the character or use of the structure which renders it a nuisance. *Burbank* v. *Bethel Steam Mill Co.*, 75 Maine, 373, at p. 382. The hurt to the plaintiff must come from the structure, qua nuisance, to give her a cause of action for maintaining it. *Bowden* v. *Lewis*, 13 R. I. 189 a case in many respects similar to this. In the first case the plaintiff's buildings were destroyed by fire communicated from the defendant's steam mill situated on its own land but without the required statutory license therefor. The statute declared any stationary steam engine so erected without the license "to be a common nuisance," and the statute R. S., ch. 22, sec. 13, giving a right of action for injury from a common nuisance, was then in force. It was held, nevertheless, that the absence of the required license did not give the plaintiff a right of action, and that unless the steam mill was a nuisance in fact, its erection and use were not wrongful as to the plaintiff. In the second case the plaintiff was lessee of certain oyster lots from the state, and erected a building on them without the required statutory license therefor. This building somewhat impeded navigation, was unsightly, and also obstructed the view from the defendant's villa lots near by. After the denial of a request for the removal of the building, the defendant himself removed it. In an action of trespass for such removal, it was held that neither the absence of the required license nor the described damage to the defendant's villa lots justified his action. The plaintiff had judgment. In the case at bar had the license been obtained and the structures made lawful, the inconvenience to the plaintiff from the obstruction to navigation, the lessening of her enjoyment of her estate and of its value from the proximity and ugliness of the structures, would have been the same in kind and degree. Hence she was not injured by the lack of the license and cannot maintain this suit on that ground. The two cases cited by the plaintiff, being from other states, are not compelling authority

however closely in point, but we think they are each distinguishable from this case. In *Wheeler* v. *Bradford*, 54 Conn. 244, the plaintiff's residence fronted on a public park. The defendant undertook to enclose a large part of the park for his own use. The court enjoined him at the suit of the plaintiff. The park, however, was not established or reserved simply as a highway for purposes of passage, but to be kept open for air and prospect as well. Residences fronting on this park practically had annexed to them the privilege of air and prospect over the park, a distinct privilege appurtenant, and as such of material value. It was as if A. had granted to B. a privilege of prospect over his land as appurtenant to B's residence, and C. should undertake to obstruct it. In the case at bar the flats are the defendants' private property, subject only to certain public rights. Neither the public, however, nor the plaintiff has any privilege of prospect over them. In *Tyson* v. *First N. Bank*, 133 Ala. 459, (32 So. 144) the plaintiff owned a store on a business street. The defendant owned an adjoining lot on the same side of the street, and proposed to extend its building into the street of which it owned the fee subject to the easement of a public street. The plaintiff alleged that the proposed extension would obstruct not only the view of the street from his store, but also the view of his store from the street. It was held on demurrer that the plaintiff had stated an injury different in kind and degree from that suffered by the public. Granting that the owner of a store on a business street has as appurtenant thereto the right that nothing shall be erected by his neighbor on the street to hide his store from the passing throng upon whose custom his store depends, the case is obviously not the one at bar.

Undoubtedly these structures do annoy the plaintiff and the occupants of her land, and do reduce its renting and selling value, but, so far at least, it appears to be a case of damnum absque injuria. It is clear, we think, that her first and second propositions do not, under our law, sustain her suit.

We come now to her third and last proposition, viz: that the structures in fact materially impede the passage by water to and from her land, and thereby infringe a legal right appurtenant to her

land, and distinct from the public right. As to the structures in existence at the time she filed her bill, she must be remitted to her action at law under the rules stated in the early part of this opinion. As to the proposed extension, the evidence does not make it plain to us that it will materially impede passage by water to and from the plaintiff's land. It is by no means so plain a case as that of *Maine Wharf* v. *Custom House Wharf*, supra. The defendant's upland and wharf are at the extreme head of the cove. The plaintiff's land is wholly west of them. The proposed extension is on the east side of the wharf and no farther out toward the sea. Not being fully convinced of the fact alleged, we cannot make it the basis of a decree in equity for a permanent injunction, but must leave the plaintiff to establish it at law. A decree of absolute injunction is too sharp and heavy an instrument to be used unless the right to be protected thereby has been established by a judgment at law or made indisputable in equity.

We find no ground upon which this suit can be maintained in equity, and hence the decree dismissing the bill must be affirmed; but since the plaintiff may possibly be able to establish in an action at law some infringement of her individual legal rights, such as the right of access, the decree of dismissal should be without prejudice to such an action. Since the wharf and the proposed extension are confessedly in violation of the statute requiring a license, we think the defendants should not recover costs of appeal.

Final decree to be made in accordance with this opinion.

In Equity.

DANIEL M. JACOBS et al. *vs.* ADDIE M. PRESCOTT et als.

Lincoln. Opinion October 30, 1906.

Wills. Construction. Technical Words. "Heirs." "Family."

It is a general rule in the construction of wills that words not technical are to be understood in their usual, ordinary, popular signification, and that technical words are presumed to be employed in their technical sense, unless there is something in the context or subject matter to indicate that the testator intended a different use of the terms employed.

In a bequest of personal property the word "heirs" means, prima facie, those who would be entitled to it had the testator died intestate, and the word "family" is synonymous with kindred or relations, those who are related by blood and who are entitled as next of kin under the statute of distributions.

A testatrix after giving legacies to numerous persons, the most of whom were related to her by consanguinity and the rest as relatives of her deceased husband, directed "any money remaining after my debts and expenses are paid to be divided between my heirs by my family herein named," excepting N, who was one of the legatees related to her by blood.

Held: that the words "my heirs by my family herein named" did not embrace those legatees who were related to the testatrix's deceased husband only, and that those of the legatees named in the will, except N, take under this clause, who would have been entitled to the estate had the testatrix died intestate, in the proportions in which they would take under the statute of distributions.

In equity. On appeal by defendants. Appeal sustained. Decree according to opinion.

Bill in equity brought by the plaintiffs, Daniel M. Jacobs and Joel P. Huston, administrators with the will annexed of the estate of Melinda H. Sanborn late of Damariscotta, deceased, against Addie Prescott, Frances Whitten, Etta M. Tedford, Gertrude M. Peabody, Ruth Newcomb, Hattie Tibbetts, Helen F. Newcomb, Charles F. Newcomb, Barnet M. Stuart, Albion W. Stuart, Joel A. Sanborn,

Robert M. Sanborn, Warren M. Abbott, Loren Stuart, Fred Stuart, Willis Stuart, Allura J. Jacobs, Eliza A. Sanborn, and Adoniram J. Sanborn, asking the court to determine who took as beneficiaries under the residuary clause of the said will of the said Melinda H. Sanborn.

This cause came on for hearing before the Justice of the first instance and was argued by counsel, and thereupon the plaintiffs' bill was sustained with costs and it was ordered, adjudged and decreed as follows:

"First. That the word "family," found in the phrase "my heirs by my family herein named" contained in the nineteenth and residuary clause of the will set forth in the bill, includes and was intended by the testatrix to include all the beneficiaries named in said will related to the testatrix both by consanguinity and affinity, and that the following persons named in said will except Helen F. Newcomb are entitled to receive said residuary estate in equal shares, to wit: (Here follows the names of all the defendants, except that of Helen F. Newcomb.)

"Second. That the costs of all parties to this bill, both of plaintiffs and defendants, including reasonable counsel fees, be paid by the administrators of the estate of the will annexed out of the estate.

"Third. That this case be remanded to the Probate Court in said County of Lincoln for the distribution and settlement of said estate in accordance with this decree."

Thereupon in accordance with the provisions of section 22 of chapter 79, R. S., fourteen of the defendants took an appeal to the Law Court.

The case appears in the opinion.

Wm. H. Hilton, for plaintiffs.

P. H. Gillin, for defendants, Addie Prescott, Frances Whitten, C. F. Newcomb, Barnet M. Stuart, Loren F. Stuart, A. W. Stuart, Etta M. Tedford, Ruth M. Newcomb, Gertrude M. Peabody, Hattie A. Tibbetts and Warren M. Abbott.

Pierce & Hall, for defendants, Eliza A. Sanborn, Allura J. Jacobs, Adoniram J. Sanborn, Robert M. Sanborn, and Joel A. Sanborn.

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

POWERS, J. Bill in equity by the administrators with the will annexed to determine who take as beneficiaries under the residuary clause of the will of Matilda H. Sanborn of Damariscotta. The testatrix by the first nineteen clauses of her will gave to the nineteen defendants various legacies of from $200 to $2000 each, and then said: "These bequests to be made after my just expenses for funeral and nice headstone or tablet shall have been erected or money retained to pay for it — it is my wish to have my money collected and divided as soon after my decease as law will allow — any money remaining after my debts and expenses are paid to be divided between my heirs by my family herein named — with exception of Helen F. Newcomb her portion I consider sufficient for her." Of these nineteen legatees, fourteen, including Helen F. Newcomb, were related to her by consanguinity, and the most of these were her heirs at law. The remaining five were related to her by affinity only as relatives of her deceased husband. The case comes here on appeal from the decree, of the justice hearing the cause, that all of the legatees named, with the exception of Helen F. Newcomb, are entitled to receive the residuary estate in equal shares. A construction of the will is asked upon two points; first, as to whether the words "my heirs by my family herein named" embraced the legatees who were relatives of the testatrix's deceased husband only; second, as to who and how many take under said residuary clause.

It is a general rule in the construction of wills that words not technical are to be understood in their usual, ordinary, popular signification, and that technical words are presumed to be employed in their technical sense, unless there is something in the context or subject matter to indicate that the testator intended a different use of the terms employed. Accordingly the word "heirs," in a bequest of personal property means, prima facie, those who would be entitled to it had the testator died intestate. Schouler on Wills, section 542; and the word "family" is synonymous with kindred or relations those who are related by blood and who are entitled as

next of kin under the statute of distributions. Bouvier's Law Dictionary. 30 A. & E. Encycl. of L. 2nd Edition, 130.

These words, however, are flexible and should receive a broader construction when such appears to have been the testator's intention. We find nothing in the context, in the clause of the will under consideration, or in the entire will to show that the testatrix intended to use either the words "heirs" or "family" in a broader or different sense than that which is generally given to them. The exception of Helen F. Newcomb throws no light upon the question involved, for she was related to the testatrix by blood and one of her heirs at law. The fact that the words "herein named" immediately follow the word "family" does not give to that word a meaning broad enough to embrace all the legatees named. The words "herein named" may as well have been used to modify the whole clause "my heirs by my family," as the words "my family" alone. The testatrix appears to have had in mind, blood and not affinity, and to have used the words "by my family" to emphasize her intention and more clearly restrict the objects of her bounty under the residuary clause to those who were related to her by consanguinity. The will is holographic, and it is common for a person to speak of "my family" in contradistinction to the family of one's husband or wife. The order of the words has no especial significance. It is the same as if the testatrix had said "my heirs herein named by my family," the words "by my family" being a paraphrastic description of the persons already mentioned.

Our conclusion therefore, in answer to the first point presented, is that the words "my heirs by my family herein named" did not embrace those legatees named in the will who were related to the testatrix's deceased husband only. In answer to the second point, those of the legatees named in the will, except Helen F. Newcomb, take under the residuary clause, who would have been entitled to the estate had the testatrix died intestate, in the proportions in which they would take under the statute of distributions. *Trust Co.* v. *Williams*, 183 Mass. 173; 30 A. & E. Encycl. of L. 730, 2nd Edition. How many they are the case does not afford sufficient data to determine, as while the bill sets out that all of the blood relatives

of the testatrix named in the will were her heirs at law, this is denied in the answer of several of the defendants. This matter must be determined by the justice entering the final decree.

The costs of these proceedings may properly be decreed a charge upon the estate.

The decree appealed from is reversed.

Decree according to the opinion.

JAMES BELL *vs.* JAMES P. JORDAN et al.

Cumberland. Opinion October 29, 1906.

Contracts. Construction. Intention of parties to govern, when. Breach. Damages. Liquidated Damages.

In the construction of contracts, it is a fundamental rule or consideration paramount to all others that the intention of the parties, as gathered from the language of all parts of the agreement considered in relation to each other, and interpreted with reference to the situation of the parties and the manifest object which they had in view, must always be allowed to prevail unless some established principle of law or sound public policy would thereby be violated.

The defendants made a contract to sell the plaintiff 5000 cases of "High Maine Standard Corn" from the crop of 1903, but in order to safeguard the transaction against extraordinary contingencies, they qualified the proposition to sell 5000 cases by stipulating that "in case of short crop owing to circumstances beyond the control of the packer, 70% delivery to be guaranteed buyer, and 10% of purchase price to be paid buyer by seller for any quantity delivered short of the 70% guaranteed by this contract." *Held:* that it was not the intention of the parties that the defendants should be relieved of the obligation of their guaranty to deliver 70 per cent by any other circumstances than that of a short crop, and in that event the intention disclosed by the contract is that the defendants were to deliver such part of the 70 per cent as the condition of the crop would enable them to provide.

Although the crop of 1903 was short, it was not a total failure, but was such as would have enabled the defendants to deliver 40 per cent of the 5000 cases called for by the contract, or 2000 cases. *Held:* that it was the duty of the defendants to deliver that amount and to pay 10 per cent of the purchase price of the balance. The necessary shortage was only 30 per cent and not 70 per cent of the 5000 cases sold.

For failure to deliver the 2000 cases which they might have delivered, *Held:* that the defendants are liable to pay damages, the difference between the contract price of the corn and the market value of the same at the time and place stipulated for delivery, and for failure to deliver the balance of 30 per cent which they were unable to deliver, they are liable to pay 10 per cent of the purchase price as liquidated damages with interest on both of said sums from the date of the breach to the time of judgment.

On agreed statement of facts. Remanded for assessment of damages according to opinion.

Assumpsit to recover damages for the breach of a contract whereby the defendants agreed to sell and deliver to the plaintiff 5000 cases of sweet corn during the year 1903. The defendants failed to sell and deliver any sweet corn to the plaintiff under this contract, thereupon the plaintiff brought this action for the recovery of damages. The action was commenced in the Superior Court, Cumberland County. An agreed statement of facts was then filed and the case sent to the Law Court with the agreement that the case should be submitted for hearing and argument on the agreed statement of facts, damages to be assessed by the Judge of the Superior Court after the liabilities of the defendants had been finally determined by the Law Court.

All the material facts appear in the opinion.

George F. Gould, for plaintiff.

Bird & Bradley, for defendants.

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

WHITEHOUSE, J. This is an action to recover damages for the breach of a contract for the sale of sweet corn, and the case comes to this court on an agreed statement of facts.

The plaintiff was a wholesale grocer doing business at Philadelphia, and the defendants were packers of sweet corn, doing business at

Portland, Maine, with factories at North Turner and New Gloucester. In the month of January 1903, the plaintiff entered into the following written contract with the defendants, viz:

"Sold to Mr. James Bell, Philadelphia, Pa.,

For account of The United Packers, Portland, Maine.

"Five thousand (5000) cases, 2 dozen each, 'High Maine Standard' corn, of crop 1903.

"Price, 80 cents per dozen, F. O. B. Portland, Me., with rate of freight from Portland, Me., to Philadelphia, Pa. allowed buyer.

"Cans to be covered by tissues furnished by seller, and buyer's plain labels to be pasted on the outside of the tissue, and allowance to be made buyer for labels of $1.00 per thousand.

"One thousand (1000) cases of the goods covered by this contract to be shipped and billed as soon as packed and ready to send forward, and the remaining four thousand (4000) cases to be shipped later as instructed by buyer, with the understanding that the entire lot is to be sent forward before freezing weather. All goods to be billed when shipped.

"In case of short crop, owing to circumstances beyond the control of the packer, 70% delivery to be guaranteed buyer, and 10% of purchase price to be paid buyer by seller for any quantity delivered short of the 70% guaranteed by this contract.

"Terms Cash in 10 days, less $1\frac{1}{2}$%."

In the summer and fall of the year of 1903 there was a short crop of corn, owing to circumstances beyond the control of the defendants, and consequently the defendants were able to pack only forty (40) per cent of the total amount of corn which they had contracted to sell and deliver to purchasers.

Although the plaintiff was ready at all times to receive and pay for the corn specified in the contract, in accordance with its terms, the defendants failed to deliver any corn whatever or to perform any of the terms of their contract.

The controversy between the parties involves a construction of the last clause of the contract relating to the obligation of the defendants "in case of a short crop." The plaintiff claims that although there was a short crop, the defendants by the stipulations in their contract,

considered together, should have delivered to him forty per cent of the total 5000 cases which they engaged to deliver, and paid him ten per cent of the purchase price of the balance of the "seventy per cent delivery" guaranteed by the clause of the contract in question. In other words the plaintiff claims that it was the duty of the defendants, by the terms of the contract to deliver to him the forty per cent of the total amount which they had packed and were able to deliver, and to pay him ten per cent of the purchase price of the remaining thirty per cent guaranteed, which they were not able to deliver.

On the other hand the defendants contend that under the terms of the contract in the event of a short crop, they had the option either to deliver to the plaintiff the seventy per cent of the entire 5000 cases which they engaged to deliver, or to deliver none at all and pay ten per cent of the whole seventy per cent as liquidated damages. Thus the only question before this court is whether the defendants are liable to pay damages according to the ordinary rule for failing to deliver the forty per cent of the corn which they sold and might have delivered, or whether they are only required to pay ten per cent of the purchase price, as liquidated damages on that amount as well as on the remaining thirty per cent which they could not deliver.

In the construction of contracts there is one fundamental rule or consideration which is paramount to all others, and that is, that the intention of the parties, as gathered from the language of all parts of the agreement considered in relation to each other and interpreted with reference to the situation of the parties, and the manifest object which they had in view, must always be allowed to prevail unless some established principle of law or sound public policy would thereby be violated.

When the contract for the sale of the sweet corn in question in this case is examined in the light of the foregoing considerations, it is the opinion of the court that it must be construed in accordance with the plaintiff's contention. The defendants desiring a market for the product of their factories in 1903, made a contract to sell the plaintiff 5000 cases of "High Maine Standard Corn" from the crop

of that year. The plaintiff desiring to supply his stock in trade as a wholesale grocer, accepted the defendants' proposition. The one wished to sell corn and the other wished to buy it. But in order to safeguard the transaction against extraordinary contingencies, the defendants qualify the proposition to sell 5000 cases by stipulating that in the event of a short crop occasioned by "circumstances beyond the control of the packer," only 70 per cent of the 5000 cases should be guaranteed, and if they were unable to deliver the 70 per cent by reason of such short crop they would pay 10 per cent of the purchase price of the quantity not delivered as damages for such failure to deliver. It was obviously not the intention of the parties that the defendants should be relieved of the obligation of their guaranty to deliver 70 per cent by any other circumstance than that of a short crop. In that event the intention disclosed by the contract is that the defendants were to deliver such part of the 70 per cent as the condition of the crop would enable them to provide. Although the crop of 1903 was short, it was not a total failure, but was such as would have enabled the defendants to deliver 40 per cent of the 5000 cases called for by the contract, or 2000 cases. It was the duty of the defendants to deliver that amount and to pay 10 per cent of the purchase price of the balance. The necessary shortage was only 30 per cent and not 70 per cent of the 5000 cases sold. For failure to deliver the 2000 cases which they might have delivered, the defendants are liable to pay as damages, the difference between the contract price of the corn and the market value of the same at the time and place stipulated for delivery, and for failure to deliver the balance of 30 per cent which they were unable to deliver, they are liable to pay 10 per cent of the purchase price as liquidated damages, with interest on both of said sums from the date of the breach to the time of judgment.

According to the stipulation of the parties, the case is remanded to the Superior Court for the assessment of damages in accordance with this opinion.

So ordered.

AMERICAN BOARD OF COMMISSIONERS FOR FOREIGN MISSIONS.

Appellant from Decree of Judge of Probate in re last Will and Testament of Solomon H. Chandler.

Cumberland. Opinion November 12, 1906.

Wills. Testator must be of sound mind when will is executed. Proponent must prove affirmatively that testator was of sound mind when will was executed. Sanity. Insanity. A "disposing mind," defined. Mere intellectual feebleness to be distinguished from unsoundness of mind. Testator under guardianship when will was executed. Same a rebuttable presumption of fact, and does not work an estoppel upon proponent of will. Testimony of medical experts. Same considered. Same subject to the test of reasonableness and consistency. Prejudiced expert testimony. Same an unsafe criterion. R. S., chapter 69, section 26; chapter 76, section 1.

Revised Statutes, chapter 76, section 1, provides as follows:

"A person of sound mind, and of the age of twenty-one years, may dispose of his real and personal estate by will, in writing, signed by him, or by some person for him at his request, and in his presence, and subscribed in his presence by three credible attesting witnesses, not beneficially interested under said will." There is no exception or qualification to the requirement that a person must be of sound mind in order to make a valid will, and the burden rests upon the proponent of the will to prove affirmatively that the testator was of sound mind when he made the will. Hence in probating a will the sanity of the testator must be proved; it is not to be presumed.

But the word sanity is used in its legal and not its medical sense. Etymologically, insanity signifies unsoundness. Lexically, it signifies unsoundness of mind, or derangement of the intellect. In law, every mind is sound that can reason and will intelligently, in the particular transaction being considered; and every mind is unsound or insane that cannot so reason and will. The law investigates no further. This definition clearly differentiates the sound from the unsound mind, in the legal sense.

A disposing mind involves the exercise of so much mind and memory as would enable a person to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds; and a disposing memory exists when one can recall the general nature, con-

dition and extent of his property and his relation to those to whom he gives, and also to those from whom he excludes, his bounty. But mere intellectual feebleness must be distinguished from unsoundness of mind. The requirements of a "sound and disposing mind" does not imply that the powers of the mind may not have been weakened or impaired by old age or bodily disease.

It is a well established rule in this state that while confinement in an insane asylum or the disability of guardianship is made prima facie evidence of some mental incapacity, yet it is a rebuttable presumption of fact and may be overthrown by a preponderance of the evidence. The incapacity of guardianship is simply a fact which may be proven like any other fact tending to establish mental incapacity, but it does not work an estoppel upon the proponent of a will. R. S., chapter 69, section 26, recognizes this principle and provides, among other things, that "when a person over twenty-one years of age is under guardianship, he is incapable of disposing of his property otherwise than by his last will."

MEDICAL EXPERTS. In the consideration of the testimony of medical experts the test of consistency and reasonableness always having reference to the other testimony in the case, which their opinions may tend to corroborate or contradict, should be applied.

The opinion of a medical expert whose testimony does not differentiate between a medically sound mind and a legally sound mind is entitled to weight only when the other evidence shows that it applies to legal unsoundness, as a mind legally sound may be medically unsound. On the other hand, a medically sound mind necessarily includes a legally sound mind.

When it appears that the opinion of a medical expert is made up from a prejudiced view and for a predetermined purpose, then the ordinary rule of law with reference to the effect of interest upon credibility should be applied with special force, as such opinion evidence presents an unsafe criterion upon which to found a judgment affecting important interests. Such testimony is not only worthless but insidious and dangerous, for it is impossible for the layman in the analysis of such testimony to distinguish the true from the untrue. And if the untrue is acted upon, injustice must follow.

On report. Appeal dismissed. Decree of Probate Court affirmed in part. Case remanded for further proceedings in accordance with opinion.

Appeal by the American Board of Commissioners for Foreign Missions from the decree of the Judge of Probate, Cumberland County, approving and allowing certain instruments as the last will and testament and codicils thereto, of Solomon H. Chandler late of New Gloucester, Cumberland County, deceased. This appeal was to the Supreme Judicial Court, sitting as the Supreme Court of

Probate, held at Portland on the second Tuesday of October, A. D. 1904, and was taken in accordance with the provisions of the Revised Statutes, chapter 65, section 28. The appeal and reasons of appeal are as follows:

"STATE OF MAINE.

"To the Honorable, the Judge of the Probate Court, in and for the County of Cumberland:

"Respectfully represents American Board of Commissioners for Foreign Missions, a corporation legally existing and located in Boston in the County of Suffolk and Commonwealth of Massachusetts, that it is interested in the estate of Solomon H. Chandler, late of New Gloucester in said County of Cumberland, deceased, of which said court has now jurisdiction, as residuary legatee under a certain instrument purporting to be the last will and testament of said deceased, dated September 17, 1897, and certain instruments purporting to be the last will and testament and codicils thereto of the said deceased, dated respectively March 10, 1896, August 11, 1896, and August 9, 1902, that it is aggrieved by your Honor's decree on the petition of Andrew C. Chandler et al, that certain instruments purporting to be the last will and testament and codicils thereto of said deceased dated respectively March 10, 1896, August 11, 1896, and August 9, 1902, may be proved and allowed, made at a Probate Court held at Portland, in and for said County of Cumberland, on the third day of June, A. D. 1904, whereby certain instruments presented with said petition, dated respectively March 10, 1896, August 11, 1896, and August 9, 1902, purporting to be the last will and testament and codicils thereto of Solomon H. Chandler, late of New Gloucester, in said County, deceased, were approved and allowed as the last will and testament and codicils thereto of said deceased, and letters testamentary issued to Lyman M. Cousens, Andrew C. Chandler and John W. True, and whereby it was further decreed that the costs of the petitioners and contestants, including fees of witnesses and stenographers, together with reasonable counsel fees for both said petitioners and contestants, be paid out of the estate of said Solomon H. Chandler, and hereby

appeals therefrom to the Supreme Judicial Court, being the Supreme Court of Probate, to be held at Portland, within and for the County of Cumberland, on the second Tuesday of October, A. D. 1904, and alleges the following reasons of appeal, viz:

"First: The written instruments offered by the proponents, purporting to be the last will and testament and codicils thereto of Solomon H. Chandler, dated respectively March 10, 1896, August 11, 1896, and August 9, 1902, are not, nor is either of them, the last will and testament of the said Solomon H. Chandler.

"Second: The said written instrument dated March 10, 1896 offered by the proponents, purporting to be the last will of said Solomon H. Chandler, was revoked by a subsequent and valid will duly made and executed by the said Solomon H. Chandler on the 17th day of September, 1897, he being then of sound mind and of the age of twenty-one years, which said valid will was not thereafter legally changed or revoked by said Solomon H. Chandler.

"Third: The said written instrument dated August 11th, 1896, and offered by the proponents, purporting to be a codicil to the alleged last will and testament of said Solomon H. Chandler dated March 10th, 1896, was revoked by the said Solomon H. Chandler by his said valid will duly made and executed on the 17th day of September, 1897, which said valid will was never changed or revoked by said Solomon H. Chandler.

"Fourth: The said written instrument dated August 9th, 1902, purporting to be a codicil to the alleged last will of Solomon H. Chandler, was not legally executed in the presence of three credible attesting witnesses not beneficially interested thereunder.

"Fifth: The said Solomon H. Chandler at the time of the making and executing of the written instrument offered by the proponents, dated August 9th, 1902, purporting to be a codicil to his alleged last will and testament dated March 10th, 1896, was not of sound and disposing mind.

"Sixth: Upon petition of the municipal officers of the town of New Gloucester, in the county of Cumberland and State of Maine, dated April 12th, A. D. 1902, said town then being the place of residence of said Solomon H. Chandler, representing said Solomon H.

Chandler to be a "person of unsound mind, who by reason of infirmity and mental incapacity is incompetent to manage his own estate and to protect his rights" and further praying that John W. True of New Gloucester be appointed guardian of said Solomon H. Chandler, and after due notice given to said Solomon H. Chandler on said petition as ordered by the court, and after a hearing upon the same at which said Solomon H. Chandler was present and was interrogated by the court, said Solomon H. Chandler was adjudged and decreed by the Probate Court for said county of Cumberland on May 20th, A. D. 1902, to be "a person of unsound mind" and said John W. True was appointed by said court to be the guardian of said Solomon H. Chandler, and gave bond in that behalf as ordered by said court, and under the warrant of said court caused the estate of said Solomon H. Chandler to be inventoried and appraised, and took and maintained until said Chandler's decease, custody and control of his person and estate; and said judgment and decree was not subsequently modified, annulled or reversed or vacated by said court or any court having jurisdiction in the premises; and the mind of said Solomon H. Chandler did not after the time of said judgment and decree become restored to a condition of sanity of mind and was not so restored on August 9th, A. D. 1902, the date when said alleged codicil purports to have been made.

"Seventh: The making and execution of the written instrument dated August 9th, 1902, purporting to be a codicil to the alleged last will and testament of the said Solomon H. Chandler dated March 10th, A. D. 1896, was obtained by the undue influence of William K. Neal, John W. True and Andrew C. Chandler, exerted over Solomon H. Chandler.

"Eighth: The said Solomon H. Chandler at the time of the making and execution of the written instrument dated August 9th, 1902, purporting to be a codicil to his alleged last will and testament dated March 10th, 1896, was unduly influenced and fraudulently deceived in the making and execution thereof by other persons or by influence other than his own mind, to wit, by persons having confidential and fiduciary relations to him and his estate, viz: John W. True, his legal guardian, William K. Neal, attorney for the guardian, and

Andrew C. Chandler, the guardian's agent, to whom was committed the custody of his person, all of whom were then participating in the guardianship service in their several capacities for hire, and all of whom were to be benefited by the provisions of said alleged codicil, and the execution of said alleged codicil was thus procured by them.

"Ninth: The said written instrument dated August 9th, 1902 purporting to be a codicil to the alleged will of Solomon H. Chandler dated March 10th, 1896, is not the offspring of the mind and will of said Solomon H. Chandler, but is the offspring of the mind and will of another or other persons, viz., William K. Neal, John W. True and Andrew C. Chandler.

"Tenth: The said written instrument dated August 9th, 1902, purporting to be a codicil to the alleged will of Solomon H. Chandler dated March 10th, 1896, is not the act of the free will of said Solomon H. Chandler, but was procured by the fraud, deceit and undue influence of other persons to be benefited by reason thereof, viz., Andrew C. Chandler, named as legatee under said alleged codicil, John W. True, named as executor under said alleged codicil, and William K. Neal, acting as agent and attorney for said John W. True in this behalf.

"Eleventh: The making and execution of said alleged codicil dated August 9th, 1902, was not the spontaneous act of Solomon H. Chandler understanding the nature and consequences thereof, but was the act of William K. Neal and other persons advised by him.

"Twelfth: John W. True, then the legal guardian of Solomon H. Chandler, and William K. Neal, then acting as attorney and agent of said guardian, and Andrew C. Chandler, agent of said guardian to whom was then committed the custody of the person of said Solomon H. Chandler, and in whose actual custody upon said date was his person fraudulently deceived said Solomon H. Chandler and thereby procured from him the making and execution of the alleged codicil of August 9th, 1902, as a codicil to a will dated March 10th, 1896, which will they each and all then knew had been revoked by a subsequent valid and existing will, by reason whereof the contestant was defrauded of its legal rights under the provisions of said valid will dated September 17, 1897.

"Thirteenth: John W. True, then the legal guardian of Solomon H. Chandler, and William K. Neal, then acting as attorney at law, legal adviser and agent of said guardian, and Andrew C. Chandler, agent of said guardian to whom was then committed the custody of the person of said Solomon H. Chandler, and in whose actual custody upon said date was his person, practiced a fraud upon said Solomon H. Chandler in obtaining the making and execution by said Solomon H. Chandler of the alleged codicil dated August 9th, 1902, under the provisions of which they were persons to be benefitted, in that they all were present at the making and execution thereof, and they each and all then knew said Solomon H. Chandler to be a person then under guardianship by reason of the fact that he had been decreed by the Probate Court of the County of Cumberland in which he then resided to be "a person of unsound mind," and they each and all then knew that his condition of mind was such that he did not then recall the fact of the existence of or the provisions of the valid will dated September 17th, 1897; and they each and all then had knowledge of the existence of such subsequent valid last will of said Solomon H. Chandler which revoked the alleged will of March 10th, 1896; and they each and all then failed and neglected to recall to the mind of said Solomon H. Chandler that he had theretofore made and executed such valid will, which was subsequent to said alleged will of March 10th, 1896; and in place thereof said William K. Neal, in the pesence of and with the knowledge and consent of said John W. True, the guardian, and Andrew C. Chandler, the custodian of the person of Solomon H. Chandler, presented and read to Solomon H. Chandler the revoked will dated March 10th, 1896, as a then valid will subject to be changed by a codicil; by reason of all of which fraudulent practice the making and execution of the alleged codicil of August 9th, 1902, was obtained with the purpose and intent thus to defraud the contestant, and to so divert the testamentary disposition of the estate of said Solomon H. Chandler that they might be benefited thereby.

"Fourteenth: William K. Neal, in the presence of and with the assistance of John W. True and Andrew C. Chandler, on the ninth day of August, 1902, fraudulently deceived the said Solomon H.

Chandler, he being then under guardianship as a person of unsound mind, by falsely representing and pretending to him that the then revoked and void instrument dated March 10th, 1896, purporting to be the will of Solomon H. Chandler, of which said Neal had obtained possession by virtue of said guardianship, was his legal and valid last will and testament, and thereby unduly influenced and induced him to make pretended alterations and changes therein by the making and execution of the instrument dated August 9th, 1902, purporting to be a codicil to said alleged will dated March 10th, 1896, whereby the legal and valid will of said Solomon H. Chandler dated September 17th, 1897, of the existence of which the said William K. Neal, John W. True and Andrew C. Chandler each and all then had knowledge, would be by said Solomon H. Chandler unwittingly revoked.

"Fifteenth: Andrew C. Chandler and John W. True are the petitioners who signed the petition as proponents for the probate and allowance by the Probate Court of the alleged will dated March 10th, 1896, and the alleged codicil dated August 11, 1896, and the alleged codicil dated August 9th, 1902, as the last will and testament of said Solomon H. Chandler, now in hearing; they are also two of the executors named in said alleged codicil of August 9th, 1902, and they are persons to be benefited thereby; and they are also two of the persons by reason of the fraud, deceit, acts, promptings and undue influence of whom, acting upon the weakened mind of said Solomon H. Chandler, the making and execution of said alleged codicil dated August 9th, 1902, was procured; and by reason thereof the decree of the court directing "that the costs of the petitioners and of the contestants in this case, including fees of witnesses and stenographers, together with reasonable counsel fees for both said petitioners and contestants be paid out of the estate of said Solomon H. Chandler by the executors and charged in their account with said estate" is unjust, without equity, encouraging and assisting the practice of frauds and deceit, and is contrary to the policy of the law.

"Dated this fourteenth day of June, A. D. 1904.

"American Board of Commissioners for Foreign Missions,

"By FRANK H. WIGGIN, Treasurer."

This appeal and the reasons therefor were duly entered at the said October term of said Supreme Judicial Court sitting as the Supreme Court of Probate.

At said October term of said Supreme Judicial Court, the petitioners and legatees filed a motion to have the appeal dismissed. The motion was overruled and thereupon the petitioners and legatees took exceptions. These exceptions were not considered by the Law Court.

Afterwards at said October term, of said Supreme Judicial Court, the appellant was allowed to amend its "Reasons of Appeal" by adding directly after the 15th specification therein the following averment:

"Sixteenth: And the said American Board of Commissioners for Foreign Missions avers that Frank H. Wiggin upon all the dates of taking this appeal, and of making, signing, filing in the Probate Court and entering in the Supreme Judicial Court these reasons for appeal was the duly elected and qualified and acting Treasurer of said corporation, the American Board of Commissioners for Foreign Missions; and for more than a year next preceding any and all of said dates was continuously such Treasurer; and said Frank H. Wiggin, in his said capacity as Treasurer was duly authorized by said corporation in its name and behalf to take this appeal; and to sign these reasons for appeal for and in its name and behalf; and said Treasurer, Frank H. Wiggin, in the name and behalf of said American Board of Commissioners for Foreign Missions was duly authorized to execute and procure to be executed the necessary bond for costs of appeal from said decree of the Probate Court.

"American Board of Commissioners for Foreign Missions,
By SETH L. LARRABEE,
SAMUEL C. DARLING,
FRED V. MATTHEWS,
its Attorneys."

To the ruling allowing this amendment to the "Reasons of Appeal" the appellees and legatees took exceptions, but the same were not considered by the Law Court.

Also at said October term of said Supreme Judicial Court, a

motion was filed by the appellees to strike out and expunge certain allegations in the appellant's "Reasons of Appeal."

The grounds of the motion were that the allegations objected to "were immaterial, argumentative, scandalous, not pertinent to the issue, in legal effect a repetition of allegations in other reasons of appeal, a recital of evidence only, and that they did not present any issue or allegation material to the appeal but was an attempt to raise false issues which would obscure the real issues to be tried and produce confusion and unduly prejudice the rights of the appellees in the trial of the appeal."

This motion was denied and thereupon the appellees took exceptions, but the same were not considered by the Law Court.

The cause was fully heard at said October term of said Supreme Judicial Court sitting as the Supreme Court of Probate. (The testimony, including that taken out in the Probate Court together with depositions, fills four printed volumes containing in all nearly 3000 pages.)

At the conclusion of the testimony in the Supreme Judicial Court, and in accordance with the previous agreement of the parties, the presiding Justice made the following order:

"Upon the hearing of said cause, the Justice presiding being of opinion that questions of law are involved of sufficient importance and doubt to justify the same, and the parties agreeing thereto, and in accordance with their written stipulations, the cause is, by direction of the Justice, reported to the Law Court for final determination and decision of all questions of law and fact, upon the foregoing testimony, being the evidence adduced at the hearing before the Judge of Probate, and certain additional evidence introduced before this court by deposition and oral testimony, or so much thereof as may be deemed legally admissible."

The wills and codicils under consideration in the case and other facts material to the issue, sufficiently appear in the opinion.

Solomon H. Chandler, the deceased testator, appears to have been commonly known as Hewett Chandler and is frequently spoken of by that name in the testimony, a part of which is quoted in the opinion.

Catherine C. Chandler, one of the legatees, is called Madam Chandler both in the testimony and in the opinion.

The case does not disclose the exact amount of the deceased testator's estate, but the appellant's brief refers to the codicil of August 9th, 1902, as disposing of "nearly half a million of dollars."

The appellant's brief consists of 985 printed pages, besides indexes, etc., and the appellees' brief covers over 600 printed pages.

Seth L. Larrabee, Samuel C. Darling (of Boston, Mass.), *Fred V. Matthews, and S. Boyd Darling* (of Boston, Mass.), for appellant.

Nathan and Henry B. Cleaves and Stephen C. Perry and Guy H. Sturgis, for appellees, also for Andrew C. Chandler, Charles P. Chandler, Fred H. Chandler, Roland C. Chandler and Catherine C. Chandler, legatees.

Josiah H. Drummond, for executors.

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

SPEAR, J. This is an appeal from the decree of the Judge of Probate of Cumberland County approving and allowing the last will and testament and codicils thereto, of Solomon H. Chandler.

The cause is "reported to the Law Court for final determination and decision of all questions of law and fact, upon the foregoing testimony, being the evidence adduced at the hearing before the Judge of Probate, and certain additional evidence introduced before this court, by deposition and oral testimony, or so much thereof as may be deemed legally admissible."

On the tenth day of March, 1896, Mr. Chandler executed a will by which after providing for the payment of the usual expenditures and appropriating a sum not exceeding $500 for the erection of a monument, he directed the disposition of his property as follows:

"Third: I give, bequeath and devise all the rest, residue and remainder of my estate, real, personal and mixed, wherever found and however situated, intending to include in this provision all property I now have and all which may hereafter be acquired by me, and any rights and interests in and to any property which I may

have at the time of my death though not reduced to my possession at that time to the American Board of Commissioners for Foreign Missions, a corporation duly established by the laws of the Commonwealth of Massachusetts and having an office and place of business in Boston, in the County of Suffolk and Commonwealth of Massachusetts, for the following uses and purposes, and for none other, that is to say to invest and re-invest the property which said Board may acquire under this provision, and all sums of money which may be received by said Board of Commissioners as premiums from the sale of any of the securities which may come to said Board of Commissioners under this provision as well as all sums which may be received as premiums by said Board of Commissioners by reason of the investment and re-investment of any of the funds received by them from my estate or the accumulation thereof in such a manner as will yield a fair annual income, having regard more for the safety of the funds than for the amount of the income that may be realized therefrom, and said Board of Commissioners are to apply and use from year to year, the income of said rest, residue and remainder and the income of such portions of said principal sum as may remain from year to year, together with such portion of the principal as added to such yearly income will make the sum of thirty thousand dollars per annum for four years and after the expiration of said four years such income and such portion of the remainder of said principal as added to such income will make a sum of twenty-five thousand dollars per annum until the full amount of the said principal sum and the income therefrom shall have both been expended for the general purposes and objects of said Board, but upon the following conditions that none of the property which said American Board of Commissioners for Foreign Missions shall receive from my estate under these provisions and none of the income which said Board, or its successors or assigns, may derive from such property shall ever be expended towards the reduction of the indebtedness of said American Board, or their successors or assigns, and that none of the aforementioned principal or interest shall ever be used to defray any of the running expenses of said society, but shall be wholly expended for purely missionary purposes. It is my wish and preference that the funds

which the said American Board of Commissioners for Foreign Missions may receive under the provisions of my will shall be conscientiously expended for the advancement of the cause of Christ in those foreign lands and mission fields where, in the judgment of said American Board, the most good can be accomplished."

He appointed Andrew C. Chandler and John H. Card as executors of this will.

On the 11th day of August 1896, he made a codicil by which he appointed Lyman M. Cousius as an additional executor, making no other change in the will.

On the 17th day of September 1897, Mr. Chandler made a further will providing as in the will of 1896 for the payment of the ordinary expenses of administration and directing the erection of a monument and made a change in the executors appointing Lyman M. Cousins and Henry P. Cox. The third clause in this will was identical with the third clause in the will of 1896 above quoted except the omission of the two words "of any," clause three in the will of 1896 reading "investment and reinvestment of any of the funds," and clause three of the will of 1897 reading "investment and reinvestment of the funds." It is apparent that the omission of these two words in the connection in which they were used made no difference, whatever, in the identity of meaning of these two clauses in the two wills. The fifth clause of the will of 1897 simply provided for an early settlement of the estate.

On the ninth day of August, 1902, Mr. Chandler made a codicil to the will of March tenth, 1896, which omitting formal parts provided as follows:

"I hereby ratify and confirm as and for my last Will and Testament the instrument made and executed by me March tenth A. D. 1896 and the codicil thereto dated August eleventh, A. D. 1896, with the exception of the following provisions and changes in the disposal of my estate.

"Believing that it is right and proper for me to give to my next of kin some portion of the estate belonging to me at time of my decease, a large share of which was received by me from the estate

of my deceased father, Solomon Hewitt Chandler, I make the following devises and bequests.

"First: To each of the sons of my deceased brother Andrew C. Chandler, my nephews Andrew C. Chandler, Charles P. Chandler, Fred H. Chandler, and Roland C. Chandler, all of New Gloucester, I give, devise and bequeath one tenth part of all the estate belonging to me at time of my decease, after the payment of all sums required under the provisions of the first and second items of my said will. To have and to hold to them and each of them and their heirs and assigns forever.

"Second: I give and bequeath to Catherine C. Chandler, widow of my deceased brother Andrew C. Chandler, if she is living at time of my decease, one tenth part of all my said estate in remembrance of her continual acts of kindness towards me during the many years I have made my home in her family.

"Third: I give and bequeath unto Sara Archer Chandler, child of my nephew Andrew C. the sum of five hundred dollars, as a token of my regard for her, she having received her name at my suggestion and request.

"Fourth: If either of the persons named in this codicil as devisees and legatees is not living at the time of my decease I give, devise and bequeath the share and portion of my estate which would be received by such one if then alive to the children of the deceased legatee, in equal shares and portions, to have and to hold to them and their heirs and assigns forever.

"Fifth: I hereby confirm the appointment of Lyman M. Cousens and Andrew C. Chandler as executors of my will, and this codicil thereto, and I revoke the appointment of John H. Card as such executor, and in his place and stead I nominate and appoint John W. True of New Gloucester, as one of the executors thereof, and I request and direct that no bond be required of him in that capacity by the Judge of Probate having jurisdiction of my estate.

"Sixth: I hereby revoke and annul all wills by me at any time made and executed, excepting the will first mentioned herein."

Solomon H. Chandler died on the 31st day of December 1903. On the 22nd day of January 1904, Andrew C. Chandler and John

W. True, two of the executors named in the codicil of August ninth, 1902, filed a petition in the Probate Court for the county of Cumberland, dated Jan. eighteenth, 1904, praying for the proof and allowance of the will of 1896 and the codicil thereto, including the codicil of August ninth, 1902, and that letters testamentary issue to Lyman M. Cousens, Andrew C. Chandler and John W. True the executors therein named. This petition was resisted by the American Board of Commissioners for Foreign Missions, and, upon full hearing the Probate Court entered a decree that the will of 1896, and the codicils thereto, be approved and allowed as the last will and testament and codicils thereto of said deceased, and that letters testamentary issue to the several persons therein named as executors. From this decree, the American Board appealed filing fifteen reasons therefor.

At this point it is proper to add that, in the space which could properly be given to the longest opinion, it would be both useless and impossible to undertake any connected analysis of the testimony and evidence presented in this case containing, as it does, 3000 printed pages besides numerous exhibits not printed, and argued by the appellant in a brief of 985 printed pages besides indexes, and by the appellees in a brief covering over 600 printed pages. The great volume of these arguments which are not only very able, but also logical and concise, as a complete analysis of the great mass of testimony would permit, establishes the futility of any attempt on the part of the court to follow out the various branches of the controversy, unprecedented in the mass of material involved.

We desire, however, to acknowledge our appreciation of the great assistance the arguments have afforded us in considering the case, not only by reason of their masterly discussion and analysis, but by presenting complete indexes of the witnesses and cases cited, and a thorough digest, chronologically and topically arranged, of every material piece of testimony. While these helps have not relieved us of the laborious task of reading the testimony, they have been of inestimable value in enabling us to collate and compare it.

Notwithstanding the voluminous testimony and the large sum involved, yet, in the propositions of law and fact governing its consideration, this proceeding may be resolved into the ordinary will case,

presenting only the usual questions raised in such contests, and must be decided upon its own peculiar circumstances and facts. The appellants filed fifteen reasons of appeal but in their brief they say, "the issues raised by these separate reasons of appeal will all be considered in argument under the general subdivisions of testamentary capacity, undue influence and fraud." We adopt this classification.

Therefore the first and perhaps the most important questions for our determination is, did Solomon H. Chandler, on the ninth day of August 1902 possess such soundness of mind, as, in contemplation of the law, enabled him to make a valid disposition of his estate by will? At this time our statute provided that "a person of sound mind and of the age of twenty-one years may dispose of his real and personal estate by will." There is no exception or qualification to this requirement that a person must be of sound mind to make a valid will. The burden rests upon the proponents to affirmatively prove it. In probating a will the sanity of the testator must be proved and is not to be presumed. These principles are too well established in this state to require citation. But the word sanity is used in its legal and not its medical sense.

In *Johnson* v. *Maine & N. B. Ins. Co.*, 83 Maine, 186, Mr. Justice EMERY speaking for the court says: "Etymologically, insanity signifies unsoundness. Lexically it signifies unsoundness of mind, or derangement of the intellect. Medical science with its usual zeal has deeply investigated the various forms, symptoms, causes, results and manifestations of mental unsoundness, or disease, and has discovered numerous kinds of such diseases to which it has given appropriate technical names. Dr. Hammond (Late Surgeon General United States Army,) for instance, classifies these kinds into seven classes, and thirty-three sub-classes (not claiming this to be a natural classification.) Dementia and mania are both specified in this classification. But however necessary such an analysis and classification of mental diseases may be to the science of medicine, they are impracticable and unnecessary in legal science. In law, every mind is sound that can reason and will intelligently, in the particular transaction being considered; and every mind is unsound or insane that cannot so reason and will. The law investigates no further." This

definition clearly differentiates the sound from the unsound mind, in the legal sense.

In *Hall* v. *Perry*, 87 Maine, 572, Mr. Justice WHITEHOUSE, in delivering the opinion of the court, goes a step further and defines those faculties of the mind whose presence are essential to verify the existence of testamentary capacity in the testator: "A 'disposing mind' involves the exercise of so much mind and memory as would enable a person to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds; and a disposing memory exists when one can recall the general nature, condition and extent of his property and his relation to those to whom he gives, and also to those from whom he excludes, his bounty. He must have active memory enough to bring to his mind the nature and particulars of the business to be transacted and mental power enough to appreciate them and act with sense and judgment in regard to them. He must have sufficient capacity to comprehend the condition of his property, his relations to the persons who were or should have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least, their obvious relations to each other, and be able to form some rational judgment in relation to them. . . . . But mere intellectual feebleness must be distinguished from unsoundness of mind. The requirements of a "sound and disposing mind" does not imply that the powers of the mind may not have been weakened or impaired by old age or bodily disease. A person may be incapacitated by age, and failing memory, from engaging in complex and intricate business, and incapable of understanding all parts of a contract, and yet be able to give simple directions for the disposition of property by will." For an exhaustive review of the authorities upon this point, see *Delafield* v. *Parish*, 25 New York, 9.

In speaking of the testatrix in this particular case, Mr. Justice WHITEHOUSE further says: "She may have been childish, changeable, impatient and sometimes inconsiderate; her judgment in relation to

the value of property may not have been the most reliable, and her mind may not have been vigorous enough to grasp all the features of a complicated transaction; but all this may be said of multitudes of elderly people whose competency to manage simple and ordinary kinds of business is never questioned by their acquaintances and friends. 'Weakness of memory, vacillation of purpose, credulity and vagueness of thought, may all consist with adequate testamentary capacity under favorable circumstances.'" Schouler on Wills, section 70.

Our court have also said in *Randall & Randall, Appellants,* 99 Maine, 398, "If the testator possesses so much mind and memory as enables him to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds, and can recall the general nature, condition and extent of his property, and his relations to those to whom he gives, and also to those from whom he excludes his bounty, it is sufficient."

Under these legal principles arises a pure question of fact upon the first proposition, which it is incumbent upon the proponents or appellees in the first instance to prove, namely, that the testator on the ninth day of August, not the eighth nor tenth nor any other day, was possessed of testamentary capacity. Under our statute, the question of age being eliminated, the only standard as to such capacity is whether the testator was of "sound mind," as this phrase is used in its fixed legal meaning. That is, had he on that day, at the time the codicil was executed, the capacity to make *a* codicil not *the* codicil, produced. If he had, the codicil in question should be sustained. If he had not, the codicil should fail. As said in *Delafield* v. *Parish,* 25 New York, at page 97, under a statute similar in principle to ours, "the question in every case is, had the testator, as compos mentis, capacity to make a will; not, had he capacity to make the will produced. If compos mentis, he can make any will, however complicated; if non compos mentis, he can make no will—not the simplest." Likewise, Mr. Chandler, if of sound mind, in the legal sense, could have made any codicil, and consequently the one under consideration.

In assuming the burden of proof, upon this proposition, which

requires only a preponderance of the evidence as in civil actions, the proponents of the will and codicil of 1902 present, first, as evidence of the testamentary capacity of the testator, the internal proof furnished by the terms of the codicil itself. Under the will of 1896 republished, as under that of 1897 revoked, Mr. Chandler had bequeathed practically all of his extensive estate to the American Board. In fact, he had not disposed of any of it by either of these wills in favor of any of his relatives. It appears that the nucleus of his great fortune was derived from his father, a direct ancestor of the nephews, who were recognized in the codicil of August ninth. By this codicil he diverted about one-half of his large fortune, substantially all of which would have been transmitted by his will to the American Board, from it to his relatives above named.

If the other evidence in the case affords satisfactory proof that, at the time the above codicil was made, the testator was not possessed of testamentary capacity, then, of course, the internal evidence from the terms of the codicil, itself, is of no value, as it was not the testator's will. On the other hand, if such evidence does not amount to such proof, then the internal evidence is material, and may become important. While the question of testamentary capacity under the evidence, aliunde the internal proof, is a very close one, yet we are inclined to the opinion that it does not preclude the proponents from the right to have considered the internal evidence of the terms of the codicil. This evidence is plainly in harmony with what we should expect to be the rational and natural instinct of the testator. The character of the codicil therefore in this case becomes significant. It manifests a rational act. Its provisions are just, reasonable and natural, in harmony with natural justice, and have a tendency to prove a normal state of mind.

Gardiner on Wills, Hornbook Series 1903, page 136, speaking of this class of evidence says: "In determining the question of competency, the character of the will itself is extremely significant. A rational act, rationally done, is convincing proof that a rational being did it. 'The strongest and best proof that can arise as to a lucid interval is that which arises from the act itself'. Indeed, sometimes the intrinsically reasonable character of a will gives rise to a pre-

sumption that it was executed during a lucid interval, though the testator be chronically insane. So, if the provisions of the will are just, reasonable and natural, they point towards a normal testator." In *Barker et al.* v. *Comins et al.*, 110 Mass. 477, the court say: "Where the will is unreasonable in its provisions and inconsistent with the duties of the testator with reference to his property and family, it furnishes some ground which the jury may consider upon the question of loss of memory, undue influence and other incapacity." Our court has recognized these principles in *Wells, Appellant*, 96 Maine, 164.

The next evidence presented by the proponents to prove the testator's testamentary capacity was that of the persons who witnessed the execution of the codicil. At this point we shall consider only such part of the testimony of the subscribing witnesses, as bears upon the testator's soundness of mind. Their testimony as to undue influence and fraud will be considered under those heads respectively. The witnesses to this codicil were William K. Neal, Margaret McGlinch and Minnie M. Morse. Mr. Neal, a well known lawyer of Portland, drew the codicil upon the date of its execution, having had some weeks previously a conversation with Mr. Chandler with respect to it, in his office in Portland. Before drawing the codicil Mr. Neal called upon Mr. Chandler in New Gloucester, and, as he testifies, asked him if he had thought over the matter that they talked of in Portland a short time ago. Mr. Chandler said he had, although Mr. Neal did not speak of the business as pertaining to the will. Mr. Neal then went into Mr. Chandler's room in company with other parties and there had some conversation with him upon general topics, and later asked him again if he had thought over the matter which had been talked of in Portland before, and if he had concluded what to do, and he said he had. After more conversation, Mr. Neal produced the will of 1896 and the codicil attached to it, and read it to Mr. Chandler. Mr. Neal says "and after I got through reading I remember one remark which he made as I finished the reading. "Well, he said, I don't think that John H. Card is much of a fellow, do you? and I think the answer I made was, perhaps you might have selected somebody else for executor who would be better; and

he said, will you read that again and I read it the second time."

This remark with reference to Mr. Card and the request to have the will read again, are in accord with the existence of memory and understanding. The remark shows that he recalled what he, at least, considered defects in the capacity or qualifications of Mr. Card for the important trust of executor. The request for the re-reading of the will is evidence of a desire to comprehend and understand it.

Mr. Neal then asked him what he had concluded to do and he answered, well it is rather natural that I should give them something, is it not, and I think it would be right, I think that was very nearly his exact words. Then after some more conversation Mr. Neal inquired how much he desired to give. As the character of this testimony is very important we give Mr. Neal's answer in full to the following question. Q. You stated that you went to his desk and made a memorandum. A. No, I went to the desk and got a piece of paper and made a memorandum, and I said then, how much, and he said he hadn't quite made up his mind how much; and that matter was—then I think I said this, as I recall it,—will you make it a specific sum or make it some per cent of the amount which you leave. And he sat and thought the matter over apparently, and he said he thought about ten per cent for each one; and I made the memorandum giving the names of the four nephews, and I think Mr. True gave me their full names, and I carried out against the name one-tenth; and then as I recall it Mr. True asked something in regard to whether he wanted Mrs. Chandler to have any part of the estate; and then the matter of his having lived in the family for so many years was spoken of; and he said, yes, I will give her the same as the rest; and then I think the next thing, as I recall it now, was, I said, in case any of these parties should die before you do, Mr. Chandler, what disposition do you want made of these legacies?

Q. That was your suggestion to him? A. That was my question; and do you want it to go back into the estate, or what should be done with it; and he said, give it to the children.

During this interview the will and codicil of 1896 were twice read to Mr. Chandler by Mr. Neal and from the testimony of Mr. Neal it

would seem that he understood them; at least nothing appears in the interview, with respect to Mr. Chandler's disposition to make a change in his will, to indicate the contrary. Mr. Neal drew up the codicil of August ninth at Mr True's house at noon. He had no conversation with Mr. True as to the provisions of the codicil nor with Andrew Chandler nor Charles P. Chandler. He returned to Mr. Chandler's room in the afternoon with the codicil prepared. What was then done will be shown by the following question to Mr. Neal and his answer:

Q. Now, if you will state the conversation which took place between you and Mr. Chandler when you returned with this paper?

A. After we sat down, I produced this paper and read it aloud, and Mr. Chandler was sitting facing me near his desk; and when I had finished it he said, well, that is just right, that is just as we talked this morning; and I said, I tried to make it that way, and I folded it up and handed it to Mr. Chandler, and I said, you want to keep that and think it over, and the first time you come down to Portland drop in and if it is all right we will fix it up; and his answer to that was, it is all right and why not fix it today. And I said, if you prefer to do that of course I can do it now just as well as then.

Mr. Neal also said in response to a question that Solomon H. Chandler on the ninth day of August 1902 was in his opinion in the possession of mental capacity sufficient to transact business and with an intelligent understanding of what he was doing; and also that he had had an acquaintance with the testator more than twenty-five years.

We have quoted thus fully from the testimony of Mr. Neal as his evidence constitutes the citadel of assault against which the appellants hurl the force of their attack. From all the admissible testimony of Mr. Neal, fairly considered, his evidence adequately proves a legally sound and disposing mind in the testator on the ninth day of August 1902. That he might have had days, immediately preceding or soon following this date, when his mind was not sufficiently clear, to enable him to comprehend all the relations which the law requires he should understand, in order to make a valid will, may be

true. But the testimony of Mr. Neal if true proves that the mind of Mr. Chandler on this day, although slow and unquestionably impaired from age, and possibly by the insipient stages of disease, was nevertheless working with an intelligent and comprehensive understanding as to the subject matter under consideration. The evidence clearly shows that Mr. Chandler was a silent, deliberate, reticent man with respect to all his business affairs. He did not discuss them in the family nor with the neighbors. He had said nothing about his intended change in his will, but the evidence shows that when Mr. Neal called upon him, weeks after this matter had been discussed in his office in Portland, Mr. Chandler had been thinking about it. Without restraint or influence of any kind when approached a few weeks later upon the subject, he at once comprehended what had been said before in the office and had come to his own conclusion, absolutely free from any suggestion in the meantime, to distribute a portion of his estate among his next of kin. Now this silent deliberation of two or three weeks and the determination to which he at once had come, when asked with respect to it, to divert a part of his estate to his relatives, was in complete harmony with the characteristics of Mr. Chandler and the manner in which we should expect him to act, if in a normal condition of mind.

The conclusion to which Mr. Chandler came, after deliberating upon the matter from the time of the interview in Portland until the ninth day of August, in response to the question as to what he had made up his mind to do, was so aptly, tersely and naturally expressed, as to show a clear comprehension of the relation of those, whom he was about to make the objects of his bounty: "Well, it is rather natural that I should give them something, is it not, and I think it would be right." It *was* natural and it *was* right. What more could be said? What more would one expect Solomon H. Chandler, in view of his characteristics as disclosed by the testimony, to say? What expression could better describe the apparent duty of the testator? Fairly analyzed, this declaration of his seems to have comprehended the whole situation embraced in the transaction of August ninth. The testator and his brother, the father of the nephews, had accumulated and owned their property jointly, until the death of the

brother Andrew in April 1894. A portion of the joint property came to Andrew and Solomon Chandler by inheritance from their father, the grandfather of the nephews, who were made legatees under Solomon's codicil. Madam Chandler, his sister-in-law, another legatee, was the widow of his deceased brother, Andrew. For him she had made a pleasant home the greater part of his life, until ill health had compelled her to surrender the further discharge of the duty which she, for so many years, had cheerfully performed. When this necessity required a change of domicil for Mr. Chandler, he did not seek the company of strangers but made his new abode in the home of his nephew, Andrew, a member of the Chandler family with which he had been closely identified from boyhood. He entertained pleasant relations with all of his nephews and had said in his interview in Portland that they were reliable, likely men. He himself had become old, decrepit and broken. His body was weak and his mind was failing. He was undoubtedly aware of his condition. From the activities of a shrewd business life, with his thoughts and energies engrossed in the details of managing a large and growing property, he had, in obedience to the mandate of old age, become relieved of these exacting duties; and his mind, though impaired, had an opportunity to meditate upon other matters than the accumulation and management of wealth. It is an instinct of old age, when ambition has laid aside the cares of life, to revert to the days of one's youth, to call up the memories of the past, to reflect upon family relations and to ponder upon the duties which these new thoughts awaken. When Solomon Chandler's attention was called to the fact that he had entirely overlooked all of his next of kin in the distribution of his large estate, we feel convinced that, true to this instinct, he also reflected upon the manner in which the basis of his fortune had come to him; the relations of his brother, his nephews and his sister-in-law, and gave expression to that reflection in the phraseology already quoted, "Well, it is rather natural that I should give them something, is it not, and I think it would be right."

From all the facts and circumstances surrounding the life of Solomon H. Chandler and this codicil of August ninth, we think the reasons which he gives for his action, is ample proof of his

understanding and comprehension of his act and, in the legal sense, of his soundness of mind.

The next witness to the codicil in question was Miss Minnie M. Morse. She was, on August ninth, acting in the capacity of a nurse for Madam Chandler who was at the time ill, and was called from Madam Chandler's room into that of Solomon's with the express purpose of becoming a witness to the codicil. The effect of her testimony is that, in her judgment, Mr. Chandler knew what he was doing when he signed the codicil. She said that Mr. Neal asked him if he understood fully the codicil, and if it was done in accordance with his dictation and as he wanted it, and Mr. Chandler said he did. The last witness was Miss Margaret McGlinch who had long been a servant in Madam Chandler's family. The effect of her testimony is that from 1900 down to August ninth, 1902, she observed that Solomon was growing older and weaker physically but she did not observe any peculiarities of mind nor incoherence of thought but that he was forgetful. She did not recall any others. These witnesses substantially corroborated the testimony of Mr. Neal as to the mental condition of Mr. Chandler on the ninth day of August, 1902. We do not deem it necessary to further refer to their testimony at the present time as we are now discussing only the evidence offered in proof of the execution of the codicil, and the testamentary capacity of the testator.

The only other witnesses present at the interview and at the execution of the codicil, were John W. True and Andrew Chandler, Mr. True corroborates the testimony of Mr. Neal as to what was said and done upon these occasions, and, while Mr. Chandler does not remember all the conversation as testified to by Mr. Neal and Mr. True, he does not deny that it occurred substantially as they have related it. His testimony clearly demonstrates that he must necessarily either have not heard or forgotten parts of the conversation which took place at the execution of the will. He does, however, recollect some of the conversation and particularly that, in case any of the legatees or nephews died, their share would go to their children. He also says that the testator talked intelligently and that he appeared to understand what he was talking about. Andrew

Chandler was his attendant and, from his relation to him, necessarily had a very intimate knowledge of the workings of his mind from day to day, and from time to time. He was, perhaps, better able to determine than almost any other person, whether at the execution of this codicil, he talked intelligently and comprehended what he was doing. While his testimony comprises nearly two thousand questions, yet, the vital part of it, with respect to the testamentary capacity of Solomon H. Chandler on August ninth, is included within the few sentences in which he says, on that day, he talked intelligently and appeared to understand. Andrew Chandler says that Solomon's mind was mixed at times, upon some matters and clear upon others; that he was more confused on some days than others, but that these confused spells passed away.

Whatever his condition of mind before or after the ninth day of August, its only bearing upon the issue here involved is its tendency to prove or disprove the mental capacity of Mr. Chandler on that date. Whether he was upon any particular day before August ninth, or upon any particular day thereafter, mentally incapable of making a will, is not the question. Was he capable on that day? Andrew Chandler's testimony indicates that he was.

Mr. True's testimony upon two propositions of fact which occurred on August ninth, connected with the preparation and execution of the codicil in question, is positive and very important. It distinctly shows the clearness of Mr. Chandler's mind upon the matter of the codicil. The testimony is so decisive that we deem a few questions and answers worthy of quotation. With respect to the amount he desired to give to each of his nephews, Mr. True a witness for the contestants, in answer to his own counsel, testified as follows: Q. I will ask you just once more; this is an *important point*, I want you to try and recollect, was Mr. Neal's remark that it would be proper for him to divide ten per cent among them, or something less? A. You could either give a lump sum or make it a percentage five or ten per cent or more or less. Q. That is all he said? A. That is all he said. Q. Now Mr. Hewitt Chandler replied to that what? A. I guess ten per cent will be about right. Q. What further was said? A. Mr. Neal said, ten per cent to each?

and he said, yes, to each one. Q. Now Mr. True are you positive that the next question asked by Mr. Neal was whether Mr. Hewitt meant ten per cent to each nephew or ten per cent to all of them? A. Yes sir. Q. He said ten per cent to each? A. Yes sir. Q. And what did Hewitt answer to that? A. He said yes, ten per cent to each, repeated. Q. Did he use the word yes, or look at Mr. Neal as you are looking at me, did he merely nod his head? Now I want your best recollection sir. A. My best recollection is that he said yes, repeated the ten per cent to each. Q. Said yes, ten per cent to each? A. Yes sir, that is my best recollection. Q. You don't think there was any nodding of the head at all? A. No sir, not in that case. Q. But spoken words? A. Yes sir. Q. Yes, ten per cent to each. A. Yes sir.

The next important point is the testimony of this same witness with reference to the time of signing the codicil. After Mr. Neal had read the codicil to Mr. Chandler, he laid it upon the roll top desk and said he could look it over and if it was satisfactory, or if it was all right, he could sign it at some later time. To this suggestion, Mr. Chandler answered, "That is all right and why not fix it today," or "why not fix it now?" These two propositions of fact are as well established as human testimony can do. The declaration of the testator as to the amount he desired to give was made in the forenoon, and that stating that the codicil was all right and why not sign it now, in the afternoon, the two covering the whole period from the taking of the minutes for the preparation of the codicil to the time of its execution. If there is anything in the conduct or conversation of Mr. Chandler, during this period, that indicates an unsound mind in the legal sense, we fail to discover it. On the other hand, both of these transactions indicate a lucid mind as to the business being transacted, and a comprehension and understanding of what he himself was doing. He seems to have said all that was necessary upon both points, and to have said it clearly.

His statement, we again repeat, that the codicil was as they had talked in the morning and that it was all right and why not sign it now, not only evidenced the exercise of the functions of memory as to what had occurred, but a comprehension of the import of the

morning conversation; that it was for the purpose of making a change in his will and that, to be effective, it must be signed. In other words, when this codicil was read to him, by the operation of the law of association, that mysterious power of the intellect that produces a "consecution of mental states," his mind ran back over the ground of the previous interview, remembered the talk in the morning, comprehended the object of it, and understood that the codicil embraced it.

There is another fact brought out in the testimony of Andrew Chandler which we deem conclusive as showing not only the exercise of memory but of original thought. Either upon the afternoon of the execution of the codicil, or the next day, he said of his own volition "we" or "I have left Margaret out." Margaret had long been a faithful servant in the family of the brother and sister-in-law, with whom he had spent the most of his life. But especially in his later days, when the feebleness of old age and mental decline were creeping upon him, and greater care was necessary to his comfort, undoubtedly the fidelity of Margaret, who had administered to him at this time so well, had impressed itself upon his appreciation, and what more natural or rational than he should think of her in the distribution of his favors. And more important than all is the necessary inference from an analysis of the mental operation which produced the thought of Margaret. To discover this, we have but to recall the expression, "I have left Margaret out." Out of what? Out of the codicil. His mind must necessarily have conceived something from which she was left out. What was he thinking of when he gave utterance to this expression? There can be but one rational answer. He recalled that he had modified or changed his will; that he had made his nephews and his sister-in-law beneficiaries under the change; that he had given his grand niece $500; he recalled some or all of these things first, and then came the reflection that he had omitted this faithful servant, had "left Margaret out."

It can be said of this incident as was said in *Wells, Appellant*, 96 Maine, 164, "It frequently happens that the most satisfactory evidence of a person's real state of mind is to be gathered from the

mind's own action as shown by his conversation, claims, declarations and acts. Proven facts of this class carry greater weight than the opinion of witnesses." His evident anxiety and repeated inquiries after Madam Chandler's health, upon this day, are also significant, and show both the existence of memory and the emotion of solicitude.

We have now substantially reviewed the evidence of all the witnesses who had the opportunity of any personal knowledge, worth noting, with respect to the mental condition of Mr. Chandler on the ninth day of August 1902. Under the legal principles established by our court and embodied in the first part of this opinion, we are unable to say, upon the testimony reviewed, that Mr. Chandler was not of sound mind on the ninth day of August 1902. On the other hand, we think this evidence quite conclusively shows that he was of disposing mind on that day. We think an examination of the report will show the fact that no witness called, either by the proponents or contestants, has testified to a single act or word on the part of the testator on the ninth day of August which is not entirely consistent with the existence of testamentary capacity.

But it should be remarked that we have thus far confined ourselves to the testimony relating to this single day. Now arises the question whether the other testimony, volumes of which have been taken with respect to his mental condition before and after this date, fairly warrants the inference that, in view of his condition before and after, he must, at this time, necessarily have been of unsound mind. The appellants take the affirmative of this proposition and confidently assert that the evidence sustains it. The proponents of the will and codicils must sustain the burden of proof of the testator's mental capacity, not only upon the evidence of August ninth, but upon all the evidence in the case, and if, upon all the evidence they have failed, then the appeal must be sustained.

The report of the evidence requires the court to determine this case upon so much of the testimony reported as is legally admissible. We feel at this time constrained to say that this restriction eliminates at least quite a part of the testimony upon which the contestants rely to overthrow the contention of the testator's responsibility when

he executed the codicil. The admissible and the inadmissible are so interlaced that it would be almost an endless task to separate the wheat from the chaff. We have endeavored, however, in our investigation to give a liberal interpretation to the rule of admissibility.

We shall be able to discuss the volume of testimony bearing upon the different phases of this case only by grouping it under certain heads and referring to it in that form. The first proposition which the appellants assert in derogation of Mr. Chandler's mental capacity is the contention that he was, at the time of executing the codicil, under legal guardianship and consequently incapable of making a will, unless the restoration of his sanity be proved beyond a reasonable doubt. But such it not the law. It is a well established rule in this state, and we think in most others, that while confinement in an insane asylum, or the disability of guardianship, is made prima facie evidence of some mental incapacity, it is a rebuttable presumption of fact and may be overthrown by a preponderance of the evidence. Of course it is evident that a greater or less amount of evidence may be required to overcome this presumption, depending upon the nature and extent of the incapacity of the person under guardianship, and varying with the circumstances of the case. As was said in *May* v. *Bradlee*, 127 Mass. 414, a case where the testator at the time of making his will had been under guardianship as non compos for twenty-six years, "the testator was under guardianship and that implies some degree or form of mental unsoundness. The issue at the trial was whether that unsoundness amounted to testamentary incapacity."

As we interpret the law the incapacity of guardianship is simply a fact which may be proven like any other fact tending to establish mental incapacity, but it does not work an estoppel upon the proponents. The law recognizes that a person may require a guardian by reason of incapacity in one particular, while, in other respects, he may be entirely competent. It is well settled that a man may be of unsound mind in one respect and not in all respects; that there may be partial insanity of the testator, some unsoundness of mind, that does not in any way relate to his property or disposition of the same by will. Chapter 69, R. S., recognizes this principle and provides

in part; "When a person over twenty-one years of age is under guardianship, he is incapable of disposing of his property otherwise than by his last will." Therefore any presumption of testamentary incapacity arising from a decree of unsound mind, may be overcome by testimony as to the facts and circumstances connected with the execution of the instrument, as was held in *Halley* v. *Webster*, 21 Maine, 461, in the instructions to the jury, "that if they were satisfied that previous to the execution of the will the deceased was of unsound mind and memory, the burden of proof would be upon the proponent to prove that at the time of executing it he was of sound mind and memory, and also, that the lowest share of mind and memory, which would enable a person to transact the ordinary business of life with common intelligence, would be sufficient to answer the requirements of the law that he should be of sound and disposing mind and memory."

Under our statute and the decisions of our own court, the only burden upon the proponents of a will to overcome the disability imposed by guardianship, is to prove by a preponderance of the evidence that the testator at the time of executing the will was of sound mind, in the legal sense. As before intimated, if the guardianship was imposed on account of the impairment of some particular function of the brain which did not materially interfere with the judgment, comprehension and memory, it might require scarcely any evidence at all to remove the effect of it. On the other hand, if it was imposed on account of long standing and chronic insanity involving the destruction of all these faculties, no amount of evidence could overcome it.

Of the impairment of the mind between these two extremes, the amount of evidence required to overcome the disability, would depend upon the facts and circumstances of each particular case; so that when we reach the final determination as to mental capacity or incapacity, whether the person is in an insane asylum, under guardianship, or under no legal disability, we revert to the simple proposition of law whether, under all the circumstances in the particular case under consideration, the testator was of sound and disposing mind. The proof must be sufficient to overcome all disabili-

ties, however originating and however imposed. When the proponents have sustained the burden of proof upon this proposition, it matters not how the obstacles to be overcome were created.

Upon this contention, the contestants must fail, as the evidence relating to the mental condition of Mr. Chandler on the ninth day of August, 1902, and which has led us to conclude upon this particular evidence that he was on that day of disposing mind, has in no way been impaired by the mere fact, that several months earlier the testator was placed under legal guardianship. We come to this conclusion, regardless of the claim of those immediately interested in procuring guardianship that it was on account of Mr. Chandler's physical condition, upon the assumption that the decree of guardianship is a legal judgment and conclusive upon the facts therein recited.

The two next groups of evidence, that of the neighbors and friends of Mr. Chandler, and of the medical experts, will be considered upon the same proposition, namely; do they show that the mind of Mr. Chandler, before and after August ninth, had approached such a state of decay that, notwithstanding the evidence of those who observed him personally and witnessed, with their own eyes, his appearance, manner and conduct at the execution of the codicil, the inference must be drawn that he was upon that day of unsound mind, in the legal sense, notwithstanding his apparent mental capacity.

First, we will consider the testimony of the neighbors and friends. Of these there are upwards of one hundred and twenty. We shall allude principally to the character of their testimony without attempting to discuss it in detail. It is evident from the record that the death of Mr. Chandler, the disposal of a portion of his property by the execution of a codicil, at a time when it was generally known that he had become enfeebled by age and disease, and a contest over the validity of this codicil involving nearly half a million of money, had excited a keen interest and a divided sentiment among the people of the quiet village of New Gloucester and vicinity. As is true in the development of all such controversies, all these people arrayed themselves in support of one side or the other of the contention. Every-

thing that Mr. Chandler said or did in the presence of any of these witnesses was recalled and undoubtedly discussed and so applied to his mental and physical condition as to support the particular bias of the witness presenting it. While witnesses are thus arrayed against each other, their convictions strengthening with the growth and heat of the discussion, although they may be honest in their purpose, they cannot, while human nature remains unchanged, overcome the tendency to distort, magnify or minimize the incidents which they relate as their interest persuades. That Mr. Chandler's mind was in a precarious condition on August ninth, nobody disputes. That he was forgetful and at times dazed, and at all times for several months prior thereto, partially incapacitated, nobody denies. But there was a line some where between the beginning and the end of the malady which finally carried him off, where he passed from the possession of a sound to that of an unsound mind, as this term is defined in law. The question is whether, in the progress of that disease, he had passed that line on the ninth day of August. None of these neighbors and friends pretend to have any personal knowledge of his mental condition on that particular day. Does their testimony, when massed upon the single point of testamentary capacity, as to his mental condition before and after, establish the conclusion that upon that day, he was incapable of making a will? The effect of this testimony as a whole is that, physically, Mr. Chandler for nearly a year after this date was able to be about; to attend his meals with the family at the table; to go into Portland from time to time with Andrew who attended him; to walk about the village alone and go to the post office; to attend church and Sunday school; that he lived and was about, gradually declining, for more than a year, and that he died December 31, 1903, more than sixteen months later. This class of testimony as to his mental condition, covering the year 1902 and 1903, has a tendency to show that prior and up to August ninth, his mind was somewhat impaired; that he was growing forgetful; that their were times when his ideas were confused and his mind dazed; that when he was tired these spells came upon him, and when he became rested, they passed away; that these confused spells were manifested by various acts

and statements; that at other times his conversation was coherent and intelligible; his acts rational; his appearance normal; that the normal was his general condition up to August ninth, and the confused and dazed, the exception. That, during all this period up to and beyond August ninth, he did not have lucid intervals for a longer or shorter period, does not appear from a single witness. That he did have such an interval on August ninth, without a single incident occurring upon that date to contradict it, affirmatively appears from the testimony which we have already reviewed. We are therefore still unable to say that the proof of his condition as discovered by the testimony of his neighbors and friends, prior and subsequent to August ninth, necessarily shows such a mental condition on that date as to outweigh the evidence already considered in proof of his legal sanity.

The next class of evidence to which our attention is called is that of the medical experts. The testimony of the seven witnesses who testified under this head contains more than six hundred pages of the report. Four eminent alienists testify, upon the one side, upon long hypothetical questions purporting to contain facts and incidents, in the life of Mr. Chandler pertinent to the issue, that, on the ninth day of August, he was of unsound mind. Three, equally eminent, are called upon the other side, who, upon hypothetical questions purporting to contain similar facts and incidents, as unhesitatingly testify that on the same day, he was of sound and disposing mind. The facts and incidents contained in the hypothetical questions put by the proponents are objected to on the part of the contestants, on the ground of the omission of facts which should be considered and of containing statements which should be omitted. To the hypothetical questions put by the contestants, the proponents interpose a similar objection. To distinguish the admissible from the inadmissible, for the purpose of determining whether the objections upon either side are well founded, would be practically impossible. We shall therefore not attempt to review the hypothetical questions, nor to excuse the opinion expressed by any of the eminent alienists as being based upon any alleged over-statement or under-statement of facts therein contained. We do not entertain the slightest suspicion, if the hypothetical ques-

tions put by the contestants had been so changed as to be absolutely satisfactory to the proponents, and the same had been done with respect to the questions put by the proponents, that any one of the eminent specialists would have changed his testimony, or the reasons therefor, in the slightest degree. Their testimony upon the one side and the other clearly demonstrates that they were inclined to testify in favor of the side which called them. In considering their testimony we have endeavored to apply the test of consistency and reasonableness, always having reference to the other testimony in the case which their opinions may tend to corroborate or contradict.

Judged by this criterion we find an inherent weakness in the very foundation upon which their conclusions rest. First, we discover that the experts called by the contestants have made no proper distinction in giving their opinion nor could they do so under the law, between medical and legal sanity. We may say here, that this criticism does not apply to the three experts who testified that the testator, in their opinion, was of sound mind on August ninth, because a medically sound mind must necessarily include a legally sound mind. On the other hand the opinion of the four witnesses, whose testimony does not differentiate between a medically sound mind and a legally sound mind, is entitled to weight, only when the other evidence shows that it applies to legal unsoundness; because a mind legally sound may be medically unsound. It may require additional and different evidence to prove legal unsoundness. That is to say, medical unsoundness may intervene in the diagnosis of a case before legal unsoundness appears at all; therefore these medical experts may be correct in their opinions as to medical unsoundness without having expressed any opinion at all as to legal unsoundness. Unless then, it is shown from some source, that these opinions apply to legal unsoundness they are of but little value. And three of them expressly declare that their opinions relate only to medical unsoundness.

Again the error underlying the basis of Dr. Bancroft's opinion, the only expert called by the contestants, who says he founded his opinion upon the evidence instead of the assumptions, is illustrated by quoting a few questions and answers of his cross examination.

Q. You have undertaken to give your opinion based upon all the evidence in the case, have you? A. Yes sir. Q. Where there is a conflict of evidence, how have you reconciled it, to whom have you given the benefit of a doubt? A. I have carefully weighed the evidence and have placed it where I thought it belonged. Q. You have undertaken to pass on all the evidence, have you not and given an opinion? A. I have. Q. You have assumed the province, have you, of the court and jury in giving your opinion upon all the evidence in the case? No sir. Q. You have undertaken to give your opinion, haven't you, upon all the evidence in this case? A. I have not undertaken to assume the province of any court or any jury. Q. Have you undertaken to give your opinion and to find the fact that he was of unsound mind on this evidence? A. I have undertaken to *weigh all* the evidence from a *medical point of view* and pronounce an opinion. Q. And you have undertaken a sort of judicial medical position in doing it, have you, or undertaken to? A. I have undertaken to answer in a *medical opinion.*

For two reasons the opinion of this witness is entitled to very little weight. One is, that he gave his own interpretation to more than two thousand pages of testimony, then based his opinion upon his own interpretation. Now, we have already said as clearly appears from the record that a large part of the testimony was inadmissible. This medical expert says that he "carefully weighed the evidence." What evidence? Is it to be presumed for a moment that he eliminated the inadmissible from the admissible? There is no pretence that he did or could. Suppose he based his opinion upon the testimony of Charles P. Haskell; what part of it did he adopt; the hearsay, the opinion, or the facts? We are unable to say, and therefore it would appear that no further comment is necessary to show the unsatisfactory character of an opinion thus given. The second is, he gave only a medical opinion. He does not pretend to have differentiated between medical and legal unsoundness. Whether this opinion covers legal unsoundness can be ascertained only by reference to the other testimony.

All the experts concede that Mr. Chandler died Dec. 31, 1903, from senile dementia; that he had become a senile dement sometime

prior to this date, all agree, and whether this disease had fixed itself upon him on the ninth day of August to such a degree as to incapacitate him mentally, is where the doctors disagree.

Again upon this point the experts for the contestants have gone so far in their effort to make the testator a senile dement on that day, as to render their testimony of substantially no value. Let us subject a vital part of it to the test and see if, in the light of their own statements, it meets the standard of consistency and reason. Dr. Channing on page 358 admits that he testified as an expert in the case of *McCoy* v. *Jordan* at Dedham in 1902, and described normal old age as distinguished from senile dementia, as follows: Q. I will read the question to you. "Assuming that the arteries as you felt them at the wrist, or at the temples, or in the neck, or wherever you can feel them, especially in the arteries at the wrist, show a degree of hardness that comes from what we call an atheromatous deposit, a sclerosis, a hardening of the arteries caused by a deposit, an atheromatous deposit, and that in a measure cuts off the supply of the blood to the brain, the brain shrinks and loses its power in proportion as that condition of the arteries in the body and generally in the brain exist, that the brain does not get the nutriment necessary for its growth and development to keep it in good order, and it becomes shrunken and weakened, and that weakening is shown by loss of memory, by enfeebleness of the memory, by hesitation in speech, by a disposition to dwell upon things in the past and forget things in the future; I will ask you whether or not those things are characteristic of senile dementia as distinguished from normal old age." I will read the answer: "I should say not. That is the rule in old age. You do get those things sooner or later in the arteries." Whether or not you recognize that question and that answer? A. I do vaguely, yes.

This was a case in which the question of senile dementia was involved and this same expert says in answer to the question, Q. I ask you whether or not you stated yesterday that on August ninth the disease of senile dementia was well advanced in the hypothetical man? A. Yes, I think it was. Q. Did you hear the testimony of Dr. Cowles? A. I did. Q. Did you hear him state that

there was a grave condition of dementia in 1902, and on August ninth a *strong and pronounced type*? A. As I remember it, I did. The hypothetical man was the testator. On page 361 of the report is found a definition by this same expert upon the same trial, of a senile dement, the important part of which is as follows: "Senile dementia is a diseased condition as contradistinguished from a condition that is to be regarded as a normal one. It is a form of insanity; form of mental disease. The individual who has this form of disease has little or no memory. If there is any memory at all remaining, it is for nothing of importance; simply an automatic mental operation. He has no memory for persons or places or names, or, as a rule, even for his own name. He practically remembers nothing of a recent period, and, as a rule, nothing of a remote period. In case of normal old age he generally has a relative one, but in senile dementia there is an absolute change. In normal old age a man, to a greater or less degree, can put his mind upon matters that seem important to him. He is able to give his attention more or less continuously to matters of interest; but a man with senile dementia is not capable of doing that; it is a man practically without a mind, without the use of his mental faculties; reduced to more or less of an automaton, and living the simplest kind of a life on a more or less animal scale; and he not only shows these marked mental changes but also a good deal of physical disturbance."

It will be here noted that these experts declare that on the ninth day of August, the testator presented a *strong* and *pronounced* type of senile dementia. That is, on that day, Mr. Chandler was a man, according to the definition just given, practically without a mind; without the use of his mental faculties; reduced to more or less of an automaton; and living on a more or less animal scale. Now the evidence from all the witnesses upon both sides, who knew and saw Mr. Chandler up to August ninth, flatly and effectually contradict the above conclusion of the medical experts as to his actual condition on that day. We need only refer to the testimony already alluded to, to establish this assertion. The hypothetical man who, these experts say, was an automaton and reduced to a condition little better than an animal, was not the Mr. Chandler who was present on the

ninth day of August at the making of his codicil; who designated the amount which should be given to his legatees; who inquired after the health of Madam Chandler and who exhibited no incident of mental unsoundness to any of the witnesses who observed him upon that occasion. It seems to us that a fair interpretation of the evidence, as a whole, rather places Mr. Chandler, on the ninth day of August, in the classification of men who have reached a normal old age, as defined by the witness, or was crossing over that unknown border that marks the fatal passage from normal old age to senile dementia. This single contradiction of the expert opinions illustrates not only how dangerous, but how unfortunate, that men of great knowledge, experience and skill, should array themselves upon different sides of the same proposition, which can have but one solution in truth, and come to absolutely contrary conclusions. It is evident that such testimony is not only worthless but insidious and dangerous, for it is impossible for a layman, in the analysis of such testimony, to distinguish the true from the untrue. If the untrue is acted upon injustice must follow.

Another fundamental weakness in the testimony of the experts for the contestants is that their testimony does not apply to the condition of the actual Mr. Chandler but to a hypothetical man who, we conceive, is supposed to represent Mr. Chandler in the hypothetical questions. Dr. Channing is asked if, assuming that the hypothetical question or questions did not include all the substantial facts proved at the trial, his answer would be more or less modified on that account. He says in answer, "I should say that a sufficiently strong case was made out in the hypothetical questions which would not be materially changed." Then further along he is asked, "suppose the evidence shows a different state of facts, whether or not your opinion would be partial?" A. That would be a different condition of affairs and of course I would have to weigh whatever there was. That would be an entirely new proposition and I should have to take it up anew. I have given a definite opinion on the *hypothetical* question,—the facts in that question. Then further along he is again asked, "So you are not speaking of the mental condition of the man whose mind is being investigated, are you, in this hypothetical question?" A. I

am speaking of *a* man in *a* hypothetical question when I am speaking of that subject. Then again when asked whether or not in the hypothetical question, he was speaking of the man whose mind was being investigated in this proceeding, he answered no.

Dr. Jelly says that although he read the evidence and depositions and heard the testimony for several days, yet, as his opinion depended upon the truth of the hypothetical questions, he could have given his opinion "just exactly as well by reading the hypothetical question as by hearing the evidence." That is to say, if the hypothetical questions assumed statements of facts not existing, or omitted those that did exist, in the language of one of the eminent specialists, that would present "an entirely new proposition and I should have to take it up anew." In fact he admits that if the hypothetical questions were wrong his opinion was wrong. That the questions were wrong can be demonstrated from the following testimony. Dr. Cowles was asked this question: "Assuming that Howard Gould, who had known Mr. Chandler for many years, met him in the latter part of the summer 1902, probably in August, at the Falmouth Hotel in Portland, and had a conversation with him, Mr. Chandler inquiring about Mr. Gould's wife, whom he knew and had known for years, calling her by name, and inquired for her sister, calling her by name, inquiring for Mr. Gould's son; and that there was nothing peculiar about him at that time, no incoherence in his talk nor change in his intelligence from former years; did you consider that assumption of fact in your hypothetical question?" A. There was no assumption of that nature that I remember in the question. Q. That was eliminated entirely from the hypothetical question, was it not? A. I didn't hear it in the question. Yet Howard Gould did testify as to the conversation with Mr. Chandler in the Falmouth Hotel, as follows: "I met him, I think, in the corridor of the hotel, and he inquired for my wife, and called her by her name, Sarah, and wanted to know how Sarah was, and if she was well and if she was enjoying good health. He said he hadn't seen her for a long time, and he inquired for her sister, Martha Stowell, and wanted to know how she was, and where she was living at the present time, if she was with me; and then he inquired for my son

Arthur." He further said that he did not observe anything peculiar about him at that time nor any incoherence in his talk nor notice any change in his intelligence different from former years. Dr. Cowles admits that if this testimony was true it showed both memory and intelligence; still he did not consider it.

These questions and answers present but one of the numerous instances of a similar nature to be found in the evidence calculated to show the one sided character of the medical testimony. In other words, these experts are testifying to the mental condition of an assumed man, whom they, themselves, had helped to create, by aiding in formulating the hypothetical questions, with the avowed purpose of declaring him a dement. That the hypothetical questions upon both sides are erroneous in the rehearsal of facts is manifest from a casual reading. The statements upon the different sides differ materially, and it follows as a corollary that one, the other, or both must be wrong. The truth is, all are wrong. They are made up from a prejudiced view and for a predetermined purpose. The ordinary rule of law with reference to the effect of interest upon credibility should be here applied with special force. Such opinion evidence presents an unsafe criterion upon which to found a judgment affecting important interests. It might make an appalling difference in deciding this important question, whether the assumed material found in this hypothetical man corresponded with real material of which the actual man was constructed. And whenever the expert, who has never examined the actual man as many of the witnesses have, fails to satisfy us that the assumed and the real correspond, we must decline to accept his opinion upon the point in issue, as of sufficient value to overthrow the testimony of witnesses, having personal knowledge of the real man. We shall not discuss the testimony of the proponents' experts further than to say that to our minds they have given fully as satisfactory reasons for the opinions they have expressed in the case as have the experts on the other side. Upon the whole, we consider it more consistent with the facts shown by the other testimony and therefore entitled to some probative force. In fine, we at least think the opinion evidence of the proponents fully

as convincing of the truth of their position, as that of the contestants is of theirs.

We have not undertaken to discuss this class of testimony in detail. We have, however, endeavored to explore the grounds upon which the experts based their conclusions, and to discover, if possible, the foundation upon which their opinions stand. This accomplished, our conclusion still is that the testator's legal sanity, on August ninth, as before declared, has not in the least been shaken by the testimony of the medical experts.

The next class of evidence bearing upon the issue of mental capacity is found in the production of the memoranda and diaries. These furnish us but little aid as Mr. Chandler practically ceased writing before 1902. The last of his handwriting showed an unsteady hand and an imperfect sight. Letters were repeated and the lines were crooked. We should hesitate, however, to say that this defect in the chirography of the testator was evidence of any greater decay than that which may be attributed, in many instances, to the weakness incident to approaching old age. It needs no expert to inform us that the hand may tremble and the sight may fail, long before the mind is deprived of its mental grasp. These evidences of mental incapacity therefore must be considered in each particular case in connection with the other testimony. The other testimony may show that these defects are due solely to mental decline. It may show that they are due to other causes. Without attempting to assign any particular cause, it is sufficient to say here that the production of the memoranda and diaries, considered in connection with the testimony tending to prove the testator's legal sanity, on August ninth, which we have already reviewed, does not overcome the effect of that testimony.

Our conclusion upon this phase of the case is, after a careful examination of the evidence, to only a small portion of which we have been able to allude, that Solomon H. Chandler on the ninth day of August 1902, was in the possession and exercise of sufficient mental power to render him of sound mind in the sense that the law requires it.

But the contestants go further and assert that even if the court

arrives at the conclusion that Mr. Chandler was in the possession of testamentary capacity, on the ninth day of August, the codicil should still be overthrown, because of the exercise of undue influence in inducing the testator to make it. They also claim that they have proven the existence of such fiduciary relations existing between Mr. Neal, Mr. True and Mr. Chandler, as to impose upon the proponents the burden of showing the absence of undue influence. But such is not the rule in this State. *O'Brien, Appellant*, 100 Maine, 156.

It is charged in the argument of counsel that "the preparation and execution of the codicil was the combined act of the tripartite guardianship of John W. True, William K. Neal and Andrew C. Chandler. This tripartite guardianship contributed a large beneficiary, an executor, a self-assumed attorney for the estate and custodian of the codicil and provided the witnesses in part from its composite self and the remainder from servants within the sphere of its influence, without any action or request from Mr. Chandler."

We are unable to find anything in the evidence that establishes the truth of the above charge, or warrants the severe expression of counsel. It will require more than the acrimonious epithets of those subject to unexpected disappointment, to induce us to believe that men, who have passed middle age without a suspicion of wrong, for no greater consideration than appears in this case, have suddenly overthrown the reputation of a lifetime, and at once become unprincipled and sordid malefactors. It is our duty to decide the case upon the evidence and not upon inuendo or rhetoric. What then is the basis of the serious charge made by the contestants against these three men? What took place at Mr. Neal's office when and where the first suggestion, as to any change in his will, was made to Mr. Chandler? We will quote substantially all the testimony upon this point.

With respect to the interview at the office and how Mr. Chandler happened to be there, Mr. Neal said in answer to whether he sent for him "I never sent for him to come and see me at any time, for any purpose." It is therefore plain that Mr. Neal cannot be charged with securing the presence of Mr. Chandler in his office. He further says, he spoke to him about the matter of the will and

in reply to the question, "What did you say to him," answered, "I said that I had been informed that he had made one or more wills, and that in them he had given all of his property to foreign missions, and nothing to his relatives, and asked him the question if that was not a little strange; to which he replied, as I now recall, that that was a notion which he had; and I asked him then in regard to his nephews, as to what sort of men they were, and he gave them a very high recommendation."

Now as to what was said by Mr. Neal, or by anybody else in the office, to Mr. Chandler with respect to making a change in his will appears in the following statement, in answer to a question; "I will say, that as he got up to leave the office I said to him,—if you think this matter over, Mr. Chandler, and decide to make any change, drop in and see me when you are down here, or words to that effect. I cannot give the exact words, and he said,—I will see, and went out." That is all that Mr. Neal ever said or did, as shown by the evidence, by way of attempting to influence Mr. Chandler at the interview in the office. There is not a syllable of testimony in the case which pretends to show that anything else was ever said or done. That the inquiry of Mr. Neal can be distorted into an exercise of undue influence, is too trivial to discuss. Nor does the testimony show that any other influence of any kind was at this time exerted upon Mr. Chandler. We find no legal or moral impropriety, under the circumstances of Mr. Chandler's visit to Mr. Neal's office, in Mr. Neal's inquiry.

He had a right under the law to suggest to the testator to provide for his relatives who were the natural objects of his affection and bounty, but he did not even go to this extent. He only asked if it was not "a little strange" that he had omitted them in the distribution of his property. Mr. Neal was not a relative of the family; he took nothing under the codicil, nor was he in any way directly interested in this instrument, nor did he have any personal interest in the distribution of the property. The case also shows that he had no knowledge and took no part in placing Mr. Chandler under guardianship, and that, on August ninth, he went to New Gloucester for the direct and express purpose of assisting in the draft of two wills

for neighbors of Mr. True. His interview with Mr. Chandler and the making of his codicil upon this day were, consequently, incidental to the main purpose.

From the time Mr. Chandler left Mr. Neal's office until the ninth day of August, there is neither claim nor pretence that any of the three men charged, or any other person, even made mention of the word will or codicil to Mr. Chandler. If a conspiracy had been working in the hearts of these men to improperly influence Mr. Chandler in the distribution of his property, something would have occurred in the furtherance of that purpose in the interval between the visit at the office and August ninth. Up to this date we fail to find a single word or act, on the part of either one of the three men charged with the conspiracy, calculated to influence Mr. Chandler in the least degree.

What then do we find upon August ninth? We have substantially quoted all the testimony of Mr. Neal brought out upon cross examination relating to what was said and done upon that occasion. We need not repeat it. It is sufficient to say that not one word can be attributed to the lips of either one of these three men in any way urging, or in the least degree persuading, Mr. Chandler to make and execute the codicil in question. A most careful scrutiny of the evidence will show that Mr. Chandler instead of being requested to do anything, was asked if he had thought over the matter of making a change in his will, and then, what he had concluded to do; and that Mr. Chandler made the reply that it was rather natural that he should give his relatives something and thought it would be right. Then Mr. Neal inquired how much he desired to give and suggested that he could give a specific sum or make it a percentage, and Mr. Chandler suggested ten per cent. Mr. Neal retired, made the codicil, brought it back, read it to Mr. Chandler, then placed it upon the roll top desk, told him that he could look it over and at some future time, when he came into Portland, sign it. Upon which Mr. Chandler at once replied, it is all right, why not sign it now.

The evidence of this day's transactions instead of tending to prove a conspiracy, conclusively proves the contrary. If these three men had entered into a plot to influence and induce Mr. Chandler to

execute a codicil, diverting the succession of one-half of his property, the instrument by which this unlawful act was to have been accomplished, would not have been laid upon the roll top desk to be looked over, and at some future time signed by the victim of the conspirators. In fine the evidence surrounding the execution and making of this codicil presents no features of an unusual character. There is no evidence in the case that Andrew Chandler said one word with respect to the disposal of the property and that Mr. True simply inquired of him if he desired to remember Madam Chandler. While Mr. True was guardian of Mr. Chandler, he was the recipient of no favors under this codicil. And he reiterates his statement of denial, in every possible form, that any one of the nephews, the Chandler boys, or the widow of the deceased brother, Mr. Neal, or any other person ever requested him in any way directly or indirectly, to talk or confer with Mr. Chandler as to the disposition of his property.

The burden of proof rests upon the contestants to sustain the allegation of undue influence by a preponderance of the evidence. They have failed to do so.

The next proposition which the contestants assert as a reason why this codicil should not be sustained is that the three men above charged with the exercise of undue influence were also guilty of a fraud upon Mr. Chandler in inducing him to execute the codicil. We feel called upon to notice but one allegation under this head and that is that Mr. Neal read to Mr. Chandler the will and codicil of 1896, instead of the latter will of 1897, as the will which the new codicil of 1902 was intended to republish.

We have already quoted in full item three of the will of 1896 and shown that the corresponding item of the will of 1897 was identical, with the exception of the clerical omission of two unimportant words. That is, the two wills were in their substantial features precisely alike. Mr. Neal read the will of 1896 and the codicil, and at the request of Mr. Chandler, read it again, and as we have already held, under the question of testamentary capacity, he comprehended and understood it. With the exception of the provision in the will of 1897 directing a speedy settlement of the estate and a change or

addition in the Board of Executors, there was no difference in the provisions of the two wills. It is apparent, therefore, that the codicil affecting the will of 1896 instead of that of 1897 perpetrated no fraud either upon Mr. Chandler or the residuary legatees under the will of 1897. The situation of the residuary legatees was not changed in any degree because the codicil was applied to the will of 1896 instead of that of 1897. If the testator was possessed of such mental capacity on August ninth as enabled him to comprehend the effect of the codicil which he executed, and we have decided that he was, we find in the evidence presented upon the question of fraud, no adequate reason for setting it aside.

Our final determination upon all the contentions of fact is, that the codicil republished the will of 1896, and the codicils thereto, which became a part thereof, and that said will and codicils are valid instruments representing the last will and testament of the testator, Solomon H. Chandler.

Appeal dismissed. Decree of Probate Court that the instrument purporting to be the last will and testament dated March 10, A. D. 1896, of Solomon H. Chandler, late of New Gloucester in the County of Cumberland, deceased, and codicils thereto, dated August 11, 1896 and August 9, 1902, be approved and allowed and that letters testamentary issue to the executors, affirmed; ordered, that the costs, stenographers and counsel fees, and other expenses of the proponents and executors, in the Probate Court and Supreme Court of Probate, be paid out of said estate by the executors, and charged in their account with said estate. Case remanded to the court below for further proceedings in accordance with this opinion; it is further ordered that the estate is not to be charged with the payment of any costs, stenographers or counsel fees, or other expenses of the contestant.

ALDEN W. KELLEY *vs.* CHARLES F. TARBOX.

Washington. Opinion November 14, 1906.

Officers. Attachment of personal property. Same must be maintained by officer at his peril. Return prima facie evidence of attachment. Officer not deprived of possession of attached property by filing certificate as provided by statute in town clerk's office. R. S., chapter 83, section 27.

When an officer has made a valid attachment of personal property on a writ of attachment, he must maintain it at his peril.

When an officer has made an attachment of personal property on a writ, his return on the writ is at least prima facie evidence that the property enumerated in such return was attached.

When an officer has made an attachment of personal property on a writ, the filing in the office of the clerk of the town in which the attachment was made, of an attested copy of so much of his return as relates to the attachment, etc., as provided by R. S., chapter 83, section 27, is an act independent of the attachment, and is calculated to operate only as one of the modes of preserving an attachment already made.

When an officer has made return on a writ of attachment that he has attached certain personal property, it does not follow from the return that he did not take possession of the property attached, although as a matter of precaution he filed under the statute an attested copy of his return; nor, even if he undertook to preserve the attachment by filing an attested copy of his return, that he did not afterwards take possession of the property attached.

When an officer has attached personal property on a writ and has filed an attested copy of his return in the office of the town clerk, as provided by R. S., chapter 83, section 27, he does not thereby deprive himself of the right to gain actual possession of the property attached, and to remove it whenever necessary for its preservation.

In the case at bar, the plaintiff is a judgment creditor of one H. L. S. The original writ in the action in which the plaintiff recovered his judgment against H. L. S. was placed in the hands of the then sheriff of Washington county who attached certain personal property thereon and made return as follows:

"Washington, ss. April 17, A. D. 1902.

At 9:45 o'clock in the forenoon by virtue of the within writ, I attached one carpet, one couch, one Morris chair, two rugs, four rockers, one table, one hat-tree, one hardwood chamber set, one rolling top desk, one table, one

bookcase, six chairs, one safe and one blank cabinet in said County of Washington, and within five days after the above attachment I filed in the office of the Clerk of the Town of Machias a true and attested copy of so much of this return as relates to said attachment, with the value of said defendant's property, which I am herein commanded to attach, the names of the parties, the date of the writ and the court to which the same is returnable; and on the same day I gave to the within named defendant a summons in hand for his appearance at court."

After the plaintiff had obtained his judgment and execution thereon, he placed the execution in the hands of a deputy of the defendant sheriff with instructions to make demand, within thirty days after the date of the judgment, upon the attaching officer, whose term of office had then expired, for the personal property attached on the original writ. *Held:* (1) that the attachment made by the attaching officer was valid; (2) that it was the duty of the defendant's deputy to make demand on the attaching officer, within thirty days after the date of the judgment, for the personal property attached on the original writ; (3) that the defendant's deputy failed to make such demand; (4) that as the failure of the defendant's deputy to make such demand released the attaching officer from all liability relating to the attachment and deprived the plaintiff of any right of action against the attaching officer, the defendant sheriff became liable for all damages occasioned by the neglect of his deputy.

On exceptions by plaintiff. Sustained.

Action on the case brought by the plaintiff, a judgment creditor of one Harry L. Smith, against the defendant, sheriff of Washington county, to recover damages caused by the alleged failure of one of the defendant's deputies to make demand, within thirty days after judgment, on an execution, for certain personal property attached by the former sheriff of said county on the original writ in the action in which the plaintiff recovered judgment against said Smith. The term of office of the former sheriff, who made the attachment, had expired at the time the plaintiff obtained his said judgment and execution thereon.

Tried at the January term, 1906, of the Supreme Judicial Court, Washington county. Plea, the general issue.

"After the evidence upon both sides was introduced the court ruled that the defendant was not liable for the failure of his deputy to make demand upon the attaching officer for the goods alleged to have been attached, unless it be shown that there was a valid attachment of such goods.

"That the return of the officer upon the original writ showing that

an attachment was attempted to be maintained by filing in the Town Clerk's office an attested copy of his return under R. S., c. 83, sec. 27, of the present R. S., did not show a valid and maintained attachment of such goods, since it appears that the goods were not bulky, and there was no other reason why the same could not have been immediately removed.

"That in view of the officer's return it was incumbent upon the plaintiff to prove by evidence outside of the officer's return that a valid attachment of the goods in question was made and maintained, and that there is no presumption, in view of the officer's return, that the attachment was properly made and maintained and that there was no sufficient evidence thereof.

"The court further ruled that the action could not be maintained and thereupon ordered a verdict for the defendant."

To these various rulings and to the order of the presiding Justice directing a verdict for the defendant, the plaintiff took exceptions, "all of the evidence, documentary and oral, to be made a part of the bill of exceptions; but the counsel by agreement may omit from the printed report of the case any portion of the evidence that they agree is immaterial."

It was also "further agreed by counsel for the plaintiff that if the foregoing rulings and the direction of a verdict should be considered by the Law Court to be erroneous, and if the Law Court should decide upon all of the evidence that the plaintiff is entitled to judgment, that judgment for the plaintiff shall be ordered and the case remanded to nisi prius for the assessment of damages only."

J. H. Gray, for plaintiff.

A. D. McFaul, for defendant.

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

SPEAR, J. This is an action in which the plaintiff, a judgment creditor of Harry L. Smith, seeks to recover of the defendant, sheriff of Washington county, for the failure of Fred P. Gilson, one of his deputies, to make a demand, within thirty days from the date of judgment, upon an execution, for personal property attached by

Isaac P. Longfellow, former sheriff of the county, upon the original writ, upon which said judgment and execution were obtained.

The facts show that the plaintiff on the 16th day of April, 1902, brought suit against one Harry L. Smith, returnable at the next October term of court; on the 17th day of April, the writ was delivered to Isaac P. Longfellow, sheriff of the county, who by virtue thereof attached certain personal property the estate of the debtor; the writ was served and the action entered at said October term of court and continued from term to term; on the 29th day of October 1903, judgment was entered in favor of the plaintiff for $126.00 debt or damage and $20.70 costs; on the 3rd day of November, 1903 a writ of execution was issued directed to the sheriff of said county or any of his deputies; on the 6th day of November, 1903, the writ of execution was delivered to Fred P. Gilson of Machias, then a deputy sheriff of Charles F. Tarbox, sheriff of said county, the term of office of said Isaac P. Longfellow as sheriff having expired before the rendition of judgment.

At this point the allegations became a matter of dispute but the plaintiff avers that the said Longfellow on the 6th day of November, 1903, had in his hands and possession the goods and chattels of the said Harry L. Smith, above described which he held by virtue of the attachment on the original writ; that said Fred P. Gilson was on said 6th day of November, 1903, requested by the plaintiff to demand and receive of the said Longfellow, the goods and chattels aforesaid and apply them to the satisfaction of said judgment and execution, and that the said Gilson neglected and refused to make such demand within thirty days after judgment was rendered, so that the plaintiff lost his right of action against the said Longfellow, in case the said Longfellow had failed to keep said goods and chattels by virtue of said attachment as required by law and surrender them to the officer holding the execution; and that afterwards about the first of March, 1904, returned the execution to the plaintiff in no part satisfied.

The plaintiff's exceptions show that "After the evidence upon both sides was introduced the court ruled that the defendant was not liable for the failure of his deputy to make demand upon the

attaching officer for the goods alleged to have been attached, unless it be shown that there was a valid attachment of such goods.

"That the return of the officer upon the original writ showing that an attachment was attempted to be maintained by filing in the Town Clerk's office an attested copy of his return under R. S., c. 83, sec. 27, of the present R. S. did not show a valid and maintained attachment of such goods, since it appears that the goods were not bulky, and there was no other reason why the same could not have been immediately removed.

"That in view of the officer's return it was incumbent upon the plaintiff to prove by evidence outside of the officer's return that a valid attachment of the goods in question was made and maintained, and that there is no presumption, in view of the officer's return, that the attachment was properly made and maintained and that there was no sufficient evidence thereof."

The court further ruled that the action could not be maintained and thereupon ordered a verdict for the defendant.

The decision of this case must finally turn upon the question of fact, whether the deputy sheriff, Fred P. Gilson, made a demand upon Isaac P. Longfellow, the former sheriff, for the goods and chattels attached upon the original writ. If the evidence sustains the contention of the defendant that he made such demand, that is the end of the plaintiff's case, as the deputy sheriff would have discharged his full duty. If, on the other hand, the evidence proves that he neglected to make such demand, then the defendant who was responsible for the misfeasance of his deputies, will be liable.

By the stipulation in the record the court is to determine this issue of fact.

When established by the plaintiff that the execution was placed in Gilson's hands with directions to make a demand, and that it was returned in no part satisfied and without any demand endorsed upon it, it then devolved upon the defendant, if he would interpose the defense that a demand was made, to assume the affirmative of that proposition. It was incumbent upon him to sustain the burden of proof. We are of the opinion that, upon the evidence, he has failed.

We must then proceed farther and, upon the assumption that no

demand was made, determine the ruling of the court. The presiding Justice held as a matter of law that the return of the officer upon the original writ "did not show a valid and maintained attachment of such goods, since it appears that the goods were not bulky, and there was no other reason why the same could not have been immediately removed," and further that it was incumbent upon the plaintiff to prove by evidence outside of the officer's return, a valid attachment and that there was no presumption in view of the officer's return that the attachment was properly made and maintained.

The first question that arises for discussion is whether the officer's return showed a valid attachment of the goods in question. "The return of the officer is the evidence, that property referred to therein has been attached." *Darling* v. *Dodge*, 36 Maine, 370. *Wentworth* v. *Sawyer*, 76 Maine, 434. *Parry* v. *Griefen*, 99 Maine, 420.

To constitute an attachment, it is not necessary, that the officer should handle the goods attached, but he must be in view of them with the power of controlling them and of taking them into his possession." *Nichols* v. *Patten*, 18 Maine, 231.

The return of the officer on the writ of *Kelley* v. *Smith*, is at least prima facie evidence that the property therein enumerated was attached. The officer in his return says: "At 9.45 o'clock in the forenoon, by virtue of the within writ, I attached one carpet, one couch, one morris chair, two rugs, four rockers, one table, one hat-tree, one hardwood chamber set, one rolling top desk, one table, one bookcase, six chairs, one safe and one blank cabinet in said County of Washington." This is the clause that constitutes the return of the officer's attachment and if it stopped right here would operate as a valid attachment of the goods. Then follows another clause relating to the filing of the certificate in the town clerk's office: "And within five days after the above attachment I filed in the office of the Clerk of the Town of Machias a true and attested copy of so much of this return as relates to said attachment with the value of said defendant's property, which I am herein commanded to attach, the names of the parties, the date of the writ and the Court to which the same is returnable."

We are unable to discover anything in the last clause of the

return which is inconsistent with the declaration of the officer in the first clause that he had made an attachment. In fact the language of the second clause "within five days after the above attachment" admits the attachment in the first, and becomes only the evidence of one of the modes authorized by law of preserving the attachment.

Non constat from the officer's return that he did not retain possession of the goods, although he had also filed his certificate under the statute as a matter of precaution, nor, even if he undertook to preserve the attachment by filing a portion of his return, that he did not thereafter take possession of the articles attached.

Upon this phase of the case relating to attachments and the different methods of preserving them, our court in *Wentworth* v. *Sawyer*, 76 Maine, 434, in discussing the reason for the statute authorizing the preservation of attachments by filing an attested copy of a portion of the return, say: "It will be seen by this provision that no attempt is made to change the mode of making the attachment but a new and easier method of preserving it is provided." Nor are we satisfied that the officer by filing with the town clerk the copy and certificate required by statute deprived himself of the right to gain actual possession of the property attached, and remove it whenever necessary for its preservation." See also *Parry* v. *Griefen*, supra.

The officer's return shows a valid attachment in the original suit but the presiding Justice in ordering a nonsuit held that not only a valid attachment must be made by the officer but must be maintained by him. It seems to us, however, that when an officer has made a valid attachment upon a writ he must maintain it at his peril. And it becomes immaterial, if Sheriff Longfellow had made a valid attachment, whether he maintained it or not, as he would be liable in either case, if demand was made upon him on execution for the delivery of the goods for the benefit of the attaching creditor. To be sure the case at bar is not against Longfellow, but, to fix his liability even if guilty of the misfeasance alleged, the statute required that a demand should be made upon him for the goods attached by a proper officer, within thirty days from the rendition of judgment. That is, if it be assumed that Longfellow, after he

had made a valid attachment, absolutely released it and let the property go out of his control and custody, yet without a demand he was relieved from all liability. On the other hand, having made a legal attachment, he must himself assume the responsibility of preserving it, and if by neglect, mistake or intention, he lost the control and custody of the personal property attached so that he could not surrender it to the officer for the benefit of the creditor, if demanded, within thirty days from judgment, he would become liable.

Hence it was incumbent upon the officer, charged with the duty, to make the required demand in order to preserve the liability of the attaching officer, whether the property attached was in his custody or not.

The duties of the attaching officer in his relations to the attaching creditor is stated in *Wentworth* v. *Sawyer*, 76 Maine, supra, as follows: "The sheriff is the mere minister of the law to preserve for the creditor satisfaction of the debt, and it is therefore indispensably necessary that he should sustain such a relation to personal property which he has seized, as will enable him to hold it to answer the purpose for which it was attached. His relation to the property by virtue of the attachment, and the reduction of it into his possession and control, are such that he is vested with a special property in it which enables him to protect the rights he has acquired, and this special property continues so long as he remains liable for it, either to have it forthcoming to satisfy the plaintiff's demand, or to return it to the owner, upon the attachment being dissolved."

Blake v. *Kimball*, 106 Mass. 115, is an action of tort against a sheriff for the negligence of one of his deputies and clearly states the duties of the attaching officer and his relations to the attaching creditor, as follows: "Upon the attachment of personal property on mesne process, the duty of the attaching officer to the plaintiff in the suit is to keep the attached property safely, so that it may be forthcoming in order to be taken upon such execution as shall be issued in thirty days after the final termination of the suit in a judgment in favor of the plaintiff. The extent of the plaintiff's right and of the officer's duty, as to such property, is that it shall be forthcoming.

During the pendency of the suit, the officer may make such arrangements upon his own responsibility, in regard to the custody of the property as he may see fit. To these arrangements the attaching creditor is not a party, unless he should choose to make himself so by direct participation or express consent. The removal of the attached property beyond the officer's reach would have no effect on the rights and liabilities of the parties in relation to each other. The attached goods remain constructively in the officer's possession, and his liability to the creditor's rights against him, are exactly the same as if the possession instead of being constructive was actual and literal."

In his ruling, the court undoubtedly assumed that inasmuch as the attachment had not been maintained and the attaching officer could not produce the goods, the plaintiff had suffered no loss on account of the failure of Gilson to make a demand within thirty days after judgment, but it clearly appears from the above decisions that the attaching officer whatever had become of it, was legally responsible to the attaching creditor for the "actual and literal" possession of the property attached.

Upon the necessity of demand, see *Pearsons* v. *Tinker*, 36 Maine, 384, which was an action against an attaching officer for failure to preserve his attachment upon a brig, which soon afterwards sailed on a voyage and, at the time of the issue of judgment and execution upon the writ of attachment and for more than thirty days thereafter, was beyond the jurisdiction of the State. The execution seems not to have been placed in the hands of the officer within thirty days for the purpose of preserving the judgment lien, and it was held that nothing had been done whatever to fix the liability of the defendant and further that the fact that the vessel was out of the jurisdiction of the State, did not relieve the defendant from the necessity of seasonably placing his execution in the hands of the officer for a demand upon the deputy sheriff making the attachment on the original writ.

To the same effect is *Wetherell* v. *Hughes*, 45 Maine, 61, and *Bicknell* v. *Hill*, 33 Maine, 297.

This being the law, it was the duty of Gilson, the defendant's deputy, in whose hands the execution was seasonably placed, to make

a demand upon the attaching officer within thirty days from the date of judgment, for the goods attached upon the original writ, in order to fix his liability for the goods so attached. In other words, such a demand was a prerequisite to the right of the plaintiff to maintain an action against Mr. Longfellow for not preserving the attachment. The failure of the deputy to make such demand deprived the plaintiff of any right of action, whereby the defendant became liable for all damages occasioned by the neglect of his deputy.

According to the stipulation in the report, the case is remanded to nisi prius for assessment of damages only.

Exceptions sustained.

AMERICAN MERCANTILE EXCHANGE *vs.* A. G. BLUNT.

Penobscot. Opinion November 19, 1906.

Contracts. Construction. Legal contracts made illegal by subsequent statute. Effect of such change stated. Statute 1899, chapter 112. R. S., chapter 130, section 7.

When a contract is partly written and partly oral, the written and the oral parts must be construed together in determining what the whole contract expresses.

When any material part of an entire contract which was legal when made, becomes illegal by reason of a statute subsequently enacted, such contract is thereby wholly terminated as soon as the statute takes effect although the time specified in the contract for its performance has not then fully expired.

When a contract legal at its inception becomes illegal by subsequent statutory enactment, no action can be maintained on such contract for a failure to continue to perform the conditions of such contract after the illegality has attached.

But while it is true that a contract which was legal at its inception may become illegal by subsequent statutory enactment, yet it does not follow

that the acts done under the contract before the enactment of the statute are illegal. In such case the statute puts an end to the contract and no recovery can be had thereon for non-performance after the time when the contract is thus terminated.

The plaintiff and the defendant made a contract which was partly written and partly oral, wherein it was stipulated, among other things, that the plaintiff should employ its "system" in the collection of claims placed in its hands by the defendant. This contract was a continuing agreement and was intended to be operative until the same was cancelled by the parties or abrogated by law. The parties did not cancel the same. It was a part of the plaintiff's "system" that when judgments had been obtained against debtors, it would advertise such judgments for sale by public posters. By a statute subsequently enacted such advertising was made illegal. *Held:* (1) that the contract was an entire contract; (2) that the contract being an entire contract was wholly terminated as soon as the statute took effect; (3) that the plaintiff cannot recover from the defendant for non-performance of the conditions of the contract after the time when the statute went into effect.

On report. Judgment for defendant.

Assumpsit on a contract made November 24, 1897, by the plaintiff corporation, a collection agency, and the defendant in relation to the collection of claims placed in the hands of the plaintiff by the defendant. The plaintiff alleged that the defendant had failed to perform his part of the contract and that in consequence of this failure the defendant owed the plaintiff $75.00 for subscriptions. The action was brought to recover this sum of $75.00.

The writ was dated May 5, 1905. Plea, the general issue with the following brief statement: "And for brief statement defendant further says: That the alleged several promises claimed in the declaration to have been made by the defendant were not made within six years before the commencement of said suit."

Tried at the April term, 1906, of the Supreme Judicial Court, Penobscot County. At the conclusion of the testimony, the case was "reported to the Law Court for determination upon so much of the evidence as is legally admissible."

The case appears in the opinion.

T. P. Wormwood, for plaintiff.

Martin & Cook, for defendant.

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

SPEAR, J. This action is based upon a contract wherein the plaintiff avers that the defendant has failed of performance on his part and in consequence of such failure, is indebted to the plaintiff in the sum of $75. The essential part of the contract under which the plaintiff claims is as follows:

"AMERICAN MERCANTILE EXCHANGE.

Incorporated Nov. 24, 1897.

"In consideration of an annual contract in above Agency, I hereby agree to pay said Agency, or order, all sums of money as collected out of accounts placed in said Agency's hands by me, whether such collections or settlements are made through said Agency's office or by me through my office or by any other person in my behalf, until the same shall amount to Twenty Dollars, and I further agree to send to the said Agency on or before ten days from date, ten accounts, otherwise the payment of Twenty Dollars shall become due and payable to said Agency, or order, on demand."

This agreement was properly executed by the plaintiff and defendant.

"TO AMERICAN MERCANTILE EXCHANGE.

"We hereby agree to subscribe to your Exchange under the following special terms and conditions.

"1. You will employ *your system* to collect all claims we may place in your hands, suing where you deem advisable, and using legal means to enforce payment from debtors in any part of the United States and Canada, and all such claims shall be subject to our control or withdrawal; unless legal action has been taken, and all debts that may be advertised for sale shall be held at the figures quoted by us."

It will be observed by the use of the language in the first clause of this stipulation "you will employ your system to collect all claims," etc., that the written contract herein set forth did not state or contain all the elements of the contract. What the plaintiff's system

above alluded to was, is not stated. The testimony, however, fully describes the "system" employed by the Agency in the collection of accounts. In answer to the question, "You have stated that when you went to Mr. Blunt, you explained to him the method of the Agency. Now will you explain to us what that method was?" The agent of the plaintiff who executed the contract answered in detail as follows: "At that time the method was to take the list of claims on a blank form, collecting ten cents for each claim to cover postage. A series of four letters were employed by the Agency, the first notifying that the account was due and unpaid, and asking them to call on their creditor and make some settlement, and informing them at the same time that the Agency in no case handled the money. After a certain length of time which shows on the list, I can't remember now, a second letter was sent informing them of the fact that they who did not pay would be reported to the trade if it was still left unpaid. After a certain length of time a third one was sent informing them that they would be sued if it was not paid, and a fourth one that when judgment was obtained, the account would be advertised for sale by public posters, and enclosing them a copy of one of the posters that had been already published."

This "system," the terms of which were not incorporated in the written contract, nevertheless, in view of the purposes and object of the defendant, became, by the specific written allusion to it, a material and important feature in the performance of the contract on the part of the plaintiff. The defendant in the written stipulation, prescribing its duties, required that the plaintiff should use its "system." Its "system" at the time the contract was executed, was explained by the plaintiff's agent as above set forth. When so explained, the terms of his interpretation became as much a part of the contract as though they had been contained in a separate written document. Therefore, the whole contract of the parties, or so much of it as is necessary to the decision of this case, is contained in the written clauses before quoted in this opinion, and the explanation of the "system" as made by its agent to the defendant; that is, the written and the oral parts of the contract are to be construed together in determining what the whole contract expressed.

This contract was entire, and constituted a continuing agreement and was binding upon the defendant to pay his subscription yearly unless abrogated by consent of the parties or operation of law. There is no pretence that the contract was mutually cancelled, but the defendant avers that its further performance was made illegal by the enactment of chapter 112, Public Laws of 1899, which went into effect April 16, 1899, seven months before the maturity of the second year's subscription. By the contract the subscription was not due until the end of the year. This act is now incorporated in chapter 130, sec. 7, of the Revised Statutes, as follows: "No person, firm or corporation, shall publicly advertise for sale in any manner whatever, or for any other purpose whatever, any list or lists of debts, dues, accounts, demands, notes or judgments, containing the names of any or all of the persons who owe the same. Any such public advertisement containing the name of but one person who owes as aforesaid, shall be construed as a list within the meaning of this section. Any person, firm or corporation, violating the provisions of this section, shall be liable in an action of debt, to a penalty not exceeding one hundred dollars, and not less than twenty-five dollars, to each and every person, severally and not jointly, whose name appears in any such list."

It is clear that this statute when it took effect April 16, 1899, absolutely prohibited the plaintiff from using that part of its "system" wherein it had stipulated that accounts would be advertised for sale by public poster. It is presumed that the plaintiff did not violate this statute and did not, subsequently to the date when it took effect, post any list of delinquent debtors. Therefore the case stands as if the plaintiff on the 16th day of April, 1899, had ceased to perform its contract in respect to posting lists of debtors' names and advertising the judgment for sale. While the plaintiff's contract as to the method of advertising does not specifically state that the posters shall contain the name of the debtor, yet the only inference to be derived from the language used clearly sustains that conclusion.

But the full performance of its contract was a condition precedent to the right of the plaintiff to recover the annual payment agreed upon, whether the non-performance was caused either by the fault

of the plaintiff, by impossibility, as by an act of God, or by a statute prohibiting performance. Upon this point the circuit court of the United States for the district of Pennsylvania in *Odlin* v. *Insurance Company of Pennsylvania*, Federal Cases, Vol. 18, No. 10433, says: "It is a general principle of law that where a contract is lawful when made and a law afterwards renders performance of it unlawful, neither party to the contract shall be prejudiced and the contract is to be considered at an end." This does not mean that a contract legal at its inception becomes illegal by subsequent statutory prohibition as to acts done before the enactment of the statute, but that the statute puts an end to the contract and there can be no legal recovery by the plaintiffs even if it should perform the unlawful acts, as it is contrary to the policy of the law to permit a party to recover for the performance of his own illegal acts or benefit by his own wrong. The law, however, excuses the plaintiff from performing its contract and releases it from liability to damages for non-performance, but it does not leave it in a position to maintain an action for recovery upon an entire contract, the performance of any part of which is prohibited, even if performed.

In *Greenough* v. *Balch*, 7 Maine, 461, the court fully approved of this rule of law and says: "Nor are we disposed to find fault with the doctrine, that where the consideration, or a part of it is malum prohibitum, it violates and invalidates the promise, as much as if it had been malum in se; both being unlawful, and neither entitled to favor or indulgence."

Shaw, C. J., 3 Cush. 448, in discussing the status of illegal contracts says: "The law will not lend its aid to carry into effect an illegal contract, if it be executory, nor to restore the party who has paid money on it, if executed."

In *Goodwin* v. *Clark*, 65 Maine, 280, it was held: "A person cannot recover for his personal services, portions of which are rendered in an unlawful employment, the contract being an entirety."

In *Bishop* v. *Palmer*, 146 Mass. 469, the court say: "As a general rule where a promise is made for one entire consideration, a part of which is fraudulent, immoral, or unlawful, and there has been no apportionment made, or means of apportionment furnished

by the parties themselves, it is well settled that no action will lie upon the promise." But these propositions are elementary. While these two cases do not involve the same state of facts presented in the case at bar, yet by analogy, they are clearly applicable. In the cases cited, it is held that when any stipulation of an entire contract is illegal, the contract cannot be enforced. In the case at bar the contract is entire and a part of it became illegal, malum prohibitum, at once upon the effect of the statute. The advertisement of a single account for sale, however soon after the statute became a law, would have subjected the plaintiff to the penalty prescribed. Therefore if the plaintiff during the second year of the contract, and before it was performed, was prohibited by law from the performance of any material stipulation, the entire contract for the year failed and it cannot recover even for the part performed.

For the third and subsequent years for which it has brought suit the prohibited part of the contract was illegal from the beginning of the year and no recovery can be had for any of these years.

Under the contract the balance of the first year's subscription $11.14 is barred by the statute of limitations.

Judgment for the defendant.

ANN M. LANCEY et als. *vs.* DAVID M. PARKS.

Somerset. Opinion November 22, 1906.

Adverse possession. Disseizin. Notice of adverse occupancy necessary, when. Constructive notice of adverse occupancy defined. How intention to occupy adversely under tax sale must be shown.

To work a disseizin of the true owner possession must be adverse.

Where one enters into possession of another's land by the owner's consent such owner is not disseized, but at his election, until he has notice actual or constructive that the occupancy is adverse.

To constitute such constructive notice there must be some visible change in the character or nature of the occupancy, calculated to put the owner on his guard and notify him that the land is in the possession of a hostile claimant.

Where one first enters upon land after bidding in the same at a tax sale, his intention to occupy adversely during the year allowed for redemption from such sale must be shown by some unequivocal act hostile to the owner's title, brought home to his knowledge, or which he ought to have known in the exercise of reasonable care and diligence in regard to his property.

On report. Judgment for plaintiffs.

Real action to recover two lots of land situate in the town of Detroit. Writ dated August 31, 1903. Plea, the general issue with a brief statement claiming title to the demanded premises under certain tax deeds and also by adverse possession.

At the September term, 1905, of the Supreme Judicial Court, Somerset County, the parties agreed upon the facts and then agreed that the same should be reported to the Law Court under the following stipulations: "If upon the aforesaid agreed statement of facts, the plaintiffs are entitled to recover, then the defendant is to be defaulted and the plaintiffs are to have judgment for the possession of the above described premises and for their costs; otherwise the defendant is to have judgment and for his costs.

The case fully appears in the opinion.

James M. Sanborn and E. N. Merrill, for plaintiffs.

Morse & Anderson, for defendant.

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

POWERS, J. Real action to recover two adjoining lots, forty-nine containing sixty-five acres and fifty-one containing one hundred and ten acres, in range four in the town of Detroit, reported to the Law Court on facts agreed.

It is admitted that plaintiffs' predecessor in title Wm. K. Lancey, a non-resident owner, possessed and occupied the premises until May 26, 1883 when they were sold for taxes, and that the plaintiffs are the legal owners unless the evidence establishes a better title in the defendant. The writ is dated August 31, 1903.

At the tax sale the lots were bid in for $7.02 by the defendant and one Haskell, and the town treasurer's deed to them was dated May 26, 1883 and recorded May 28, 1884. Haskell made a verbal sale of his interest in the property to the defendant and has never claimed any title to it. The defendant does not contend that he acquired a good title to the land in question by the tax deeds. It is therefore unnecessary to examine or discuss the regularity of the tax sales. He claims title by disseizin upon the following facts as stated by him.

"I have remained in open and exclusive possession of it (the premises) in manner following from that time (May 26, 1883) to the present time.

"At time I purchased the land, about fifty acres of it had been used by one William Basford as pasture land and he continued to pasture the same for three or four years after I purchased it with my permission. This portion of the land was fenced. At time I purchased, about ten or twelve acres of the land so pastured by Mr. Basford was cleared land, the rest of it was bush land or covered with a young growth. There was no fence around the rest of the land. Since then one Frank Jackson has cut the hay on the premises, from one-half to two-thirds of a ton a year. The consideration he paid me was to look after the property. He had never pastured the land, nor have the fences been repaired by any one since Mr. Basford ceased to occupy as stated. I have never tilled

any portion of said premises. The land so pastured by Mr. Basford has been gradually growing up to bushes and trees and is now practically covered with such a growth. At time I purchased, a large portion of the rest of the land, then not pastured by Mr. Basford, was a second growth of gray birch and small fir and a lot of that growing up and some small spruce and pine. The rest of the land was covered with spruce, pine, cedar and hard wood. I have from time to time cut small amounts of lumber and hoop poles on this land. Fourteen years ago I cut about twenty-five cords of wood, and eleven years ago I cut eleven thousand feet of pine on this land. I did this openly, with the knowledge of William K. Lancey and his assigns. It was generally known in the neighborhood where the land is situated that I claimed to be the owner of it and was in possession of it. Neither William K. Lancey nor his heirs nor grantees have ever occupied or attempted to occupy any portion of said land since May 26th A. D. 1883, but I have occupied said land from said time in manner before mentioned, down to the bringing of this action. I have paid the taxes on said land since May 26, 1883, to the present time, 1904, and with the exception of the first two years the land has always been taxed to me."

Do these acts constitute such open, notorious, exclusive and adverse possession as are requsite to gain title by disseizin? From the time when the defendant claims to have taken possession May 23, 1883, to the date of the writ is a few days more than twenty years and three months. Without discussing or deciding the character and nature of the defendant's occupation for the remainder of that period we think it evident that for the first year at least it was clearly insufficient. His only occupation during that year was through Basford pasturing a portion of the land. No other act is shown on the part of the defendant, and no other notice to the true owner that the land was in the possession of a hostile claimant. It is a fair inference from the defendant's own statement that at the time he purchased the land Basford was pasturing it. He says: "At the time I purchased the land, about fifty acres of it had been used by one William Basford as pasture land, and he continued to pasture the

land for three or four years after I purchased it with my permission." The date, May 26th, was a season of the year when the land was fit for pasturage. The burden was upon the defendant to establish his alleged title by disseizin. His own statement is accepted as true by the plaintiffs, and it is reasonable to presume that it was as favorable to him as was consistent with the truth. Under these circumstances his use of the words "at the time" and "continued" significantly points to the fact that Basford was pasturing the land at the time of the tax sale. It is admitted however, that William K. Lancey, the plaintiffs' predecessor in title was in possession and occupation of said premises until that date. If so Basford must have entered and occupied under Lancey up to the time of the tax sale, although he may have occupied with the permission of the defendant after that date. It is a just and well settled principle of law that if one enter into possession of another's land by his consent, or as his tenant, the true owner is not disseised, but at his election, until he has notice that the occupancy is adverse, or there has been some change in the nature of such occupancy calculated to put him on his guard. *Alden* v. *Gilmore,* 13 Maine 178, 1 Cyc. 1032. Here no election, notice or change is shown, nothing to notify Lancey in any way that Basford's occupation was not still in subordination to Lancey's title, or had assumed a hostile character. He might well repose in security believing Basford's possession to be his own. Neither can we believe that the defendant intended during the first year to occupy adversely. He does not so state. He says he was in open and exclusive possession and that it was generally known in the neighborhood that he claimed to be the owner of it. He did not take possession of it until after the tax sale. His deeds were not delivered to him until a year later. During that year the law, which he is presumed to have known, and the very terms of his deeds, gave to the owner the right of redemption. There is nothing to show that during that time he claimed anything more than a qualified ownership in the land, subject to the owner's right to redeem the same upon payment of a paltry sum. We do not decide that a person, who first enters upon land after bidding it in at a tax sale and before he has received a tax deed, can not disseize

the owner before the expiration of the year given for redemption. His intention to do so, however, must be shown by some unequivocable act, hostile to the owner's title, brought home to his knowledge or which he ought to have known in the exercise of reasonable care and diligence in regard to his property. In this case for a year after the tax sale there was no visible change of occupancy, nothing done or said by the defendant to put Lancey upon his guard and notify him that the land was in the possession of an adverse claimant, and nothing stated from which it can be reasonably inferred that the defendant himself, during that period, intended to occupy other than in subordination to Lancey's title and subject to his right of redemption.

The defendant has failed to show that this possession was adverse for the period of twenty years before the commencement of the action.

Judgment for the plaintiffs.

EDWARDS MANUFACTURING COMPANY, Petitioner for Mandamus,

vs.

FRANK L. FARRINGTON et. als., Assessors of the City of Augusta.

Kennebec. Opinion November 24, 1906.

Mandamus. Taxation. Abatement. R. S., chapter 9, sections 73, 74, 76, 77, 78.

1. The writ of mandamus is an extraordinary writ to be issued, not to vindicate a mere abstract, theoretical right, but only when necessary and effective to secure some substantial relief or benefit.
2. The writ of mandamus should not be issued to compel municipal assessors of taxes to act upon an application made to them for an abatement of a tax, when it appears from the petition for the writ that the application is barred by the unjustified omission of the applicant to furnish the assessors with a list of his taxable property "at the time appointed."
3. To justify such omission the applicant for abatement must show that he "was unable to offer it at the time appointed," R. S., chapter 9, section 74. That the applicant in good faith supposed he was a non-resident and had been so regarded by the assessors for a series of years including the year of the assessment complained of, does not justify his omission to furnish such list if in fact he was a resident and liable to taxation as such.

On report. Petition denied.

Petition by plaintiff company for a writ of mandamus to compel the Assessors of the City of Augusta to take action upon its application to them for an abatement on the taxes assessed against the plaintiff company, for the year 1904.

This petition was filed in the Supreme Judicial Court, Kennebec County, and after its filing the following agreement in relation to the matter was made: "In the above petition for madamus, it is stipulated and agreed between counsel for the petitioner and for the respondents that the case shall be heard on the fourteenth day of September, 1906, before SPEAR, J., upon the petition, and answer by the respondents then to be filed and upon the evidence as upon the alternative writ and return; that all questions of law arising thereon, concerning the granting or denial of the peremptory writ,

be reserved for the determination of the full Court as upon report, and that for that purpose the case shall be forthwith certified to the Chief Justice of the Supreme Judicial Court for the final decision of that Court in the manner provided by R. S., chap. 104, sec. 18, the full Court then to determine whether a peremptory writ of mandamus shall issue or the petition be dismissed."

In accordance with the aforesaid agreement the cause was heard by Mr. Justice SPEAR who after the hearing made the following order in relation thereto: "In the opinion of the Justice hearing the cause, important questions of law having arisen, this case is hereby certified to the Chief Justice in accordance with the agreement of counsel hereto annexed." Thereupon the cause was certified to the Chief Justice as provided by R. S., chapter 104, section 18. There was no report of evidence or any finding of facts.

The case appears in the opinion.

Orville Dewey Baker, for plaintiff.

Frank L. Dutton and Williamson & Burleigh, for defendants.

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

EMERY, J. This is a petition by the Edwards Manufacturing Company for a writ of mandamus to the tax assessors of the city of Augusta to compel them to act upon its application to them for an abatement on its taxes for the year 1904. The case comes before the Law Court on report, but without any finding of facts or report of evidence. From the petition and answer, however, the following appear to be the material facts.

The Edwards Manufacturing Company, the petitioner, is a Maine corporation and had property taxable in Augusta on the first day of April 1904. Assuming that it was not an inhabitant of Augusta, it for that reason omitted to furnish the assessors of that city with the list of its taxable property required by the statute R. S., ch. 9, secs. 73, 74. Being dissatisfied with the assessment, it afterward, on Nov. 17, 1904, made written application to the assessors under R. S., ch. 9, sec. 76, for an abatement on its tax. The assessors

refused to make the abatement asked for and gave to the company written notice of their decision as required by sec. 77 of the same chapter. The company thereupon applied to this court sitting for Kennebec County for the desired abatement. This application was dismissed by the court upon the ground that the company was an inhabitant of Augusta for taxing purposes, and having omitted to furnish the assessors with the statutory list of its taxable property at the time appointed, was thereby barred from making application for abatement, according to R. S., ch. 9, sec. 74.

Thereupon, on May 7, 1906 within the two years, the company again made written application to the assessors for an abatement on the 1904 tax, and, with the application, offered the statutory list of its taxable property for that year. The assessors have refused and still refuse to act upon this application either to grant it, deny it, or even dismiss it. This petition to this court is for a writ of mandamus to compel them to act and dispose of the application in some way. The petitioner argues that such action is necessary under R. S., ch. 9, sec. 78 to enable it to apply to the county commissioners, or to this court, for the desired abatement and have a hearing on such application should the assessors refuse to abate.

Granting, arguendo, that the assessors should have acted upon the application to them, at least to the extent of dismissing it or otherwise refusing it, and should have given the statutory notice of their decision, it does not follow that the writ of mandamus should now issue to compel them to do so. The writ is not an ordinary writ to be sued out as matter of course. It is an extraordinary writ to be issued only when it is made to appear clearly to the court that the writ is necessary to secure some substantial right, and also that it will be effective to secure that right. As said in 19 Am. & Eng. Ency. 757, 758, the writ should not be issued "where, if issued, it would prove unavailing, fruitless, and nugatory." "A mere abstract right, unattended by any substantial benefit to the relator, will not be enforced by mandamus." See *Rex* v. *Justices*, 2 B & A 391; 22 E. C. L. 108; *Mitchell* v. *Boardman*, 79 Maine 469; *Tennant* v. *Crocker*, Mayor, 85 Mich. 328; *State* v. *Board of Health*, 49 N. J. L. 349.

In this case the ultimate object of the petitioner is to procure an abatement of its tax. Its immediate object is to obtain a hearing by some competent tribunal upon the merits of its application for abatement. It seeks a decision by the assessors upon the application made to them in order that, if such decision be unfavorable, it may make application to another tribunal. It may be conceded that a decision by the assessors is a statutory prerequisite to such application, (R. S., ch. 9, sec. 78) but the question remains whether a decision by the assessors, if unfavorable, would enable the petitioner to obtain a hearing upon the merits of the application to such other tribunal. If not, then it would be useless to compel a decision by the assessors. The mere right to make application to another tribunal where no hearing could be had on the merits of the application, would be "an abstract right, unattended by any substantial benefit to the petitioner."

It has been adjudicated that the petitioning company was and is to be regarded as an inhabitant of Augusta for taxing purposes. The company practically admits that it did not furnish the assessors with the statutory list of its taxable property at the time appointed, though due notice was given. It is therefore barred from its otherwise statutory right to make application for abatement either to the assessors, or to the county commissioners, or to this court, unless it can satisfy the tribunal that it "was unable to offer it (the list) at the time appointed." R. S., ch. 9, sec. 74.

It is practically conceded in the petition itself, including exhibits, that the only excuse the petitioner has to offer to either tribunal for its omission to furnish the list seasonably, is that it had supposed it was not an inhabitant of Augusta for taxing purposes, and that the assessors and the city for many years had regarded it as a non-resident and had so treated it in assessing taxes upon its property and indeed did so in the assessment of 1904. The argument is that, beside believing that no list was required by law, the company was led to believe by the assurances and action of the assessors that no list was required by them, hence it should not be held barred from making application for abatement.

If the statute permitted an application for abatement to be

entertained upon "reasonable excuse," or "good cause," being shown for the omission to furnish the list seasonably, the above statement of the reason or cause for the omission might perhaps be held sufficient for entertaining the application; but the statute requires proof that the applicant "was unable" to furnish the list. It is evident that the facts stated do not show, nor tend to show, that the petitioner was unable to furnish the list, however good in reason and morals its excuse for not doing so. The company was bound to know that a list was required by law, was bound to know that the assessors could not lawfully have dispensed with the list. The action of previous assessors and the prior action of the present assessors or of the city did not suspend the law nor excuse the company for not obeying it. After all is said, the company appears to have deliberately elected not to furnish the required list. Though it made this election under a misapprehension of its right and duty in the premises it cannot escape the consequences.

If it be suggested that if the petitioner can get to the county commissioners that tribunal may adjudge upon the facts stated that the company "was unable" to furnish the list, the answer is that should the commissioners by any possibility do so their proceedings would be quashed upon certiorari. *Fairfield* v. *County Commissioners*, 66 Maine, 385. If it be suggested that the petitioner can perhaps prove to the tribunal other facts showing its inability to furnish the list, the answer is, as stated above, that the petition and its exhibits indicate affirmatively that the only excuse relied on is that above considered. It is a fair inference from the whole case that no other exists.

It appearing from the whole case that neither the assessors, the county commissioners, nor this court could lawfully hear and decide upon its merits an application by the company for an abatement of the 1904 tax, that the company is in law and fact barred from making such an application, that it can gain no "substantial benefit" from a decision by the assessors, the writ asked for should be refused.

Petition denied with costs.

EDMUND G. MURRAY *vs.* BRADFORD QUINT.

York. Opinion November 30, 1906.

Promissory Notes. Same defined. Holmes Notes. Limitation of Actions. R. S., chapter 83, section 89.

1. A note in which the payor for value received unconditionally promises to pay to the payee or order a fixed sum of money at a fixed date is a promissory note within the purview of the statute R. S., chapter 83, section 89, and if signed in the presence of an attesting witness is not barred in six years from its maturity.
2. The addition to such promise of a statement of the consideration for the note (not being illegal) and of a stipulation that the goods for which the note was given shall remain the property of the vendor until payment of the note, does not affect the character of the note as a promissory note within the statute cited.
3. The following instrument is a promissory note within the statute, viz :—

"$112.85. Springvale, Me., Feb. 17, 1896.

Four months after date for value received I promise to pay E. G. Murray or order one hundred twelve and 85–100 dollars, with interest at six per cent, the same being for the following named property which I have this day bought of said Murray, one brown horse 12 years old weight 1130 lbs., one top carriage made by the Water Town Spring Wagon Co., and one set of one-horse sleds called the Nutter sleds, said horse, carriage and sleds is to remain the property of said Murray until said sum and interest are paid. Payable at any Nat. Bank.

BRADFORD QUINT."

"Attest: DORA A. MURRAY.

On exceptions by defendant. Overruled.

Assumpsit on a written instrument of the following tenor:

"$112.85 Springvale, Me., Feb. 17, 1896.

Four months after date for value received I promise to pay E. G. Murray or order one hundred twelve and 85-100 dollars, with interest at six per cent, the same being for the following named property which I have this day bought of said Murray, one Brown horse 12 years old, weight 1130 lbs., one top carriage made by the Water Town Spring Wagon Co. and one set of one-horse sleds called the Nutter sleds, said horse, carriage and sleds is to remain the property of said Murray until said sum and interest are paid. Payment at any Nat. Bank. BRADFORD QUINT.

"Attest, DORA A. MURRAY."

Plea, the general issue together with a brief statement that the "defendant did not at any time within six years next before the commencement of this writ promise in manner and form as the plaintiff in his writ alleged against him."

Heard at the January term, 1906, of the Supreme Judicial Court, York County, before the presiding Justice, without the intervention of a jury, with the right of exception by either party to rulings upon questions of law.

The following facts were agreed upon: "The signatures of the maker and subscribing witness," and "that no payments on said instrument have been made, and no new promise given." The presiding Justice found the following facts: "The personal property described in said instrument was delivered to the defendant on the day of its date as a part of the transaction between the parties. The defendant since the date of this transaction has resided in this state."

"Upon these facts the presiding Justice ruled as a matter of law that the instrument declared on was a good promissory note, and that the plaintiff was entitled to recover the sum named therein viz., one hundred and twelve dollars and eighty-five cents (112.85), and interest thereon from date." To this ruling the defendant took exceptions.

The case appears in the opinion.

Geo. A. Goodwin, for plaintiff.

Allen & Abbott, for defendant.

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

EMERY, J. This is an action counting on the following written instrument as a promissory note, viz:

"$112.85 Springvale, Me., Feb. 17, 1890.

Four months after date for value received I promise to pay E. G. Murray or order one hundred twelve and 85-100 dollars, with interest at six per cent, the same being for the following named property which I have this day bought of said Murray, one Brown

horse 12 years old weight 1130 lbs., one top carriage made by the Water Town Spring Wagon Co., and one set of one-horse sleds called the Nutter sleds, said horse, carriage and sleds is to remain the property of said Murray until said sum and interest are paid.

Payable at any Nat. Bank. BRADFORD QUINT.

"Attest: DORA A. MURRAY."

The statute of limitations was set up in defense but it is admitted that the instrument was signed in the presence of an attesting witness, and that the statute does not apply to this action if the instrument is a promissory note within the meaning of R. S., ch. 83, sec. 89, which declares that the six years limitations "do not apply to actions on promissory notes signed in the presence of an attesting witness."

The defendant's contention is that the instrument is simply evidence of an agreement by the plaintiff to sell the articles therein named, and an agreement by the defendant to purchase and pay for them; that there is no obligation to pay till the sale is actually made, a circumstance striking the instrument out of the category of promissory notes. The contention cannot be sustained. By the express terms of the instrument the defendant, acknowledging value received, unconditionally promised to pay to the plaintiff or his order a fixed sum of money at a fixed time. This is all that is necessary to constitute a promissory note within the statute cited.

The additions of the statement of the consideration (not being illegal) and of the stipulation that the title to the goods bought by the promise shall remain in the plaintiff until the performance of the promise, do not at all modify the explicit terms of the promise itself. There is no intimation in any part of the instrument of any contingency in which the defendant need not pay according to the explicit terms of his promise. The instrument is a promissory note signed in the presence of an attesting witness, and the statute of limitations does not apply. *Collins* v. *Bradbury*, 64 Maine, 37.

Exceptions overruled.

FIDELITY & CASUALTY COMPANY

vs.

BODWELL GRANITE COMPANY.

Knox. Opinion November 27, 1906.

Cases on Report. Practice. Reports will be dismissed, when. Interlocutory motions. R. S., chapter 79, section 46; chapter 84, section 23.

1. No question arising in a case should be reported to the Law Court for original decision, unless at such a stage of the case that the decision of question shall in one alternative at least be a final disposition of the case itself, or unless accompanied by a stipulation to that effect.
2. A motion, under R. S., chapter 84, section 23, to require a party to produce books and papers for inspection is merely interlocutory. It may be granted or denied without concluding either party upon any question of law or fact involved in the issue to be tried, and hence, if reported as in this case without such stipulation, the report must be dismissed.

On report. Report discharged. Case dismissed from the law docket.

Assumpsit upon four separate employers' liability insurance policies, the first policy running from the 19th day of March, 1900, to the 19th day of March, 1901; the second from the 19th day of March, 1901, to the 19th day of March, 1902; the third running from the 19th day of March, 1902, to the 19th day of March, 1903; the fourth running from the 19th day of March, 1903, to the 19th day of March, 1904.

The declaration contained eight counts, two upon each of said policies. The two counts founded upon the first policy are as follows:

"In a plea of the case for that the said defendant in consideration of the agreement and contract of the plaintiff to indemnify said defendant for the period of twelve months, beginning the nineteenth day of March, A. D. 1900, and ending the nineteenth day of March, 1901, against loss from liability for damages on

account of bodily injuries accidentally suffered within said period by any employe or employes of said defendant engaged as cutters and hewers of granite, or as yardsmen or helpers at the yards of said company at Vinalhaven, Jonesboro and Spruce Head in said State of Maine, said defendant did pay the plaintiff the sum of twenty (20) dollars; and did contract and agree, if the compensation actually paid to all employes engaged as aforesaid exceeded the sum of Five Thousand (5,000) Dollars, it would pay to the plaintiff an additional amount of forty cents for each one hundred dollars in excess of said sum of Five Thousand Dollars paid as compensation as aforesaid.

"And the plaintiff avers that said defendant paid as compensation as aforesaid a large sum in excess of said Five Thousand Dollars, the exact amount of which is unknown to the plaintiff, but which the plaintiff believes and therefore avers is at least Twenty Thousand (20,000) Dollars; and the defendant then and there promised to pay the plaintiff four-tenths of one per cent on the total amount of the sum paid as aforesaid; yet the defendant has not kept its said contract and agreement but has broken the same.

"Also for that the said defendant in consideration of the agreement and contract of the plaintiff to indemnify said defendant for the period of twelve months, beginning the nineteenth day of March, A. D. 1900 and ending the nineteenth day of March, 1901, against loss from liability for damages on account of bodily injuries accidentally suffered within said period by any employe or employes of said defendant engaged as cutters and hewers of granite, or as yardsmen or helpers at the yards of said company at Vinalhaven, Jonesboro and Spruce Head in said State of Maine, said defendant did pay the plaintiff the sum of Twenty (20) Dollars and did contract and agree, if the compensation actually paid to all employes engaged as aforesaid exceeded the sum of Five Thousand (5,000) Dollars, it would pay to the plaintiff an additional amount of forty cents for each one hundred dollars in excess of said sum of Five Thousand Dollars paid as compensation as aforesaid; and did further contract and agree that the plaintiff should have the right at all reasonable times to examine the books of said defendant so far

as they related to compensation paid all employes at work as aforesaid.

"And the plaintiff avers that said defendant paid as compensation as aforesaid a large sum in excess of said Five Thousand Dollars, the exact amount of which is unknown to the plaintiff, but which the plaintiff believes and therefore avers is at least Twenty Thousand (20,000) Dollars, but the defendant has not paid the plaintiff said additional sum, and although often requested to allow the plaintiff said right and opportunity to examine its books as aforesaid, said defendant has neglected and refused so to do and hath not kept its said contract and agreement, but hath broken the same."

The other counts were of the same tenor as the foregoing with the necessary changes of dates, etc.

The writ was returnable at the January term, 1905, of the Supreme Judicial Court, Knox County. At the next April term of said Court the defendant filed as its plea the general issue. After this plea had been filed, the plaintiff made the following motion:

"And now comes the plaintiff in the above entitled action and says that issue has been joined therein; that certain written instruments in the possession of the defendant are material to the issue in said action, namely: The books and pay rolls of the defendant showing the amount paid in wages by the defendant to the several classes of employes described in the declaration in said action, and without the information contained in said written instruments the plaintiff is unable to properly prepare this case for hearing, and that said books and papers are necessary to the proofs of the plaintiff's case.

"That access thereto has been demanded by and on behalf of the plaintiff and has been refused by said defendant.

"That the same long have been and now are in the possession of said defendant.

"Wherefore the plaintiff moves that after notice to the said defendant and hearing thereon said defendant may be required to produce all of its books and its pay rolls relating to wages paid to the employes described in said declaration."

A hearing was had upon this motion at said April term of said court, and certain evidence offered by the defendant was taken out.

At the close of this hearing and without any ruling or decision by the presiding Justice, it was agreed that the matter relating to the motion should be reported to the Law Court and that "upon so much of the foregoing evidence as is legally admissible, the Law Court is to make such order as the rights of the parties may require."

For reasons which are stated in the opinion the Law Court refused to act on the motion but ordered the report discharged and the case dismissed from the law docket.

Arthur S. Littlefield, for plaintiff.

Joseph E. Moore, for defendant.

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

EMERY, J. In this case after issue was joined but before any trial of that issue the plaintiff filed a motion under the statute, R. S., ch. 84, sec. 23, that the defendant be required to produce for inspection certain books and papers alleged to be in its possession and material to the issue. The presiding Justice made no decision nor order on this motion but by agreement of the parties reported it for the Law Court "to make such order as the rights of the parties require." There was no stipulation for any disposition of the case as the result of the order of the Law Court either way.

We think the parties, in causing this motion to be reported in this way by itself before verdict, have misapprehended the function and jurisdiction of the Law Court. The motion is merely interlocutory. *W. U. Tel. Co.* v. *Locke,* 107 Ind. 9, (7 N. E. 579). It may be granted or denied without concluding either party upon any question of law or fact involved in the issue to be tried, and no stipulation was made that either party should be so concluded. Cases cannot be thus sent to the Law Court piece meal, one question at a time, the case to be returned again to the Law Court when and as often as another question may arise. *Monaghan* v. *Longfellow,* 82 Maine, 419. As said by the court in *State* v. *Brown,* 75 Maine, 456. "If the case be sent to us once in this way, there is no reason why it could not come up in the same way over and over again upon

motions possible to be made." That the parties agree to such a course does not make it lawful. It would transform the Law Court into an advisory board for the direction of the business of the court at nisi prius, a function the Law Court cannot assume. *Noble* v. *Boston*, 111 Mass. 485.

All interlocutory motions and other interlocutory matters should be disposed of at nisi prius, saving to the parties their rights of exception or appeal, if any. They should not be sent to the Law Court even upon report at the request of the parties, except at such stage of the case, or upon such stipulation, that a decision of the question may, in one alternative at least, dispose of the case itself. The legislature in constituting the Law Court and defining its jurisdiction (R. S., ch. 79, sec. 46,) did not intend it to be used as a substitute for presiding Justices nor to relieve Judges in the trial courts from the duty of deciding, as they arise, mere interlocutory questions incident to the progress of the trial or the case.

As well might motions for the appointment of auditors or surveyors, or questions of the admissibility of evidence, or requests for instructions, &c., be sent to the Law Court for original decision. It is evident, that even by agreement of parties, a trial should not be interrupted or postponed in order to obtain the opinion of the Law Court upon such questions, at least unless the parties stipulate that the opinion in some alternative shall practically end the case. *Noble* v. *Boston*, 111 Mass. 485. The result of the trial may entirely eliminate the interlocutory matter from the case. Thus, in this case, if the motion be granted, the defendant may yet obtain a verdict and judgment, and vice versa. In such event the ruling upon the motion will become immaterial and a decision upon it useless. The Law Court cannot be required and indeed has no jurisdiction to decide, prematurely, interlocutory questions which the subsequent proceedings in the case may show to be wholly immaterial, unless, as already stated, the parties stipulate that the decision may, in one alternative at least, supersede further proceedings.

Report discharged.

Case dismissed from the law docket.

In Equity.

AMERICAN WOOLEN COMPANY *vs.* KENNEBEC WATER DISTRICT.

Kennebec. Opinion November 30, 1906.

Waters and Water courses. "Great Ponds." Diversion of waters for public purposes. Compensation. Condemnation proceedings. Damages. Colonial Ordinance, 1641-7. Private and Special Laws, 1899, chapter 200, section 3.

1. Lakes and ponds of more than ten acres in extent are known as "great ponds" and are under the ownership and control of the State for the benefit of the public. The State can at its discretion authorize the diversion of their waters for public purposes without providing compensation to riparian owners upon the ponds or their outlets. *Auburn* v. *Union Water Power Co.*, 90 Maine, 516, affirmed to the above extent.
2. When the legislature has directly granted authority to divert water from a great pond for public purposes without requiring as a prerequisite any proceedings for condemnation, or for the ascertainment and payment of damages, the grantee can begin such diversion at once, and a bill in equity to restrain such diversion until such proceedings are had cannot be sustained.

In equity. On report. Bill dismissed.

Bill in equity praying that the defendant, its servants, agents or attorneys be enjoined and restrained by temporary and perpetual injunction from taking its supply of water from China lake in Kennebec County until certain condemnation proceedings, which the plaintiff alleges are required by law, shall have been had, and for such other and further relief as the nature of the case may require. The gist of the bill is stated in the opinion. To this bill the defendant filed a general demurrer.

At the hearing before the Justice of the first instance, and by agreement of the parties, it was ordered that the cause be "reported to the Law Court to be heard on the bill and demurrer."

The case appears in the opinion.

Raymond & Gordon and Charles F. Johnson, for plaintiff.

Harvey D. Eaton, for defendant.

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

EMERY, J. This is a case in equity reported upon demurrer to the bill. The material allegations in the bill may be stated concisely as follows: China Lake in Kennebec County has an area of some six square miles and the outlet of its waters is through Mile Brook into the Sebasticook River. The defendant corporation, the Kennebec Water District, composed of the territory and people of Waterville and Fairfield Village, had legislative authority by chap. 200 of Private Laws of 1899 to take water from China Lake for the purpose of supplying the inhabitants and municipalities of Waterville, Fairfield Village, Benton and Winslow with pure water for domestic and municipal purposes. Acting under this authority the Water District has laid a large pipe from China Lake to its pumping station in Waterville with an intake lower than the bed of the natural outlet of the lake, and through this pipe is constantly drawing a large quantity of water from the lake materially lowering its natural level and the natural flow of water through the outlet down Mile Brook. This diversion of water from the lake materially reduces the capacity efficiency and value of a pre-existing mill privilege and mill of the plaintiff on Mile Brook below the outlet.

The Water District was not required by its charter to go through any process of condemnation of the right to take water from China Lake and did not do so. It simply laid its pipe and diverted the water as under a grant from one having the full right. By its charter, however, the Water District was made liable for all damages that should "be sustained by any person or corporations in their property by taking of any land whatsoever, or mill privileges within the district or water from Snow Pond, or by flowage, or by excavating through any land for the purpose of laying pipes, building dams or constructing reservoirs. If any person sustaining damages as aforesaid and said corporation shall not mutually agree upon the sum to be paid therefor, such person may cause his damages to be ascertained in the same manner and under the same conditions, restrictions and limitations as are or may be prescribed in case of damages by the laying out of highways." Sec. 3 of charter.

The prayer of the bill is that the Water District be enjoined from taking any water from China Lake until it shall have acquired the right to do so by due proceedings for condemnation; hence the question now presented is, not whether the plaintiff is entitled to any compensation for the injury done its property by the Water District's diversion of water from China Lake, but is whether the water district could lawfully begin and continue such diversion for the purposes named in its charter without first going through some process of condemnation to acquire the right. If it could, then of course the plaintiff must be remitted to its claim for compensation and must assert that claim by some other process than a bill in equity.

China Lake is a "great pond" being of more than ten acres in extent, and hence with its waters is public property owned and controlled by the State for the benefit of the public. The Colonial Ordinance of 1641-7, reserving to the government full ownership and sovereignty over great ponds, was extended to the territory of Maine with the same force as in Massachusetts. The extent of that ownership and sovereignty came before the court in Massachusetts in the case *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 548. The question there presented was whether the legislature could lawfully and effectually grant to the City of Fall River the right to take water from North Watuppa Pond,—a "great pond," for domestic and public uses without providing for compensation to be made for damage caused thereby to mills and mill privileges on the outlet stream below the pond. In an elaborate opinion it was held in effect that under the Colonial Ordinance, except as to grants made prior to the ordinance, the State had full propriety in, and sovereignty over, the waters of great ponds, and could at discretion divert the waters and authorize their diversion for public uses without providing compensation to riparian owners injured thereby; that riparian lands on a river or stream flowing out of a great pond are subject to this right of the State to authorize a diversion of the water of the pond for public purposes and must bear without compensation any damage caused by the exercise of that right by the State unless the State shall choose to make compensation; that where the State, in granting authority to divert the water, has not required compensation to be

made to riparian owners for damages sustained, none need be made. True, three Justices dissented but the concurring Justices were Morton, Chief Justice and sometime Governor of the Commonwealth, Field, afterward Chief Justice, Devens at one time U. S. Attorney General, and Holmes, now a Justice of the U. S. Supreme Court; a notable array of eminent jurists. Their opinion has never been overruled. In *Auburn* v. *Union Water Power Co.*, 90 Maine, 576, the same doctrine in all its extent was without dissent declared to be the law of this State. The grounds of the doctrine are fully and convincingly stated in the cases cited and there is no need to iterate them here. Indeed, the plaintiff's counsel do not now question the authority of the Massachusetts case. They only contend that this court in the Auburn case cited (90 Maine, 576) erroneously went beyond the Massachusetts case and erroneously held that the legislature could not lawfully require its grantee of the right to take water from a great pond for public purposes to make compensation for property injured thereby. Upon this contention we have now no occasion to express or form any opinion as the question has not yet been presented.

Such being the settled law, it follows that the authority given to the Water District in its charter was not merely authority to exercise the power of eminent domain, authority to acquire by some condemnation proceedings the right to take water from the lake, but was authority to take directly and at once. The grant, as to China Lake, was of authority to take public property not private property. No proceedings by way of condemnation were necessary to vest in the grantee the right granted, and none were required. Condemnation proceedings of public property or public rights already directly granted would be anomalous and superfluous.

Conceding, arguendo, that by the terms of its charter the Water District is made liable to plaintiff for all damages done its mill privilege and mill, nowhere in the charter do we find any stipulation that these damages must be paid, or even adjudicated, before the Water District begins to take water. No authority is given the District to initiate proceedings for that purpose. It is for the

persons or corporations "sustaining damage" to begin such proceedings. Sec. 3 of Charter.

In fine, it does not yet appear that the Water District is taking water from China Lake without right. Hence the injunction prayed for should not be ordered. Whether the district should pay the plaintiff for damages caused by such taking is another question to be determined in another proceeding.

Bill dismissed with costs.

WALTER S. CUSHING *vs.* GEORGE H. WEBB.

Somerset. Opinion November 30, 1906.

Ways. Petitions. Description of Ways. Jurisdiction of Selectmen. Notice. Selectmen's Return. Evidence. Prima Facie Presumptions. R. S., 1883, chapter 18, section 14; R. S., 1903, chapter 23, section 1.

1. A petition for a way is necessary to give selectmen jurisdiction to lay out a town way under the statute.
2. The way must be described in the petition, and with such definiteness that, when notice of it is given, the public and property owners will be apprised with reasonable certainty where the way is sought to be located.
3. The selectmen's return is prima facie evidence of the fact that they gave notice on the petition, and also, of such other facts as were required by law to be embraced in the notice, such as that the notice contained a description of the way, and what it was.
4. In a case where the original petition is not in existence, and the return of the selectmen states that it was for a town way, "beginning on the north side of West Front Street, and running towards the Kennebec river," that they gave notice of their intention to lay out "the same," and that they stated in their notice the "termini thereof," and when it appears that the use of the way has been acquiesced in many years, it is *held* that there is a prima facie presumption, at least, that the petition was sufficient in form to give the selectmen jurisdiction to act, and it is not open to collateral attack.
5. In such a case, it is also to be presumed that the laying out was in accordance with the petition.

6. In such a case it is no objection that the way as laid out consisted of two streets running at an angle with each other, which were described separately in the return, but connecting and forming one way, it not being shown that the petition with the termini named in it called for only one street substantially in one direction. The presumption as to the petition is otherwise.

7. The acceptance by the town of a "road as laid out by the selectmen from "West Front Street to Alder Street" was sufficient though it appears that the road consisted of two connecting streets, running at an angle with each other.

On agreed statement of facts. Judgment for defendant.

Action of trespass quare clausum fregit for breaking and entering the plaintiff's close, the same being a lot on the south side of the Kennebec River in the village of Skowhegan. The defendant was the duly qualified road commissioner for the town of Skowhegan on the day of the entry. He admitted the entry but claimed a justification by reason of the fact that the locus was within the limits of Bridge Street which he claimed was a duly located town way in Skowhegan. The existence of such a way was denied by the plaintiff. This raised the issue whether or not Bridge Street was ever legally laid out as a town way, and so accepted by the town.

At the March term, 1906, of the Supreme Judicial Court, Somerset County, an agreed statement of facts was filed and the case sent to the Law Court for determination with the agreement that if the entry by the defendant was without authority of law judgment should be rendered for the plaintiff for nominal damages; otherwise judgment to be for the defendant.

All the material facts are stated in the opinion.

Gould & Lawrence, for plaintiff.

Butler & Butler, for defendant.

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

SAVAGE, J. Trespass quare clausum. The title of the plaintiff and the entry by the defendant are admitted. The defendant, who was the road commissioner of Skowhegan, claims a justification by reason of the fact that the locus was within the limits of Bridge Street, a duly located town way in Skowhegan. The existence of

such a town way is denied by the plaintiff. The only question raised is whether Bridge Street was ever legally laid out as a town way, and so accepted by the town.

The records of the town show that in 1885 and 1886 proceedings relative to the location of a town way or ways in Skowhegan village were had, as shown by the return of the selectmen and the warrant for a town meeting and the vote of the town thereon, as follows, so far as necessary to quote:—

"The subscribers, selectmen of Skowhegan, upon application of James B. Dascomb and others to lay out a town way in said town, beginning on the north side of West Front Street and running towards the Kennebec river, having given seven days' notice of our intentions to lay out the same and stated in said notice the termini thereof by posting said notice in two public places. . . . .

"We therefore lay out said way as follows: Beginning in the northerly side of West Front Street at the southerly corner of George W. Durrell's lot and 20 feet easterly from said corner; thence north 15 degrees west 12 rods; thence north 19 degrees west 41 rods; all of said distances are over the land of John Turner.

"Said line is the center line and said street is to be forty feet wide.

"Also another street leading easterly from the above street. Beginning at the southwesterly corner of the Morrill lot and one and one half rods southerly from said corner, thence north fifty seven degrees east 15 rods over land of John Turner to line between said Turner and land belonging to the Parker estate to Alder Street: said line is the center line and said street is to be three rods wide . . . . ." This return was signed by the selectmen, and was dated February 15, 1886. The road laid out in the second of the above descriptions is Bridge Street, and is the locus of the entry complained of.

The warrant for the annual meeting of 1886 contained the following article:—

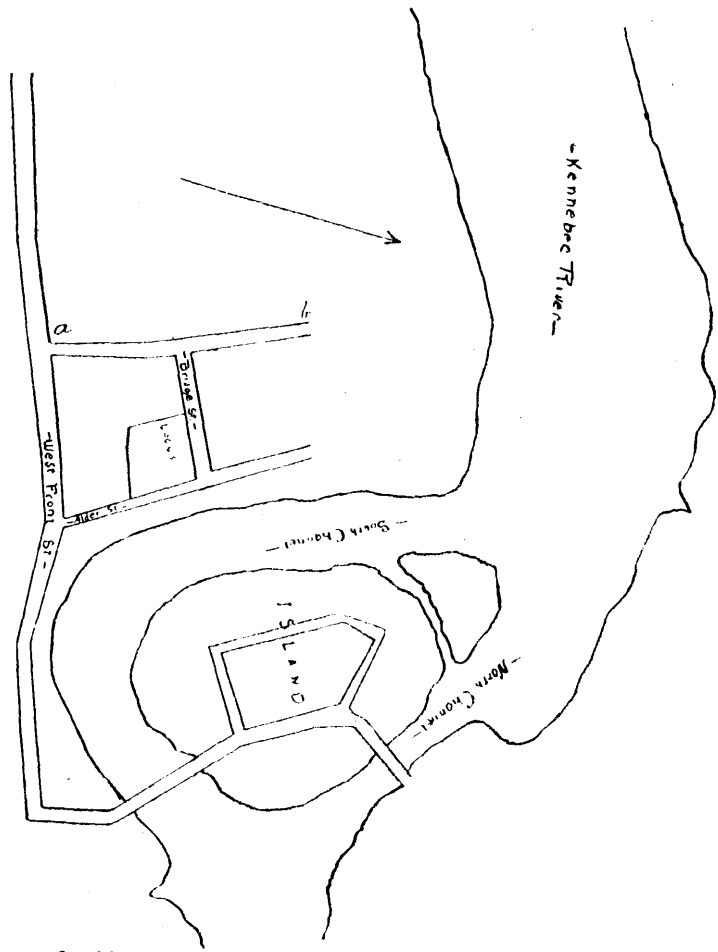
"To see if the town will vote to accept the following roads as laid out by the selectmen. First, a road from West Front Street to Alder Street."

Under that article the following vote was passed:—

"Voted to accept the road as laid out by the selectmen, a road from West Front Street to Alder Street."

It is admitted that the original petition asking for the laying out of the road from West Front Street towards the Kennebec River is not now in existence, having been lost or destroyed.

A reference to the accompanying sketch will show the situation more plainly.



a b. First description on return of Selectmen.

The statute, R. S., 1883, ch. 18, sect. 14, under which the selectmen acted is as follows: "The municipal officers of a town may personally or by agency lay out, alter or widen town ways and private ways, ... on petition therefor. They shall give written notice of their intentions to be posted for seven days, in two public places in the town and in the vicinity of the way, describing it in such notice, ..."

The plaintiff claims that the record is insufficient to show a legal laying out, in four particulars:—first, that the petition was insufficient for lack of definiteness, to confer jurisdiction on the selectmen; again, that the notice given by the selectmen was insufficient because it failed to warn property holders of any specific way which could be ascertained with any reasonable certainty; then that the actual laying out was not justified by the petition; and finally that the road was never accepted by the town.

It is evident that a petition for a way is necessary to give selectmen jurisdiction to lay out a way under the statute. And we think also that such a petition must be so definite that when notice of it is given, the public and property owners will be apprised with reasonable certainty where the way is sought to be located. While the statute does not in terms require the petition to describe the way, as it does in cases of petitions to the county commissioners for the laying out of highways, R. S., ch. 23, sect. 1, it does require the selectmen to describe the way in their notice. And as their jurisdiction is based upon the petition, it is reasonably to be implied that the way must be described in the petition. For unless a way is described in the petition, there is no proposed way to be described in the notice, and the selectmen would be without jurisdiction to give notice.

In this case there was a petition, but it is now lost, and the plaintiff seems to rely upon the inability of the defendant to prove affirmatively that the petition did describe the way with sufficient definiteness. But we do not think this difficulty is insurmountable. The selectmen's return is prima facie evidence of the fact that they gave notice on the petition, and also, we think, of such other facts as were required by law to be embraced in the notice, such as that the notice contained a description of the way, and what it was. *Cool* v. *Crommet*,

13 Maine, 250; *Inh'b'ts of Limerick, Pet'rs.* 18 Maine, 183. This return states that the petition was for a town way "beginning on the north side of West Front Street and running towards the Kennebec river," that they gave notice of their intentions to lay out "*the same,*" and that they stated in their notice the "*termini thereof,*" that is, the termini of the way asked for in the petition, and as asked for. The return therefore shows that the selectmen gave notice of their intentions to lay out a way beginning at West Front Street and running towards the Kennebec river, and therein stated the termini. That must be held to be sufficient, so far as notice was concerned. *Packard* v. *County Comr's,* 80 Maine, 44; *Hayford* v. *County Comr's,* 78 Maine, 156. And while we do not say that the return should be deemed evidence of the contents of the petition unless incorporated therein by reference or otherwise, we think that when it appears by the return of selectmen that they acted upon a petition for a way, in a general course, which they state, and that they stated in their notice "the termini thereof," meaning as we have stated, the termini of the way as asked for, and when the use of the way has been acquiesced in for many years, there is a prima facie presumption at least, that the petition was sufficient in form to give the selectmen jurisdiction to act. *Harlow* v. *Pike,* 3 Maine, 438; *Larry* v. *Lunt,* 37 Maine, 69. It is not now open to collateral attack. *Higgins* v. *Hamor,* 88 Maine, 25. This disposes of the first two objections.

And if our conclusions so far are sound, there is little difficulty with the remaining ones. To the objection that the actual laying out was not justified by the petition, it is sufficient to say that for the reasons already given, it is now to be presumed that the laying out was in accordance with the petition. It is no objection that the way as laid out consists of two streets, which are described separately in the return. They connect and form one way. The argument that the way as laid out had more than two termini, that is that each street had two termini, and therefore was not the way as petitioned for, would be sound, if it were shown that the petition with the termini named in it called for only one street substantially

in one direction. But that is not shown, and the presumption now is otherwise.

Finally, the town accepted the road as laid out, namely from West Front Street to Alder Street. This was one way, though it consisted of two connecting streets, one of which was Bridge Street, the locus in this action. The only objection, as it seems to us, is that the acceptance in terms did not include so much of the first street laid out as lay northerly of Bridge Street. Whatever might be said about this section of the first street, we do not think it can now be properly held that Bridge Street was not accepted.

Judgment for the defendant.

CAROLINE G. ALLEN, Petitioner, *vs.* WALTER H. FOSS.

Washington. Opinion November 30, 1906.

Quieting Title. Petition therefor cannot be maintained, when. R. S., chapter 66, sections 33, 34; chapter 106, sections 47, 48.

1. Whether a devisee, before probate of will, can make petition to quiet title to real estate, under R. S., chapter 106, sections 47 and 48, and after probate, maintain the petition, *quaere.*
2. A petition to quiet a title to real estate, under R. S., chapter 106, sections 47 and 48, cannot be maintained, when it appears that the respondent, after the filing of the petition, conveyed his interest in the real estate or was adjudged a bankrupt.

On exceptions by plaintiff. Overruled.

Petition brought under the provisions of R. S., chapter 106, sections 47 and 48, to quiet title to real estate, to wit "certain undivided portions of Cross Island in the town of Cutler," Washington County.

This petition was duly filed in the Supreme Judicial Court, Washington County, and notice thereon was ordered and service thereof was made as provided by R. S., chapter 106, section 47. The defendant then duly appeared and filed his answer to the petition.

The matter was heard before the presiding Justice at the January term, 1906, of said Supreme Judicial Court. After hearing had, the presiding Justice ruled that the proceedings could not be maintained and denied the petition. To this ruling the plaintiff excepted.

All the material facts are stated in the opinion.

C. B. & E. C. Donworth and H. H. Gray, for plaintiff.

William R. Pattangall, for defendant.

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

SAVAGE, J. Petition to quiet title to real estate, brought under R. S., ch. 106, sects. 47 and 48. The petitioner is the residuary devisee under the will of Richard Allen, who died November 9, 1904. His will was presented for probate at the December term, 1904, of the Probate Court in Washington County. Notice was ordered on the petition returnable at the February term, 1905. The Probate Court admitted the will to probate, March 1, 1905. An appeal was taken to the Supreme Court of Probate, and at the October term 1905, of that court, the will was finally admitted to probate.

In the meantime, the pending petition was filed December 29, 1904. Notice was ordered thereon returnable at the April term, 1905, of the Supreme Judicial Court. At the January term, 1905, counsel for the respondent entered their appearance upon the docket. On March 27, 1905, the petitioner caused a certificate, setting forth the names of the parties, the date of the petition and the filing thereof, and a description of the real estate in litigation, and signed by the clerk of court, to be recorded in the registry of deeds for Washington County. Personal service of the petition was made on the respondent April 11, 1905. On the same day, but whether before or after the service of the petition does not appear, the premises were conveyed by the respondent to one McRae. On September 26, 1905, the respondent was duly adjudged a bankrupt, on petition of his creditors, and a trustee of his estate was appointed, who duly qualified. The respondent in his answer alleges that he does not claim any estate in the premises, because of the conveyance and the adjudication in bankruptcy.

Upon these facts, the court below ruled that the proceedings could not be maintained, and denied the petition. We think the ruling was right. It will be noticed that when the petition was filed, the will of Richard Allen had just been filed in the Probate Court. The required notice had not then been given, and the will had not been admitted to probate. It was not admitted until several months had elapsed, and after litigation. It is, of course, true that when the will was finally probated, the petitioner's title to the premises related back to the death of the testator. She was entitled to the rents and profits from that time. Her deed in the meantime would have conveyed the estate, subject only to the right of the executor to take and sell it to meet the necessities of administration. And it might turn out after the administration that there was no residuum, and hence that the petitioner for that reason took no title, or at best a defeasible one.

But whatever may have been her rights after final probate of the will, a different question is presented, when the petitioner, before probate, begins a proceeding of this kind against an outsider, to try titles. Her title was not contingent in law, but it was not established in fact. It required proof. It might be sustained, it might not be. While it may be that so far as prima facie title is concerned, the petitioner might have maintained a real action commenced when this petition was and tried after the will was probated, *Rand* v. *Hubbard*, 4 Met. 261, it may not necessarily follow that this petition can be maintained. The decree, if for the petitioner, must be based upon a finding "that the allegations in the petition are true," R. S., chapter 106, section 48, that is, the allegations of facts as existing at the date of the petition. And we think that it may well be doubted whether by the statute it was intended to permit one to begin proceedings to quiet title, when his own title is not established, and cannot be without further legal procedure, and perhaps litigation. It would seem hardly just to permit one to hale a supposed adversary into court, when at the time he is unable to prove his own title, and may never be able to prove it. The will may turn out to be void because of the mental incapacity of the testator, or because of the undue influence of some one, or because of

the want of essentials in execution. Nor is there need that an expectant devisee should thus seek to protect his estate. The statute, R. S., ch. 66, sects. 33 and 34, provides for the appointment of special administrators, when there is a delay in granting letters testamentary, and such administrators may preserve and protect all the estate, both real and personal, and for that purpose may maintain suits. *Libby* v. *Cobb*, 76 Maine, 471.

But, without considering this point further, we think there is in another respect an insuperable obstacle to the maintenance of this petition. The respondent has conveyed his interests in the estate. He has also been adjudged a bankrupt. He disclaims any existing estate. The prayer of the petitioner is that the respondent show cause why he should not bring an action to try his title. If the petition is sustained, the decree will be that he bring an appropriate action, which in this case is a real action. He will be directed to become a demandant of the premises. The suit when commenced must have all the ordinary incidents of a real action, both in pleadings and proof. The allegations and proof must be made with reference to the date of the writ. *Berry* v. *Whitaker*, 58 Maine, 422. It will not be sufficient for the demandant to allege and prove that he was seized at some time within twenty years, but is so seized no longer. The judgment must inevitably be for the defendant. The real cause of litigation will not be tried. Nothing will be decided except that the demandant conveyed before suit was brought. This proceeding is purely a statutory one, and the statute authorizing it does not reach a situation like this. It is casus omissus. Whether it would be wise and practicable so to amend the statute as to provide for such a case is not for the court to say.

It is urged, however, that the present proceeding is lis pendens as to the purchaser, and that he will be bound by the judgment, if suit is brought, or barred, if the order of the court is disobeyed.

But we do not think so. If the respondent should attempt to obey an order of court to bring an action, the purchaser, even assuming the common law doctrine of lis pendens to apply, would be bound by the judgment only so far as the litigated issues might be decided, which in this case would be only that the demandant had parted

with title before suit. That question would lie at the threshold of the case, and must necessarily be the only one decided. The judgment therefore would not bind the purchaser upon the question now sought to be litigated. If the present respondent had commenced a real action before he conveyed and the case had been tried upon the general issue, no doubt his grantee would have been bound by the judgment. *Berry* v. *Whitaker*, 58 Maine, 422. But even then, by proper plea and proof, the defendant might have obtained judgment on the ground that the demandant had conveyed, *Rowell* v. *Hayden*, 40 Maine, 582, and the real cause of the controversy would have remained undecided.

Now since an attempt on the part of the respondent to obey an order to try title would be entirely futile, the order itself would be nugatory, and it would seem that no one's right would be affected. It would be a strange thing indeed for a court to make an order which cannot be executed, when the only purpose for making it is to apply the doctrine of lis pendens to a third party, in case of failure to obey. We do not think the statute R. S., chap. 106, sects. 47 and 48 contemplates such a proceeding.

Exceptions overruled.

In Equity.

HORACE A. STONE, Trustee, *vs.* CARA A. MCLAIN, et als.

Penobscot. Opinion December 1, 1906.

Wills. Construction. Trust. Termination of trust. "Family."

The fourth clause of the will of Mary J. Stewart is as follows: "All the rest and remainder of my estate of every kind real and personal I give and devise to said Gertrude, Martha and Cara, wives of my sons Charles, Edward and Rowland, and to my son Harry D. Stewart, equally share and share alike, and I wish that the indebtedness of Thos. J. Stewart & Co. shall be deducted from the shares and property so given and devised to the said wives of my sons Charles, Edward and Rowland, and that the property so as above given to said three wives of my three sons be for the education of their children and the support of their families respectively—and I enjoin them to so use and expend it." Since the death of the testatrix, Rowland has deceased leaving no children, and the wife Cara has married.

Held: that she is no longer a member of the family of Rowland; that by said clause she took the entire beneficial interest in the estate devised to her subject to a particular and temporary charge; that the purposes of the trust created upon said estate have been accomplished and the trust thereby terminated; and that said estate should be paid and turned over to her.

See *Clifford* v. *Stewart*, 95 Maine, 38.

In equity. On report. Decree according to opinion.

Bill in equity brought by the plaintiff as trustee under the last will and testament of Mary M. Stewart, late of Bangor, deceased, asking the court to determine whether or not a certain trust created under the last will and testament of said deceased had been terminated, and if so to determine to whom the property held by the plaintiff as trustee under said last will and testament should be paid and turned over.

The facts are stated in the bill which, omitting formal parts, is as follows:

"Horace A. Stone of Bangor in said Penobscot County, a Trustee under the will of Mary M. Stewart, as hereinafter set forth, com-

plains against Cara A. McLain of Cannon City in Fremont County, State of Colorado, and against Milton S. Clifford of said Bangor, Administrator with the will annexed of Mary M. Stewart late of said Bangor, deceased, and against Arthur Chapin of said Bangor, Administrator of the estate of Rowland W. Stewart, late of said Bangor deceased, and against Charles M. Stewart, Gertrude H. Stewart and Harry D. Stewart all of said Bangor and against Edward L. Stewart and Martha J. Stewart, both of Sault Ste Marie in the Province of Ontario in the Dominion of Canada, and says:

"First. Mary M. Stewart, formerly of said Bangor, died on the fourteenth day of August, A. D. 1899, and left a last will and testament, which was duly approved and allowed by the Probate Court of said Penobscot County at the December Term of said Court, A. D. 1899, and said Milton S. Clifford was duly appointed and qualified as Administrator with said will annexed of said Mary M. Stewart. A copy of said will is attached, marked "Exhibit A," and made a part of this bill as though fully recited at length herein.

"Second. By the fourth paragraph of said will the testatrix, said Mary M. Stewart, made bequests in the following terms, viz: 'IV. All the rest and remainder of my estate of every kind real and personal I give and devise to said Gertrude, Martha and Cara, wives of my sons Charles, Edward and Rowland and to my son Harry D. Stewart equally, share and share alike, and I wish that the indebtedness of Thos. J. Stewart & Co. shall be deducted from the shares and property so given and devised to the said wives of my sons, Charles, Edward and Rowland, and that the property so as above given to said three wives of my three sons be for the education of their children and the support of their families respectively — and I enjoin upon them so to use and expend it.'

"Third. The defendants, Charles M. Stewart, Edward L. Stewart and Harry D. Stewart, together with Rowland W. Stewart (then alive but since deceased) were the only children and heirs at law of said Mary M. Stewart, and all said children survived her; the defendant Cara A. McLain was at the date of the death of Mary M. Stewart the wife of Rowland W. Stewart, and Gertrude H. Stewart

was then and still is the wife of Charles M. Stewart and Martha J. Stewart was then and still is the wife of Edward L. Stewart;

"Fourth. As to the property bequeathed to said Cara, wife of Rowland W. Stewart, by the fourth paragraph of the aforesaid will the testatrix, said Mary M. Stewart, created a trust, and said Cara having failed to qualify as Trustee upon due proceedings had at the September Term of the Probate Court for said Penobscot County A. D. 1901 said Rowland W. Stewart was appointed and thereupon qualified as Trustee to administer said trust, and received the trust funds and administered them till his death, but no part of the principal or interest of said fund was paid out to or for any cestui que trust.

"Fifth. Said Rowland W. Stewart died the twenty-ninth day of September, A. D. 1904, and upon due proceedings had your complainant, Horace A. Stone, was appointed Trustee in the place of said Rowland W. Stewart at the April Term of said Probate Court A. D. 1905, and has qualified as said Trustee, and received the trust funds, and is now such Trustee.

"Sixth. At the December Term of said Probate Court A. D. 1904 said Arthur Chapin was appointed Administrator of the estate of said Rowland W. Stewart, and has qualified as such and is now such Administrator;

"Seventh. For more than three years next previous to the death of said Rowland W. Stewart said Rowland W. Stewart and said Cara did not live together as husband and wife, and since the death of said Rowland W. said Cara A. has married and her name is now Cara A. McLain; no children were ever born to said Rowland W. Stewart and his wife Cara, and the defendants Charles M. Stewart, Edward L. Stewart and Harry D. Stewart are the sole heirs of said Rowland W. Stewart;

"Eighth. All the property in the hands of the trustee is personal property, and aggregates about eleven thousand dollars. ($11,000)

"Wherefore your complainant prays this Honorable Court to determine and decree,

"1. If said trust has been terminated and if the Court shall so decree then to determine and decree to whom the property held by your complainant as Trustee as aforesaid shall be paid and turned over.

"2. If the said trust has not been terminated then to determine and decree to whom he shall pay and turn over the trust property in his hands and how much thereof, principal and income, and at what times.

"That the complainant may have such other and further relief as the nature of the case may require."

The defendants in their answers admitted the allegations of fact in the bill to be true and joined in the prayer of the bill.

The will of the said Mary M. Stewart which is dated July 8, 1899, and was by her duly executed, is as follows:

"I, Mary M. Stewart, of Bangor, Maine, do make this my last will.

"I. I give to my grandchildren one thousand $1,000 to each one and I wish and direct that this shall be devoted and expended for their education.

"II. I give to each of my sons one hundred dollars, to each ($100.)

"III. I give to Gertrude H. Stewart, wife of Charles my son, to Martha J. Stewart, wife of Edward my son, to Georgia Stewart, wife of Harry, my son, and Cara A. wife of Rowland, my son—being the wives of my four sons, all the furniture, plate, books, in my homestead equally, share and share alike except certain pieces and articles a memorandum of which to be made by me or under my direction which I wish given to the persons named in said memorandum and I enjoin and request my sons and their wives to deliver the articles to the persons as named in said memorandum, which I will have made by Mrs. Eva Parker.

"IV. All the rest and remainder of my estate of every kind real and personal I give and devise to said Gertrude, Martha and Cara wives of my sons, Charles, Edward and Rowland and to my son Harry D. Stewart equally, share and share alike, and I wish that

the indebtedness of Thos. J. Stewart & Co. shall be deducted from the shares and property so given and devised to the said wives of my sons, Charles, Edward and Rowland, and that the property so as above given to said three wives of my three sons be for the education of their children and the support of their families respectively — and I enjoin upon them so to use and expend it.

"I hope that my sons and their wives shall in the settlement of my estate and the division of the property given them act harmoniously and without dissension or dispute.

"I appoint my four sons Edward, Charles, Rowland and Harry and Charles P. Stetson executors under this will and it is my wish that they should not be required to give bonds."

Hearing on the matter was had before the Justice of the first instance at the February Rules, 1906, where it was agreed that the cause should be reported to the Law Court "upon bill and answers for determination thereof."

F. H. Appleton and Hugh R. Chaplin, for plaintiff.

E. C. Ryder, for defendants Cara A. McLain and Arthur Chapin.
Milton S. Clifford, pro se.

Terrence B. Towle and Matthew Laughlin, for defendants Charles M. Stewart, Edward D. Stewart, Gertrude H. Stewart and Martha J. Stewart.

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

POWERS, J. Bill in equity to construe the following clause of the will of Mary J. Stewart.

"IV. All the rest and remainder of my estate of every kind real and personal I give and devise to said Gertrude, Martha and Cara, wives of my sons Charles, Edward and Rowland, and to my son Harry D. Stewart, equally share and share alike, and I wish that the indebtedness of Thos. J. Stewart & Co., shall be deducted from the shares and property so given and devised to the said wives of my sons Charles, Edward and Rowland, and that the property so as above given to said three wives of my three sons be for the educa-

tion of their children and the support of their families, respectively—and I enjoin upon them so to use and expend it."

This clause was before the court for construction in *Clifford* v. *Stewart*, 95 Maine, 38, and it was there held "that the testatrix intended to create a trust upon the estate bequeathed to the wives to the extent of securing the education of her sons' children and the support of their families." The court however, at that time declined to declare what persons had any interest under this clause of the will and the extent, amount and nature of such interest. Since then Rowland has deceased leaving no children, and his wife, the defendant Cara A. McLain, has remarried. She never qualified as trustee, but her husband Rowland was appointed by the Probate Court to administer said trust, and since his decease the plaintiff Stone was appointed and qualified as trustee in his place. The trust fund in the hands of the trustee amounts to about eleven thousand dollars in personal property. No part of the fund has been paid out to or for any cestui que trust.

This court is asked to determine:

1. If said trust has been terminated, and if this court shall so decree, then to determine and decree to whom the property held by said trustee shall be paid and turned over.

2. If the said trust has not been terminated then to determine and decree to whom he shall pay and turn over the trust property in his hands and how much thereof, principal and income and at what times.

At the date of the will, the three sons, Charles, Edward and Rowland, constituting the firm of Thomas J. Stewart & Sons, were indebted to the creditors of the firm in a sum exceeding its assets in addition to some ten thousand dollars owed by them to the testatrix. What she desired was the education of the children, the support of the families of the sons, to save the legacies from their creditors and that the residue of the estate should be divided equally and fairly among all her sons. To the son who was solvent she gave one fourth, and to the wives of the other three sons she gave each one fourth charged with a trust to the extent of securing the education of the

children of the three sons and the support of their families. Thus much appears and is settled in the case above cited.

We find nothing in the will or in the surrounding circumstances to show that the testatrix used the word family in any other than its common, ordinary sense, of those who live under the same roof and form the fireside of the father or head of the family. At the date of the will the family of Rowland consisted of his wife and himself. After his death and the remarriage of his wife, his family as a family, ceased to exist. The trust was for the education of the children and for the support of the individuals composing the respective families named, so long as they remained members thereof. The testatrix in the case of the children could not have intended that they should not only have been educated and supported while members of the family but should also be supported from the trust fund during their entire lives, even after they had married, become the heads of their own families, living apart and no longer constituting a part of the families of her sons. Yet such would be the result in case the support provided was for the individuals who at one time composed the family without regard to whether they continued to remain members of it. In the case of Cara, the wife of Rowland, having become by her marriage a member of the family of Mr. McLain, she can no longer be held to be a member of Rowland's family entitled to support out of the trust fund. In the closely analogous case of *Bradlee* v. *Andrews*, 137 Mass. 50, a trust was created for the support, maintenance and comfort of the testator's son and three daughters and their families. It is there said: "The word 'family' as used by the testator, would include his son and daughters, together with their respective children so long as they should live together and form a portion of the same household, or from their tender years be entitled to be treated as its members. It would also include the wife of the son, if she continued to reside with, or be entitled to support from, him."

The purposes of the trust created upon the estate given to Cara having been accomplished, the trust itself is thereby terminated, and the only question remaining is to whom shall the trustee turn over the property. The answer depends upon whether the property was

given to Cara for a particular purpose with no intent that she should take any beneficial interest, or whether the intention was to give her a valuable interest, subject to a particular and temporary charge. It is claimed for Cara that she took the entire beneficial interest, and by the other defendants that she took no beneficial interest and that, the trust declared having terminated, there is a resulting trust in favor of the heirs at law of the testatrix. The intention of the testatrix must govern. We have already seen that the testatrix had in mind certain things, that her sons should share equally in the benefits of her estate and that in the cases of Charles, Edward and Rowland, their shares should not be subjected to the claims of their creditors. She could not accomplish both these purposes by giving the property directly to these three sons; she therefore gave it to their wives subject to a trust for the education of their children and the support of their families. If the share so given to Cara is to be regarded as intestate property a large portion might be subjected to the claims of the creditors of Charles, Edward and Rowland, contrary to the testatrix's intention. The testatrix divided the residuum of her property into four equal shares. The entire interest in one of these shares was given to her son Harry D. Stewart and we cannot escape the conviction that it was the intention of the testatrix to give to each of the wives of the other three sons the entire interest in one of these shares subject to the trust imposed upon it for the benefit of the children and family of her husband. As is said in *Stewart* v. *Clifford;* "No reason is shown why she wished to discriminate in favor of one and against the other three, and the will strongly shows that she did not." A construction which gives a beneficial interest to the wives is more in harmony with her intention to make equal division of the benefits among the sons. The legatees were daughters in law, and the relation in which they stood to the testatrix is of some weight in determining whether it was intended that they should take a beneficial interest. In the fourth clause of the will the wives of the sons take the property by the same words in which the entire interest in the share of Harry D. Stewart is given to him, and then after providing that the indebtedness of each son to the testatrix is to be deducted from the shares "so given and devised

to the wives of my said sons," the trust is created upon those shares. Immediately after clause IV of the will, she again says that she hopes that her sons and their wives in the settlement of her estate "and the division of the property given them" will act in harmony and without dispute or dissention.

Our conclusion is that it was the intention of the testatrix that the wives of her sons Charles, Edward and Rowland should take the entire beneficial interest in the shares of the residuum given and devised to each of them severally, subject to the trust created upon it, and that the property held by the plaintiff as trustee should be paid and turned over to Cara A. McLain.

Decree accordingly.

OSCAR FROMMEL et al. *vs.* GEORGE L. FOSS.

Aroostook. Opinion December 3, 1906.

Contracts. Sales. Non-delivery. Justification. Options. Same must be seasonably exercised.

The defendant, in February 1904, agreed to deliver to the plaintiffs ten carloads of potatoes at New York City in the following March; and by another contract in the same February to deliver ten other cars of potatoes at New York City in the same month of March; and by another contract in the same February, to deliver fifteen other cars of potatoes to the plaintiffs at New York City in the same March or the first of April. And in the last case, the proposition accepted was to deliver in March if the defendant could get the cars. All the potatoes were to be shipped on the plaintiffs' orders, and were to be shipped from Aroostook County. Up to the night of March 24, only five cars had been ordered out by the plaintiffs, and they, one each day from March 22. On March 24, the defendant refused to perform the contracts, for the alleged reason that the plaintiffs had not seasonably ordered out the potatoes. *Held:*

1. That the plaintiffs having the option when to order out the potatoes, it was their duty seasonably to order the shipments, so that the defendant could secure the cars, prepare them for use, load them, and deliver in New York, in the month of March, all the potatoes contracted to be delivered there under the first two contracts.

2. That the evidence shows clearly that the plaintiffs failed to order out the potatoes in season for the defendant to obtain cars, fit them, load them and deliver the potatoes in New York in March, it being practically impossible to do so in the time after March 24.
3. That time was of the essence of the contract, and that the defendant had a right to be permitted to deliver the potatoes in March, and as the plaintiffs failed to afford him the opportunity so to do, he was justified in refusing to perform.
4. That as to the third contract, the defendant had the right to deliver the potatoes at New York in March if cars could be had; that he was entitled to have an opportunity seasonably to try to secure cars; and that it was the duty of the plaintiffs, by giving orders seasonably, to afford the defendant a reasonable opportunity to perform his contract in March, or to endeavor to perform it. This they failed to do.
5. By reason of the failure of the plaintiffs to perform their clear duty, the defendant was justified in cancelling the orders, and upon the evidence, the action for the breaches of the three contracts, by way of non-delivery, is not sustainable.

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

Action of assumpsit to recover damages for the alleged breaches of contracts to deliver to the plaintiffs certain carloads of potatoes which they had bought of the defendant. The plaintiffs were potato dealers in New York City, and the defendant was a potato dealer in Aroostook County, Maine.

The declaration in the plaintiffs' writ contained three counts which are as follows:

"In a plea of the case for that on the 17th day of February, 1904, at Fort Fairfield, in said county, to wit:—At Caribou, in consideration that the plaintiffs, at the special request of the said defendant, had bought of the said defendant a large quantity of potatoes to wit:—Ten car loads of the variety known as 'Green Mountain' potatoes, at the price of $2.70 per barrel for each and every barrel thereof, to be delivered at New York City, in the State of New York, in March, then next ensuing, and had then and there promised said defendant to accept all the said potatoes, and to pay for the same at the price aforesaid, the said defendant then and there promised and agreed to deliver the said ten carloads of 'Green Mountain' potatoes to the plaintiffs at New York City, in the State of New York, in March, then next ensuing, at the price of $2.70 per

barrel, as aforesaid, and the plaintiffs aver that they, on the 24th day of March, 1904, requested the said defendant to deliver them the said ten carloads of potatoes, as aforesaid, in accordance with the terms of his agreement, and the plaintiffs aver that they were then and there ready and willing to accept the said potatoes and pay for the same in accordance with the terms of their agreement and were then and there ready, and offered to accept and receive the said potatoes from the said defendant. Yet the said defendant then and there refused, and though often thereto requested has ever since neglected and refused, to deliver to the said plaintiffs the said potatoes in acccordance with the terms of his said agreement.

"Also for that on the 18th day of February, 1904, at Fort Fairfield, in said county, to wit: — At Caribou, in consideration that the plaintiffs, at the special request of the said defendant, had bought of the said defendant a large quantity of potatoes, to wit: — Five cars of the variety known as 'Green Mountain' potatoes, and five cars of the variety known as 'Hebron' potatoes, at the price of $2.70 per barrel for each and every barrel thereof, to be delivered at New York City, in the State of New York, in March, then next ensuing and had then and there promised said defendant to accept all the said potatoes, and to pay for the same at the price aforesaid, the said defendant then and there promised and agreed to deliver the said five cars of 'Green Mountain' potatoes, and the said five cars of 'Hebron' potatoes, to the plaintiffs at New York City, in the State of New York, in March, then next ensuing, at the price of $2.70 per barrel, as aforesaid, and the plaintiffs aver that they, on the 24th day of March, 1904, requested the said defendant to deliver them the said ten carloads of potatoes, as aforesaid, in accordance with the terms of his agreement, and the plaintiffs aver that they were then and there ready and willing to accept the said potatoes and pay for the same in accordance with the terms of their said agreement, and were then and there ready and offered to receive the said potatoes from the said defendant. Yet the said defendant then and there refused, and though often thereto requested has ever since neglected and refused, to deliver to the said plaintiffs the said potatoes in accordance with the terms of his said agreement.

"Also, for that on the 24th day of February, 1904, at Fort Fairfield, in said County, to wit: — At Caribou, in consideration that the plaintiffs, at the special request of the said defendant had bought of the said defendant a large quantity of potatoes, to wit: — Ten carloads of the variety known as 'Green Mountain' potatoes, and five carloads of the variety known as 'Hebron' potatoes, at the price of $2.75 per barrel for each and every barrel thereof, to be delivered at New York City, in the State of New York, in March, or the 1st of April, then next ensuing, and had then and there promised said defendant to accept all the said potatoes and to pay for the same at the price aforesaid, the said defendant then and there promised and agreed to deliver the said ten cars of 'Green Mountain' potatoes, and the said five cars of 'Hebron' potatoes, to the plaintiffs at New York City, in the State of New York, in March, or the 1st of April, then next ensuing, at the price of $2.75 per barrel, as aforesaid, and the plaintiffs aver that they, on the 24th day of March, 1904, requested the said defendant to deliver them the said fifteen carloads of potatoes, as aforesaid, in accordance with the terms of his agreement, and the plaintiffs aver that they were then and there ready and willing to accept the said potatoes and pay for the same in accordance with the terms of their said agreement, and were then and there ready, and offered to receive the said potatoes from the said defendant. Yet the said defendant then and there refused, and though often thereto requested has ever since neglected and refused, to deliver to the said plaintiffs the said potatoes in accordance with the terms of his said agreement."

Writ dated November 22, 1904. Ad damnum, $5000. Plea, the general issue. Tried at the December term, 1905, of the Supreme Judicial Court, Aroostook County. Verdict for plaintiffs for $2,550. The defendant then filed a general motion for a new trial. Also during the progress of the trial the defendant took exceptions to several rulings made by the presiding Justice. The exceptions were not considered by the Law Court.

The case appears in the opinion.

Herbert T. Powers and Powers & Archibald, for plaintiffs.

Ira G. Hersey and Geo. H. Smith, for defendant.

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

SAVAGE, J. Action for alleged breaches of contracts to deliver to the plaintiffs certain carloads of potatoes which they had bought of the defendant. The plaintiffs were potato dealers in New York City, and the defendant was a potato dealer in Aroostook County in this State, whence the potatoes were to be shipped. The plaintiffs in three counts in their declaration set up breaches, by way of failure of delivery, of three separate contracts of the defendant, all made on different days in February, 1904; — one "to deliver the said ten carloads of Green Mountain potatoes to the plaintiffs at New York City . . . . in March, then next ensuing, at the price of $2.70 per barrel;" another, "to deliver the said five cars of Green Mountain potatoes, and the said five cars of Hebron potatoes, to the plaintiffs, at New York City . . . . in March then next ensuing, at the price of $2.70 per barrel;" and a third, "to deliver the said ten cars of Green Mountain potatoes and the said five cars of Hebron potatoes to the plaintiffs at New York City, ... in March or the 1st of April, then next ensuing, at the price of $2.75 per barrel." The defendant, not denying the various negotiations which are relied upon by the plaintiffs and which were all by letter or telegram, claims that the effect of the negotiations was to merge the several negotiations into a single contract for the sale and delivery to the plaintiffs at New York in March 1904, of thirty-five cars of potatoes of the varieties named, to be shipped from Aroostook County in this State. In any event, the defendant did not ship any potatoes covered by these contracts to the plaintiffs, but on March 24, 1904, by telegram, cancelled the plaintiffs' orders, and refused to deliver the potatoes. The verdict was for the plaintiffs for substantially all the damages claimed under all three counts, and the case comes before us on the defendant's motion for a new trial, and exceptions.

We think the evidence sustains the plaintiffs' claim that there were three separate and independent contracts, although after they were made, the parties in some respects treated them as one. The defense is that the contracts called for a delivery of the potatoes at New York in the month of March, 1904; that the plaintiffs had the

option of saying when the potatoes should be shipped, and therefore that it was their duty to order the shipments seasonably so that the defendant could procure cars, prepare them for use, and ship the potatoes to New York within the time limited by the contracts. And the defendant says that the plaintiffs failed seasonably to order the shipments of the potatoes so that he could perform his contract within the month, and that, inasmuch as the time of the delivery was of the essence of the contracts, he was excused from the performance of the contracts, and was justified in cancelling them. In other words, he says that the plaintiffs' failure or neglect to order the shipments seasonably put it out of his power to perform his contracts.

Although the correspondence is silent on the point, the parties do not disagree that under the contract, perhaps from the very nature of the business, the shipments were to be at the option of the plaintiffs. They had the right to say when the defendant should ship the potatoes. This being so, it was the duty of the plaintiffs to direct the shipments in season for the defendant to perform his part of the contract within the time limited. He had a right to insist on being permitted to perform his contract within that time. We think time was of the essence of the contract. The defendant could not be driven to postpone the delivery of the potatoes, and thereby be subject to loss by decay or waste, or as the case shows, to the burden of taxes which would be assessed against him, if the potatoes were in his possession in this State on or after April 1st. A very large part of the testimony in the case is devoted to an attempt to show that when potatoes in Aroostook County are sold in quantities of twenty cars or over for delivery in a month certain, it is the custom of buyers to order shipments early in that month, so that the delivery may be accomplished during the month. But the custom shown does not effect the question here. It is no more than the law annexes to contracts like these. The law says the shipments must be ordered seasonably, so as to enable the shipper to deliver seasonably. We think the custom goes no further.

The parties do not agree as to whether, under the contracts, the defendant was bound to deliver at New York, or only to ship from

Maine, within the time stated, and as this difference may be of importance we will consider the contracts in detail. The terms, "March delivery" and "March shipment" are used in the correspondence somewhat indiscriminately. February 15, 1904, the defendant wired the plaintiffs at New York, "Will sell five cars Mountains [Green Mountain potatoes] in sacks of hundred sixty-eight pounds two seventy March delivery." To this on the following day the plaintiffs replied,—"If your price is delivered will buy five or ten cars. Advise quick." And the defendant answered on the same day,—"Will deliver ten cars at price quoted." This completed the contract, though on the same day the plaintiffs by letter confirmed their order, "for March delivery." We think this was a contract for a delivery of the cars, in March, at New York.

On February 17, 1904, the defendant wired the plaintiffs,—"Can you use ten cars more Hebrons and Mountains two seventy five prompt on March delivery?" On the next day, as appears by a confirmatory letter of that date, the plaintiffs wired the defendant that they "would buy five each Mountains and Hebrons, March delivery, at $2.70." On the same day the defendant answered by wire,—"Will book five cars Hebrons, five cars Mountains two seventy March delivery. Will ship the car Bliss two seventy five." This acceptance completed the second contract, now in question. The reference to the car of Bliss potatoes grew out of another order, not important here. The next day, February 19, the plaintiffs wired the defendant,—"We have your confirmation of Hebrons, Mountains, March shipment and Bliss spot shipment." And in a letter of the same date to the defendant, they wrote, "We have your wire confirming five each Hebrons and Mountains at $2.70 for March delivery and one Bliss quick shipment at $2.85. We now have you booked for 15 cars Mountains at $2.70, and 5 Hebrons at $2.70, all for March shipment delivered New York, also one car Bliss at $2.85 for spot shipment. These goods are to come forward via Metropolitan Line to New York any time during March as ordered out by us."

Independently of the letter, which was confirmatory of the telegraphic contract, we think that the term "March delivery" in the

contract, read in the light of existing conditions, should be held to contemplate a delivery in March at New York. That the plaintiffs so understood it appears clearly from their letter. Though in the letter they used the term "March shipment" as well as "March delivery," their understanding is apparent when they say, "These goods are to come . . . *to New York any time in March*, as ordered out by us." Furthermore in their declaration, the plaintiffs allege that the defendant agreed to deliver the potatoes "to the plaintiffs at New York City . . . in March, then next ensuing." The plaintiffs' interpretation of the contract at that time was undoubtedly the true one.

Before we consider the rights and duties of the parties under these two contracts, it will be expedient to state the third. On February 22, 1904, the plaintiffs wired the defendant,—"How many more Hebrons and Mountains will you book us for March shipment . . ." The defendant replied the same day,—"Will ship ten cars more Mountains five Hebrons March or first of April delivery. March if can get cars. You advance me One thousand to secure them with at two seventy-five." Two days later the plaintiffs answered by wire,—"Would not make any advances on potatoes would buy fifteen cars offered if you care to book." In answer to this the defendant wired on the same day,—"Will book the fifteen cars as per wire without any advance order, order out as early in March as possible on account of shortage of cars." This completed the third contract, and we think it contemplated that the potatoes should be delivered in New York in March if the defendant could get the necessary cars; otherwise in the early part of April.

Then followed a correspondence concerning all the potatoes. In a letter from the defendant to the plaintiffs dated February 24, confirming his last telegram, and recapitulating the amounts of all the contracts, "making 35 cars in all," the defendant wrote,—"Please order them out as early in March as possible for it is hard to get cars just as you want them." On February 27 the plaintiffs wrote the defendant, "in regard to the 35 cars booked for us in all for March shipment, as follows: "In ordering them out we will arrange so as to make it convenient for us both." March 4 the defendant

wrote: "About when do you think you will order out some Hebrons or Mountains?" and the plaintiffs replied March 8, saying that "it will be the end of this month before we expect to order any out. At the present our market is well supplied and we do not expect to order any goods out until conditions here show some improvement." Again, March 9 the defendant inquired, "When do you think you will order out some Hebrons or Mountains," and the plaintiffs replied March 11, "we expect to wire you about the middle of next week to begin to let them come forward. We will advise you the early part of the week by wire just when to start shipping." March 17 the defendant wired:—"Must start loading your stock at once will have to pay 5 cents per sack tax April 1st." March 18 the plaintiffs wrote,—"We expect to begin to have our goods come forward next week. Just as soon as we hear from you what you mean by five cents tax after April 1st, we will know just what to advise you." March 19, the defendant wired, "Have four cars loaded wire shipping directions." March 22, three days later, the plaintiffs wrote, "We have wired you to let five cars come forward, one each day. On such of our potatoes as we may not order out for March, whatever the correct expense on them may be, we naturally will have to stand our part of it." On March 23, the defendant wired,—"Had to move stock and have sold," and on March 24,—"Shall cancel your orders see letter." Later on the same day the plaintiffs wired,—"We will not allow cancellation as we accepted your tax proposition on all potatoes not shipped in March, also ordered out four cars you had ready. You can ship as many as you can balance of March."

Now with reference to the first two contracts, we have already stated that the defendant was bound to deliver the potatoes at New York in March and had the right to so deliver them, and that the plaintiffs, though they had the option as to when cars should be ordered out were bound to exercise that option reasonably, with reference to the defendant's rights. And it was their duty to exercise their option in season for the defendant to deliver the potatoes at New York in March. It was their duty to take into account the situation, at least so far as it existed between them and

the defendant, for they knew that he had thirty-five cars to deliver, twenty in March in any event, and fifteen more if cars could be obtained. The case shows that cars in such numbers are not easily obtained, and that the plaintiffs were advised of this difficulty. It also appears that cars when secured had to be specially fitted or lined by carpenters, at that season of the year, to protect the potatoes from the cold. And of course they had to be loaded. The procuring, fitting and loading the cars naturally had to be done after they were "ordered out." And it also appears that the average time of carriage from Aroostook County to New York is about eight days.

In view of these circumstances, we think that the delay of the plaintiffs in ordering out cars was clearly unreasonable. Up to the night of March 24, only five cars had been ordered out, and they, one each day from March 22, the time when the order was received. The evidence is satisfactory that it was, after March 24, practically impossible then to procure, fit and load the cars, and ship the potatoes to New York in that month. It was not possible for the defendant then to perform even the first two contracts for twenty cars. The fault of the plaintiffs then having rendered it impossible for the defendant to perform these two contracts according to their terms, we think he was justified in declining to perform. *Rhoades* v. *Cotton*, 90 Maine, 453. Nor is the result affected by the fact as claimed by the plaintiffs that they accepted the defendant's tax "proposition." The truth is, the defendant made no "tax proposition." He merely called attention to the fact that there would be a liability to tax April 1, and this was done to induce the plaintiffs to greater diligence in ordering. The willingness of the plaintiffs to pay the tax could not affect the defendant's rights, which he appears neither to have abandoned nor waived.

Under the third contract, the defendant was under the duty and had the right to deliver the potatoes at New York in March, if cars could be had, otherwise in April. But March was to be preferred, if cars could be had. It was plainly for the defendant's interest to perform the contract in March, if he could. We think he should have had an opportunity seasonably to try to secure cars. It is manifestly

impracticable to try to secure cars from a railroad company, especially when cars are scarce, unless the shipper knows approximately when they will be needed. And in this case the defendant could not know, until he received orders from the plaintiffs. He had no reasonable opportunity to perform his contract in March, or to endeavor to perform it. That he had no opportunity was the fault of the plaintiffs. Accordingly, as in the case of the other contracts, he was justified in declining to perform.

Upon these principles, the verdict is clearly wrong and must be set aside. It is unnecessary to consider the exceptions.

Motion for a new trial sustained.
Verdict set aside.

RUFUS D. MOULTON

vs.

LEWISTON, BRUNSWICK & BATH STREET RAILWAY.

Sagadahoc. Opinion December 3, 1906.

Negligence. Contributory Negligence. Horse left unhitched and unattended in a city street.

1. It is not negligence per se to leave a horse attached to a carriage in the street unhitched.
2. But when one leaves a horse attached to a carriage, unhitched, unimpeded by any weight, and unattended by any person near enough to control him by the voice or to reach him before he can escape, in a city street in which there is an electric car line, at a time when the conditions are such that cars may reasonably be expected to run with snow scrapers, calculated to frighten horses both by sound and sight, he is guilty of such negligence as will prevent his recovery in an action against the railway company, if the horse frightened by the noise or action of the scrapers,

runs in front of a car and is injured by it. And this is true, although the horse had never been afraid of the electric cars, and had never run away though left unhitched.

3. The evidence in the case is *held* to be insufficient to warrant a finding by the jury that the defendant was guilty of negligence.

On motion by defendant. Sustained. New trial granted.

Action on the case to recover damages for injury to the plaintiff's horse, pung and harness caused by the alleged negligence of the defendant. The plaintiff's servant had driven the horse, hitched into a grocery pung, close beside the sidewalk of Washington Street in the city of Bath, about fifteen or eighteen feet from the defendant's car track, and had left the horse standing there unhitched and unattended while he went to the door of a house for the purpose of taking orders for the plaintiff who was a grocer. While the horse was standing there one of the defendant's cars came along, from the direction in which the horse was facing. When the car was within two or three car lengths of the horse, he suddenly started, turned around and ran onto the car track ahead of the car and was struck by the car and the injury complained of resulted. The horse was so badly injured that he was afterwards killed.

The action was tried at the August term, 1905, of the Supreme Judicial Court, Sagadahoc County. Plea, the general issue. Verdict for plaintiff for $94. 67. The defendant then filed a general motion for a new trial.

All the material facts appear in the opinion.

E. C. Plummer, for plaintiff.

Southard & Glidden, for defendant.

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

SAVAGE, J. Case to recover damages for injury to the plaintiff's horse, pung and harness, which on February 1, 1905, was struck by one of the defendant's cars. The verdict was for the plaintiff, and the case comes up on the defendant's motion.

The plaintiff's cause of action, as set out in his declaration, is in substance that the defendant negligently allowed its road bed to

become "cumbered with ice and snow, so as to interfere with the prompt and proper control of cars there being operated," that upon the track thus cumbered a car was run by the defendant's servants "at an improper and dangerously high rate of speed, and with much noise and with snow and ice flying from the scrapers of said car, rapidly approached the horse of the plaintiff . . . which had been momentarily left by plaintiff's servant . . . well outside the track of the defendant corporation, so as to be clear of all passing cars," and that "by reason of the noise and rapid approach of said car and of the snow and ice being thrown from the scrapers of said car" the horse became frightened, turned around and ran onto or across the track, in front of the car, and was struck by it. And it is further alleged that the "car failed to stop as it approached the plaintiff's horse," by reason of the negligently high speed of the car, "and especially of the unsafe condition of the railway track."

The case shows that about four days before the accident, snow in considerable quantities had fallen, and there is testimony that at the time of the accident there was snow and ice in places on the rails, although the same or other cars had gone over the track on the day in question. There is also testimony that the rails were "banked in" by snow and ice four or five inches deep, in places. Assuming this to be true, and assuming as claimed by the plaintiff that the horse was frightened by the noise of the approaching car and by the sight of the snow thrown out by the scrapers attached to the car, the condition of the track was not itself the proximate cause of the accident, and is of importance only as it affected the operation and control of the car. The condition of the track is not shown to be an unusual one in the operation of street cars in winter in Maine. The defendant company was not responsible for the snow storm or other weather conditions. They had the right to run their cars in winter as well as in summer, and after a snow storm as well as before. Nor do they appear to have been remiss in the care of their track afterwards, at least so far as they owed any duty to the plaintiff. But the condition of the track is an element to be considered when we come to inquire whether the company was negligent as to the speed at which the car was run.

Under some conditions a speed would be unsafe which would not be under others.

The car was equipped with scrapers near the wheels, so adjusted that they could be raised or lowered by the motorman. When lowered, with the car in motion, they had the effect of scraping away any shoulder of snow or ice which may have accumulated beside the rails, and throwing it from the track. The scrapers on the car in question were being operated just prior to the accident, and doubtless made a noise which could be heard, and threw out snow and ice, which could be seen by the plaintiff's horse. But the scrapers were a reasonable appliance, and the defendant company had the right to use them, and there is nothing in the case to show that they were used improperly.

With regard to the speed of the car, the plaintiff claims that it was behind schedule time, that it was making up time, that it was running at an unusual speed, one witness placing the speed as high as twelve miles an hour. The weight of the evidence is certainly against this proposition, being to the effect that the car was on schedule time and running at an ordinary rate of speed. But the truth of neither proposition settles the question of negligence. The ordinary speed might have been dangerous. An unusual speed might not have been. The question in this case is, not whether the speed was dangerous as to passengers on the car, or to teams or persons upon or about to cross the track, as at a street crossing, but whether it was dangerous as to the plaintiff's horse. Unless the defendant failed to perform some duty which it owed to the plaintiff, under existing conditions, it was not negligent as to him.

The plaintiff's servant had driven the horse hitched into a grocery pung close beside the sidewalk, and left it standing there facing in the direction from which the car came, while he went to the door of a house to take orders. At that point the street from sidewalk to car track was from fifteen to eighteen feet wide. The plaintiff claims that the horse was kind and well broken, and was not afraid of the cars, and was accustomed to being left standing unhitched, and had never been known to run away. The horse did stand still until the car came near it, say within two or three car lengths, at

the outside. He then suddenly started, turned around and ran onto the track ahead of the car. The duty of the motorman is to be tested by the appearance of the horse to him. He saw the horse some distance away. But he saw him standing quietly, so far as the case shows, by the sidewalk, until the car came near. He was not thereby relieved of all duty towards the horse, but he had a right to assume that the horse would remain standing. He might so assume until, at least, there was an appearance of fright or movement of the horse. He was bound to anticipate and be prepared to avert any reasonably to be expected movement of the horse, but not more. Measured by these rules, we are unable to see wherein the conduct of the motorman in regulating the speed of the car was negligent as to the plaintiff, even assuming the speed to have been as claimed by the plaintiff. There was no apparent danger until the car had nearly reached the horse, when he suddenly turned onto the track. It was then too late to stop the car. There is no evidence to warrant a finding that the motorman did not use due diligence to stop the car as soon as he could after the horse started. We think therefore that the plaintiff failed to show that the defendant was negligent.

But there is another ground equally fatal to the plaintiff's right of recovery. The plaintiff must prove that no want of due care on his own part contributed to the injury. The plaintiff's servant left the horse in the street unhitched and unattended and without any strap and weight, and went up some stairs to a house. It cannot be said that leaving a horse attached to a carriage in the street unhitched, is negligence per se. *Park* v. *O'Brien*, 23 Conn. 339; *Dexter* v. *McCready*, 54 Conn. 171; *Wasmer* v. *Del. Lacka. and Western R. R. Co.*, 80 N. Y. 212; Thomas on Negligence, 1181; Elliot on Roads and Streets, 628. And the question of due care is always for the jury, *Bigelow* v. *Reed*, 51 Maine, 325; *Griggs* v. *Flickenstein*, 14 Minn. 62; *Phillips* v. *Dewald*, 79 Georgia, 732; 11 Am. St. Rep. 458; *Turner* v. *Page*, 186 Mass. 600; and cases above cited; unless the evidence is such that unprejudiced and fair minded men can reasonably draw only one inference therefrom, *Blumenthal* v. *Boston & Maine R. R.*, 97 Maine, 255; *Maine Water Co.* v. *Steam*

Towage Co., 99 Maine, 473. But we are of opinion that when one leaves a horse attached to a carriage, unhitched, unimpeded by any weight, unattended by any person near enough to control him by the voice or to reach him before he can escape, in a city street in which there is an electric car line, at a time when the conditions are such that cars may reasonably be expected to run with snow scrapers, calculated to frighten horses both by sound and sight, only one reasonable inference can be drawn. That is this case. We decide no other. It is negligence so clearly that it will bar a recovery by the owner, if the horse, frightened by the action of the scrapers, runs in front of the car and is injured by it. We do not overlook the fact that the horse had never been afraid of the electric cars, and had never run away, though left unhitched. He was nevertheless a horse, and these were conditions to which he was probably not accustomed. The instincts common to the species rendered him peculiarly liable to be frightened by the sight of snow and ice thrown out from under the car by the scraper, and by the sound of the accompanying noise. These instincts the servant in charge of the horse must be presumed to have known, and knowing the conditions as to snow and ice which surrounded the track, he should have anticipated the lawful use which was made of the scrapers. The verdict cannot be sustained.

Motion for a new trial granted.
Verdict set aside.

ALWILDA S. DAVIS *vs.* LUTHER O. POLAND.

Knox. Opinion December 4, 1906.

Trespass Quare Clausum. Tenant in common can maintain such action against co-tenant, when. Damages.

It is a general rule of law that a tenant in common cannot maintain an action of trespass quare clausum against his co-tenant. But to this general rule there are exceptions, and it is well settled in this State that where the acts of a tenant in common amount to a destruction of the common property or effect a practical destruction of the interest of his co-tenant therein, the injured owner has a right of action, and under such circumstances trespass quare clausum is the proper remedy.

The plaintiff was an owner in common of certain premises and in possession of the same. The defendant, her co-tenant, entered the premises and removed from the dwelling house on said premises certain doors and windows, without the consent of the plaintiff. In the absence of any circumstances indicating that this act of the defendant was done in good faith as for the purpose of making repairs, it must be held that the removal of the doors and windows by the defendant constituted such a destruction of the common property as would make the defendant a trespasser.

But the damages awarded to the plaintiff in this case are held to be excessive. There is little or no evidence of injuries beyond that occasioned to the dwelling house by the removal of doors and windows. These could have been replaced in a few days at comparatively small cost. The jury must have considered, in estimating the damages, the actual suffering of the plaintiff, who seems to have voluntarily assumed the discomfort of living in the house for several weeks before attempting to make the necessary repairs. She is not entitled to recover for damages which she might have avoided by reasonable diligence. Therefore unless the plaintiff remits all of the verdict in excess of one hundred dollars the motion for a new trial will be sustained.

See *Davis* v. *Poland*, 99 Maine, 345.

On motion and exceptions by defendant. Exceptions overruled. Motion sustained unless remittitur made within thirty days.

Action of trespass quare clausum. The declaration in the plaintiff's writ is as follows:

"In a plea of trespass, for that on the eighth day of March, A. D. 1904, said defendant with force and arms broke and entered the

dwelling house of the plaintiff, situate in Cushing aforesaid, on land bounded and described as follows, viz:— Northerly by land formerly owned by James Smith and land of Francis Bradford; easterly by Maple Juice Pond; southerly by land of Almond Condon, and westerly by Friendship River, and then and there and thereby greatly disturbed and put in fear the plaintiff in the quiet possession of the said premises and dwelling house and then and there with great noise and violence broke into said dwelling house, and broke down the doors and split the window stops thereof and unhung the said doors and then and there broke the finish and took out eleven of the windows thereof, and took and carried the same away, and did then and there tear down the lace and other curtains and goods connected therewith and trampled the same under his feet, and then and there broke, damaged and spoiled other goods and furniture therein and did then and there threaten and put in great fear the plaintiff.

"Whereby and by reason of taking down the doors and tearing out of the windows as aforesaid and carrying the same away the plaintiff has been ever since subjected to great indignity and fear and been exposed to and endured great suffering from cold and exposure and whereby and by reason whereof she has been made sick and her health greatly injured and otherwise shocked and injured to the damage of the plaintiff (as she says) the sum of one thousand dollars."

Plea, the general issue with the following brief statement:

"And for brief statement of special matter of defense to be used under the general issue pleaded, the said defendant further says, that at the time the said acts of trespass charged against him in plaintiff's writ, he was and ever since has been the sole owner in fee of the premises therein described, and his entry upon said premises and all acts committed by him were by force and virtue of said ownership, and that the possession by said plaintiff was unlawful and in violation of his said ownership of the same; and this the defendant is ready to verify."

The case was first tried at the April term, 1904, of the Supreme Judicial Court, Knox County. Verdict for plaintiff. This verdict, was set aside by the Law Court. See *Davis* v. *Poland*, 99 Maine

345. At the time of the second trial, the defendant was allowed to amend his brief statement by adding the following thereto:

"And that such acts as he did there the defendant had a right to do as the owner in any event of an interest in fee in said premises."

The case was again tried at the April term, 1905 of said Supreme Judicial Court. At the conclusion of the testimony the presiding Justice instructed the jury that trespass quare clausum was the proper form of action and upon the evidence directed a verdict for the plaintiff. Thereupon the jury returned a verdict for the plaintiff for $317.12.

The defendant excepted to the aforesaid rulings and directions, and also filed a motion for a new trial.

The case appears in the opinion.

D. N. Mortland, for plaintiff.

Frank B. Miller and Arthur S. Littlefield, for defendant.

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

PEABODY, J. This is an action of trespass quare clausum, and comes before the Law Court upon motion of the defendant for a new trial, and exceptions to the charge of the presiding Justice directing a verdict for the plaintiff.

The plaintiff was in possession and occupation of a dwelling house claming as owner of two-thirds in common. The defendant, admitted to be the owner of one-third in common, and claiming title to the whole, entered and removed certain of the doors and windows, for the evident purpose of rendering the house untenantable, and thus compelling the plaintiff to vacate. The plaintiff remained in occupation of the premises, and brought this action to recover damages, for injury to the freehold and to her other property, and for her own physical discomfort resulting from the acts of the defendant.

The presiding Justice, finding that the evidence conclusively established the plaintiff's title to two-thirds in common of the premises, and that the defendant's acts were of such a character that they amounted to trespass as against his co-tenant, directed a verdict for the plaintiff.

Two questions are raised by both motion and exceptions: Whether trespass quare clausum can be maintained by one tenant in common against another for such injuries to the freehold as are shown in this case, and whether ownership in common existed between the parties to this action. It is a general rule of law that a tenant in common cannot maintain an action of trespass quare clausum against his co-tenant. *Porter* v. *Hooper*, 13 Maine, 25; *Maddox* v. *Goddard*, 15 Maine, 218; *Symonds* v. *Harris*, 51 Maine, 14. But to this general rule there are exceptions, and it is well settled in this State that where the acts of a tenant in common amount to a destruction of the common property or effect a practical destruction of the interest of his co-tenant therein, the injured owner has a right of action, and under these circumstances trespass quare clausum is the proper remedy. *Symonds* v. *Harris*, supra; *Blanchard* v. *Baker*, 8 Maine, 270. Assuming that the plaintiff was an owner in common and in possession of the premises, the removal of the doors and windows, without her consent, in the absence of any circumstance indicating that the act was done in good faith as for the purpose of making repairs, must be held to constitute such a destruction of the common property as would make the defendant a trespasser. But the defendant claimed in justification of his acts, that the plaintiff had lost title to her two-thirds share by the foreclosure of a mortgage given by her to secure the performance of a bond for the support and burial of her father, Edward Crouse. The evidence was not sufficient to show a breach of the conditions of this bond, and therefore the foreclosure of the mortgage was not effective to divest the plaintiff of her title, and the defendant, succeeding by purchase to the rights of the mortgagee, acquired no title thereby. *Davis* v. *Poland*, 99 Maine, 345. The presiding Justice was accordingly right in directing a verdict for the plaintiff.

The motion raises the further question whether the damages are excessive. The jury were correctly instructed by the presiding Justice that they should allow the plaintiff two-thirds the value of the windows and doors removed, and two-thirds of any other damages done to the house; also whatever injuries were done to her furniture, and something for what pain and suffering she sustained; but that

in estimating this element of damages they were to allow only for a reasonable time required for making the repairs to the house. There is little or no evidence of injuries beyond that occasioned to the dwelling house by the removal of doors and windows. These, without doubt, could have been replaced within a few days, and at comparatively small cost. The jury must have considered, as bearing upon the question of damages, the actual suffering of the plaintiff, who seems to have voluntarily assumed the discomfort of living in the house for several weeks in the early spring before attempting to make the necessary repairs. She is not entitled, and the presiding Justice so instructed the jury, to recover for damages which she might have avoided by reasonable diligence. *Fitzpatrick* v. *B. & M. Railroad*, 84 Maine, 33; *Grindle* v. *Eastern Express Co.*, 67 Maine, 317; *Miller* v. *Mariner's Church*, 7 Maine, 51; 8 Am. & Eng. Encyc. Law, 605; 13 Cyc. 71, 78.

The verdict in excess of one hundred dollars may be remitted within thirty days after the certificate of this decision is filed; otherwise the entry will be,

Motion sustained.

Exceptions overruled.

ATLAS SHOE COMPANY *vs.* HENRI P. BECHARD.

Androscoggin. Opinion December 10, 1906.

Sales. Fraud. False and fraudulent representations. Rescission. Trover.

Any vendor induced by false and fraudulent representations to sell goods upon credit, upon discovering the fraud, may rescind the sale and maintain trover for the goods so obtained.

When at the time of the purchase of the goods there is an intent never to pay for them, the sale may be avoided for fraud, although no false and fraudulent representations are made. When such representations are made, the vendor, who relying upon them parts with his property, may equally rescind, although there was at the time of the sale a bona fide intention to pay at some future time.

If a person states of his own knowledge material facts which are susceptible of knowledge, and the statement is made with an intent that another party shall act upon it, or in such a manner as would naturally induce him to act upon it, the statement so made, if false, is fraudulent both in morals and law.

In the sale and delivery of merchandise procured by fraud, it is generally the intention of the parties that the title pass to the vendee; but because of the fraud the vendee can, if he chooses, on discovering the fraud, avoid the sale and delivery and revest the title in himself notwithstanding this intention.

A vendee, for the purpose of obtaining a line of credit, made a written statement of his assets and liabilities, and agreed that it might be considered as a continuing and new and original statement upon each and every purchase of goods thereafter until he advised the vendor in writing to the contrary. The statement, though true when first made, afterwards became false and its falsity was or ought to have been within the knowledge of the vendee. No notice was given to the vendor and he, relying upon the statement as true, sold goods to the vendee after such statement had become materially and essentially false.

Held: That the vendor might rescind such sales and maintain trover against the vendee's common law assignee for such of the goods so sold as the assignee had in his possession and refused to deliver to the vendor.

On exceptions by plaintiff. Sustained. Judgment for plaintiff.

Trover for the conversion of certain goods sold and delivered by

the plaintiff to the firm of Fortier & Marcotte, of Lewiston.

The declaration in the plaintiff's writ is as follows:

"In a plea of the case, for that the said plaintiff, at said Lewiston, to wit, at said Auburn, on the twenty-seventh day of December, A. D. 1905, being possessed as of its own proper goods, of boots and shoes, according to the bill hereto attached, marked "A", and of the value set opposite each item, and all of the value of twenty-two hundred and eighty-three dollars and forty-five cents ($2283.45) as shown by said bill, thereafterwards, to wit, on the same day, lost the same, which thereafterwards, to wit, on the same day, came to the possession of the defendant by finding; Yet the defendant, knowing the same to be the property of the plaintiff, has not delivered the same to the plaintiff, though requested, but then and there converted the same to his own use, to the damage of the plaintiff (as it says) in the sum of four thousand dollars ($4000)." (Bill of items marked "A" omitted in this report.)

Plea, the general issue with brief statment as follows: "That Messrs. Fortier & Marcotte of Lewiston, were the owners of a portion of the goods mentioned in the plaintiff's writ and not the plaintiff, and that in December, 1905 and before the suing out of the writ in this action, the said Fortier & Marcotte made a common law assignment for the benefit of their creditors to this defendant and that in his said capacity as such assignee, he had in his lawful possession some of the goods that said Fortier & Marcotte had purchased of the Atlas Shoe Company and which they owned at the date of said assignment to this defendant and that subsequently to said suit herein as such assignee the defendant herein turned over to the Receiver in Bankruptcy proceedings instituted against the said Fortier & Marcotte a portion of the goods sued herein under the direction and order of the Judge of the United States Court for the District of Maine."

Tried at the April term, 1906, of the Supreme Judicial Court, Androscoggin County. At the conclusion of the plaintiff's testimony the presiding Justice ordered a nonsuit. The plaintiff excepted. It was then agreed that if the Law Court should decide that the nonsuit was improperly ordered then that Court should "have jury

power to decide the question of liability and the amount of damages that this plaintiff is entitled to recover and shall order judgment for that amount."

The case is fully stated in the opinion.

Oakes, Pulsifer & Ludden, for plaintiff.

H. P. Bechard and McGillicudy & Morey, for defendant.

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

POWERS, J. Trover for the conversion of certain goods sold and delivered by the plaintiff to the firm of Fortier & Marcotte. At the close of plaintiff's evidence the presiding Justice directed a nonsuit. The plaintiff excepted; and it is agreed that, if the nonsuit was not properly ordered, the court shall determine the amount of damages which the plaintiff is entitled to recover and order judgment therefor.

January 20, 1904, Mr. Fortier of the firm of Fortier & Marcotte went to the place of business of the plaintiff, and for the purpose of obtaining of it a line of credit for his firm, in its behalf made and delivered to the plaintiff the following written statement:

"Statement made this 20th day of January, 1904.

To the Atlas Shoe Co., Boston, Mass., by E. J. Fortier of the firm of Fortier & Marcotte, Town of Lewiston, County of Androscoggin, State of Maine, which firm is composed of the following persons: E. J. Fortier and A. R. Marcotte.

ASSETS.

Cash value of stock in store at above named town	4000	
Cash on hand in bank	1000	
Total assets	——	5000

LIABILITIES.

Owe for merchandise on open account		
Owe in notes or acceptances given for merchandise	3070	
Owe for borrowed money	nothing	
Chattel mortgage on stock of merchandise	none	
Total liabilities	——	3070

The above is a true and accurate statement of all our assets and

liabilities, and is presented to the Atlas Shoe Co., as a basis for credit. This statement may be considered by the Atlas Shoe Co., a continuing statement of our affairs, and a new and original statement of our assets and liabilities upon each and every purchase of goods from them hereafter until we advise them in writing to the contrary.

FORTIER & MARCOTTE.

Signed by E. J. FORTIER,
A member of the firm."

Thereafterwards the plaintiff furnished goods on credit to Fortier & Marcotte from April, 1904, to March 7, 1905, inclusive which were settled and paid for in full on March 17, 1905. From March 16, to Dec. 13, 1905, the plaintiff continued to furnish them goods on credit to the amount of $2283.45 and received payments on account of the same aggregating $1130.65 leaving a balance due of $1152.80. Applying the payments to the oldest items of indebtedness, as the parties themselves made no application of them, would still leave unpaid for all goods sold from and including May 10 to Dec. 13, 1905. Dec. 26, 1905, Fortier & Marcotte made a common law assignment for the benefit of their creditors to the defendant of all their stock in trade, including the goods purchased of the plaintiff which they had not disposed of in the regular course of business, and the same was taken possession of by the defendant. The next day, the plaintiff's agent, Mr. Murray, called at the store of Fortier & Marcotte, where the defendant was engaged in taking an account of the stock, and demanded of him the goods sold by the plaintiff still remaining in the stock. The defendant did not deliver them, but told Murray he could not allow him to remain in the store. The writ is dated Dec. 28, 1905, and is for all goods sold to Fortier & Marcotte by the plaintiff after the settlement in March previous. January 25, 1906, Fortier & Marcotte went into bankruptcy, and their schedules showed assets $3132.65, debts $6492.74. Among the latter was $200 in notes given for money borrowed of Delina Marcotte and Casimir Marcotte January 27, 1905.

It is conceded that the title to the goods passed to Fortier & Marcotte and that the representations contained in the statement of January 20, 1904, were true on that date. No notice of any change

in their financial condition was ever given to the plaintiff by Fortier & Marcotte. The plaintiff claims to rescind the sales, so far as relates to all goods sold on and after May 10, 1905, on the ground that such sales were induced by the fraudulent representations of the vendees as to material facts effecting their credit. Their right to do so depends in the first place upon the construction to be given to the statement of January 20. That instrument should have the construction placed upon it and the force and effect given to it which the parties themselves intended it should have at the time it was executed. There was evidence that the statement was made in order to get "a line of credit." That means credit for more than one transaction. It reaches forward in point of time and covers future transactions between the parties until a different arrangement is made. Such is the language of the statement itself. It recites that it is presented to the plaintiff the vendor as a basis for credit, and that it may be considered by it as a continuing statement of the vendees' affairs, "and a new and original statement of our assets and liabilities upon each and every purchase of goods from them (it) hereafter until we advise them in writing to the contrary." This is something more than a representation true at the time and a mere failure to notify of a change of conditions. Such a representation may be relied upon only for a reasonable time. It is here expressly agreed that it may be considered a continuing statement and a new and original statement upon each and every purchase of goods. That can mean nothing less than that it is to have the same force and effect "as a basis for credit" that it would have if it accompanied each order of goods and was made as of the date of said order. The intention of the parties is apparent and unmistakable that the plaintiff might rely upon it the same when the last as when the first goods were sold. The uncontradicted evidence is that it did rely upon it in selling the goods upon credit and that no notice not to do so was ever given it by Fortier & Marcotte. The fact that the statement, when originally made, was true cannot determine the plaintiff's rights in regard to goods afterwards sold in reliance upon it when no longer true. The plain intention was that it should continue to be true, and that the plaintiff might consider it as a new and

an original statement and one made upon each and every purchase of goods. Language clearer than that used cannot be devised to express that intention. If through any change of conditions Fortier & Marcotte owed more or owned less than therein stated, from that moment as to all sales of goods made while such change continued it became a false statement made at the time of such sales. There is no claim that they did not comprehend or remember its tenor and effect, and the uncontradicted evidence is that it was fully understood by Mr. Fortier at the time he signed it. The plaintiff in view of the purpose for which the statement was originally made and the language used might well rely upon its truth as reiterated upon every subsequent purchase. What difference can there be between a statement like this, and a case where a purchaser makes representations, true at the time, as to his property and financial standing for the purpose of obtaining credit, and obtains goods upon them; and when he wants more goods orally states to the seller that his condition is the same as when he made his previous statement? The last statement adopts the former one as of the time when the last one is made. If it is false and fraudulent as applied to the facts then existing and goods are sold upon the strength of it, we know of no case which has held that the seller's rights as to the last goods sold were affected by the fact that the statement when first made was true. The commercial transactions of mankind are largely based upon the faith given to representations of fact affecting their financial responsibility, made for the purpose of obtaining credit in their business dealings. In order that they may so continue it is necessary that such representations should be interpreted according to the plain intention of the parties at the time. The defendant is not an innocent purchaser. He is a common law assignee, Fortier & Marcotte under another name, with no other or greater rights in the goods purchased by them than they themselves had; and we see no reason in law or justice why the paper which they signed should not be interpreted and given the force and effect which they in it said they intended it should have. Certainly with that statement in its possession the plaintiff had a right to regard it as true unless advised to the contrary.

The representations made were of material facts and were relied upon by the plaintiff. If false and fraudulent the plaintiff had a right to rescind the sales which were induced by such representations. Fortier & Marcotte were out of business after Dec. 26, 1905, and their bankruptcy schedules show that in January following they were owing $6492.74, more than double the amount represented, while their assets had shrunk nearly $1900. They represented that their assets exceeded their liabilities nearly $2000. The fact was that their liabilities exceeded their assets more than $3300. No explanation is offered to show that this was a sudden change due to some particular loss or transaction, and the irresistible inference is that it must have come about gradually in the course of their business. The testimony showed that Fortier & Marcotte purchased their goods for their fall trade in the summer. A jury might properly find that for many months certainly as far back as September 1st, 1905, there was an actual and material difference between their indebtedness for merchandise as stated and as it actually existed. Moreover from January 20, 1905, they were owing $200 for borrowed money and their statement was that they owed none. Fraud is nearly always a matter of inference from circumstances. Where a person states of his own knowledge material facts which are susceptible of knowledge, and the statement is made with an intent that another party should act upon it, or in such a manner as would naturally induce him to act upon it, the statement so made, if false, is fraudulent both in morals and law. *Wheelden* v. *Lowell*, 50 Maine, 505; *Braley* v. *Powers*, 92 Maine, 203; *Cole* v. *Cassidy*, 138 Mass. 437; *Mooney* v. *Davis*, 75 Mich. 188; Benjamin on Sales, 7th Ed., American note on page 469.

Any one induced by false and fraudulent representations to sell goods upon credit, upon discovering the fraud may rescind the sale and maintain trover for the goods so obtained. 14 A. & E. Encycl. L., 2 Ed. 165; 24 idem, 1099; *Hall* v. *Gilmore*, 40 Maine, 578; *Ayers* v. *Hewett*, 19 Maine, 281. When at the time of the purchase of the goods there is an intent never to pay for them, the sale may be avoided for fraud although no false and fraudulent representations are made by the purchaser. *Burrill* v. *Stevens*, 73 Maine, 395.

When such representations are made, the vendor, who relying upon them parts with his property, may equally rescind, although there was at the time of the sale a bona fide intention to pay at some future time. *Reid* v. *Cowduroy*, 18 Am. St. R. 359, and note; *Judd* v. *Weber*, 55 Conn. 267. The decision of the case at bar does not depend upon whether the property passed to the vendees, for that is admitted, or whether the goods were purchased with an intent to pay for them at some future date, or never to pay for them. It depends upon whether the plaintiff was induced to part with its property upon the false and fraudulent representations of the buyer as to his ability to pay and means of payment, such as false statements as to his debts and assets. If it was, the right of the plaintiff to rescind the sale, revest the property in itself and maintain trover therefor cannot be denied. "In the sale and delivery of merchandise procured by fraud, it is generally the intention of the parties that the title pass to the vendee; but because of the fraud the vendor can, if he chooses, on discovering the fraud, avoid the sale and delivery, notwithstanding this intention, because in the whole transaction he has been deceived by the vendee." *Thaxter* v. *Foster*, 153 Mass. 151. Construing the statement made on January 20, 1904, as a continuing representation, renewed upon the occasion of each and every purchase of goods, as it was the intention of the parties to it that it should be regarded and considered, there was evidence in support of every proposition necessary for the plaintiff to establish to entitle it to recover for all goods sold since Sept. 1, 1905, and in the defendant's hands at the time of the demand. *Ayers* v. *Hewitt*, supra; *Ingersoll* v. *Barker*, 21 Maine, 474.

It was early held in this State that to entitle the seller to vacate the sale and reclaim the goods on the ground of fraud, it is not necessary that the fraudulent representations be made at the time of the sale, but it is sufficient if the goods be obtained by means of false and fraudulent representations, though they were made on a previous occasion. *Seaver* v. *Dingley*, 4 Maine, 306. The case at bar is stronger than that, even considered simply as a representation made January 20, 1904, upon which the seller might rely for a reasonable time. The arrangement that it should be a continuing representation,

to be considered as renewed on the occasion of each purchase until notice from the buyer to the contrary, must make a reasonable time include all time until the seller had notice from the vendee or some other source of facts which should put him on his guard against relying longer upon it. Up to that point there is the direct connection between the representation made and the credit given, which must always appear in order that the vendor may avoid a sale on the ground of false and fraudulent representations.

The evidence should have been submitted to the jury, and it is agreed that in that event the court shall assess the damages for the plaintiff. There is evidence tending to show that at the time the demand was made, the defendant had in his possession goods to the amount of $181 which had been purchased of the plaintiff by Fortier & Marcotte since Sept. 1st, 1905.

Exceptions sustained.
Judgment for the plaintiff for $181 and interest thereon from Dec. 26, 1905.

STATE OF MAINE *vs.* INTOXICATING LIQUORS, GRAND TRUNK RAILWAY, Claimant.

Androscoggin. Opinion December 11, 1906.

Intoxicating Liquors. Interstate Commerce. Common Carriers. Transit ends, when. "Wilson Act." R. S., chapter 29, section 48.

Intoxicating liquors were shipped from Boston, Massachusetts to Lewiston, Maine, by a continuous way bill over the Boston & Maine Railroad and the Grand Trunk Railway of Canada. The consignee named in the way bill and upon the packages was fictitious. The car in which the liquors were being transported by the claimant company, after its arrival in the Lewiston yard, was shifted from track to track, and was finally left upon the "team track" so called, about one hour after its arrival. In about ten minutes thereafter the liquors were seized, and subsequently libelled. The team track was about twenty rods from the claimant's freight station, and was commonly used for the purpose of unloading freight directly from cars onto teams. In the ordinary course of business, these liquors, if called for by the consignee or owner within two or three days, would have been unloaded from the car onto a team. But if not so taken within that time, they would have been taken in the car to the freight house and there unloaded by the claimant. Between the time of the arrival of the car at the team track, and the seizure of the liquors by the officer, the car which was sealed had been opened by the claimant's servants, and other merchandise which came in the same car was being taken out of it. But the liquors had not been removed or disturbed by any one. It did not appear that the consignee had in any way consented to take the liquors from the car on the team track.

Held: that in the absence of evidence showing a special arrangement, or assent, to the contrary, a railroad carrier's contract of carriage contemplates that the freight shall be transported to the carrier's freight house, and there removed from the car. So much is to be implied from the general usages of the business of such carriers. In this case there is no evidence that the carrier's duty in this respect was modified or waived by contract or otherwise. If the consignee had consented to take the liquors from the car on the team track, the carrier's duty of transportation would have been ended. Otherwise, it would still have been the duty of the carrier to complete the transportation by taking the liquors to its freight house, there to be removed from the car. Under the facts shown, the

transportation was incomplete, and the liquors were not subject to seizure under the police power of the State, in contravention of the interstate commerce provision of the Federal Constitution.

State v. *Intoxicating Liquors*, 95 Maine, 140, distinguished.

On report. Judgment for claimant.

Libel for the condemnation of intoxicating liquors seized and alleged to be intended for unlawful sale in this state, said liquors consisting of six barrels each containing thirty-two gallons of whiskey, three barrels each containing thirty-two gallons of rum, two barrels each containing thirty-two gallons of gin, one keg containing twenty gallons of whiskey, and ninety-six bottles each containing one quart of whiskey. These liquors had been shipped from Boston, Mass. to Lewiston, Maine, by continuous way bill over the Boston & Maine Railroad and the Grand Trunk Railway of Canada. Soon after the arrival of these liquors in Lewiston and before they had been removed from the car containing them to the freight house of the claimant company, they were seized by a deputy sheriff, without a warrant, and held until a warrant was procured from the Lewiston Municipal Court, as provided by Revised Statutes, chapter 29, section 48. In accordance with the provisions of section 50 of said chapter 29, the officer seizing these liquors then immediately filed a libel against these liquors and the vessels containing the same with the Judge of said Municipal Court who issued monition and notice of the same. On the return day of the libel, and in accordance with the provisions of section 51 of said chapter 29, the Grand Trunk Railway Company of Canada appeared and filed in writing a claim to these liquors as follows:

"And now comes the Grand Trunk Railway Company of Canada, a corporation created and existing under the laws of the Dominion of Canada, and a citizen of said Dominion of Canada, said corporation being a common carrier, and specifically claims the right, title and possession in the items of property hereinafter named, as having a right to the possession thereof, at the time when the same were seized. And the foundation of said claim is that they were in possession of said Grand Trunk Railway Company of Canada, and were in transit from Boston, in the State of Massachusetts, to Lew-

iston in the State of Maine, and were taken from the lawful possession of said Railway Company, on the fifteenth day of December A. D., 1905, from a car standing on the side-track in the yard of said Grand Trunk Railway Company, situated on the North side of Beech Street, in said Lewiston, by L. J. Luce, one of the deputy sheriffs of Androscoggin County; and the claimant declares that said items of property were not so kept or deposited for unlawful sale, as is alleged, in the libel of said L. J. Luce, and in the monition issued thereon." (The description of liquors and vessels here follows but is omitted in this report.)

The matter was then heard by the Judge of said Municipal Court who found that the liquors seized were intended for unlawful sale and that the claimant was entitled to no part of the same, and in accordance with the provisions of said section 51 of said chapter 29, declared the liquors and vessels containing the same forfeited. The claimant then appealed to the Supreme Judicial Court as provided by said section 51.

The appeal was heard at the January term, 1906, of the Supreme Judicial Court, Androscoggin County. At the conclusion of the evidence and by agreement the case was reported to the Law Court "to render such judgment as the rights of the parties require."

All the material facts appear in the opinion.

Ralph W. Crockett, County Attorney, for the State.

L. L. Hight, for claimant.

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

SAVAGE, J. This case of a libel for the condemnation of intoxicating liquors seized, and alleged to be intended for unlawful sale in this State, comes before the Law Court on report. The liquors in question were shipped by Reuben Ring & Co., of Boston, Massachusetts, from Boston to Lewiston, Maine, by continuous way bill over the Boston & Maine Railroad and the Grand Trunk Railway of Canada. The consignee named in the way bill and upon the packages was "John Cram" a name which the State claims is fictitious. In the complaint it is alleged that the liquors "were

unlawfully kept and deposited by some person to your complainant unknown, in a car on a side track in the yard of the Grand Trunk Railway Company, situated on the north side of Beech Street in said Lewiston." The claimant is a common carrier, and claims a return of the liquors on the ground that when seized they were in its possession as a common carrier and in transit, under the continuous way bill, and were still protected from seizure by the interstate commerce clause of the federal constitution.

From the evidence we find the following additional facts. The car in which the liquors were being transported by the claimant company arrived in its Lewiston yard at about ten minutes before seven in the morning of December 15, 1905. Subsequently it was shifted from track to track in the yard, and was finally left upon the "team track," so called, about one hour after its arrival. In about ten minutes thereafter, the liquors were seized, and held until a warrant was procured under the statute, R. S., chap. 29, sect. 48, and afterwards were properly libelled. The team track was about twenty rods from the claimant's freight station, and was commonly used for the purpose of unloading freight directly from the cars onto teams. In the ordinary course of business, these liquors, if called for by the consignee or owner within two or three days, would have been unloaded from the car onto a team. But if not so taken within that time, they would have been taken in the car to the freight house and there unloaded by the claimant. Between the time of the arrival of the car at the team track and the seizure of the liquors by the officers, the car, which was sealed, had been opened by the claimant's servants, and other merchandise which came in the same car was being taken out of it, but the liquors had not been removed or disturbed by anyone. There is little doubt that the name of the consignee as given was fictitious.

Under these circumstances, the State claims that carriage had ceased, that interstate transportation had ended, and with it the duties and responsibilities of the claimant as a carrier, and hence that the liquors were then subject to the police power of the State, exercised under the provisions of the prohibitory liquor law. It is claimed that the car had become a warehouse, and that the situation was in no essential respect different from what it would have been if the

liquors had been actually unloaded into the claimant's freight house. The State relies upon *State* v. *Intoxicating Liquors*, 95 Maine, 140, and *State* v. *Intoxicating Liquors*, 96 Maine, 415.

In the first case cited, the liquors which were consigned to the shipper's own order, arrived at the place of destination and were transferred by the carrier from the car to its freight house about nine o'clock in the forenoon of a certain day, and at about four o'clock in the afternoon of the following day they were seized by the officer, while in the freight house. There had been no delivery of the liquors, and no notice had been given to anyone of their arrival. The question decided was whether the liquors at the time of their seizure had arrived within the State, so as to be subject to its police powers, within the meaning of the Wilson Act, passed by Congress August 8, 1890, and within the construction placed upon that act by the Supreme Court of the United States in *Rhodes* v. *Iowa*, 170 U. S. 412. And the court decided that the transportation had been completed, that the liquors had arrived at their place of destination, and that storage had commenced. The liquors were condemned.

In its discussion, the court said,—"And the question is not, whether or not the liability of the railroad company for a loss continued as a carrier up to the time of the seizure, or had become that of a warehouse man. It is simply whether these liquors, when the actual transportation had been entirely completed, and when they had not only arrived at the place of their destination, but had been moved by the employees of the railroad company from the car to the company's freight house, there to await the order of the shipper, had arrived in the State, within the meaning of the Wilson Act, so as to be subject to our laws." And as already stated, the court answered the question in the affirmative, notwithstanding certain expressions in the opinion in *Rhodes* v. *Iowa*, which were believed to be unnecessary to the decision in that case, and therefore properly to be regarded as dicta. The court however indicated its duty and willingness to follow the determination of the federal Supreme Court, whenever the mooted point should actually be decided by it.

The claimant here contends that that time has now arrived, and claims that the point has been decided, contrary to our former

decision, by the federal court in *American Express Company* v. *Iowa*, 196 U. S. 133. In that case, the duties, as to delivery, of express companies, as carriers, was considered. The difference in the usages of railroad companies and of express companies as to the ultimate disposition by them of freight is in some respect very marked. These usages are so common and universal that they enter into and form a part of the carrier's contract, and the court may take judicial knowledge of them. It is open to argument, at least, whether, in view of the difference in the contracts of these two different kinds of carriers, the case of *American Express Company* v. *Iowa* can be considered as deciding the question now before us.

But we do not find it necessary to express our opinion upon this question, for we think the case now in hand must be distinguished from *State* v. *Intoxicating Liquors*, 95 Maine, 140. In this case we think the transportation contemplated and implied by the carrier's contract of carriage had not ended. In the absence of evidence showing a special arrangement otherwise, a railroad carrier's contract of carriage contemplates that the freight shall be transported to the carrier's freight house, and there removed from the car. So much is implied. Such is the effect of general usage. It is the duty of the carrier so to transport the goods. It owes this duty both to the shipper and to the consignee, and for breach of this duty it may be responsible to either. The freight house is the place contemplated where the consignee is to find the goods and where the shipper is to look for them in case the consignee does not take them. No doubt, in numberless instances, freight is unloaded directly from cars onto teams, without being put into a freight house. But this is done for convenience, by special arrangement, or after notice to shipper or consignee, assented to. If the goods are not taken by the consignee from the car, or if he does not assent to so doing, they must be taken to the freight house, unless it is impracticable by reason of bulk or otherwise.

In this case, there is no evidence that the carrier's duty was modified or waived by contract or otherwise. When it took the liquors it was bound to transport them to their destination at its freight house. It was not enough to place them upon a side track, where

the consignee could come and take them if he chose to do so. Not even if the side track was ordinarily used by it for the purpose of enabling consignees, who chose to do so, to remove their goods directly from the cars, nor even if such was the purpose in this particular case. It was not enough that the owner might call for them there. It was only conjectural whether he would or not. The consignee or owner might take the liquors there, or he might not. The case does not show that he was under obligations to do so, or that he had consented to do so. If he had done so, the carrier's duty of transportation would have ended. But if he had not done so, it would still have been the duty of the carrier to complete the transportation, by taking the liquors to its freight house, to be removed from the car. So long as the transportation was incomplete, the liquors were not subject, by virtue of the Wilson Act, to seizure under the police power of the state.

Judgment for the claimant. Order for a return of the liquors to issue.

MAVILLA BERRY *vs.* BOSTON & MAINE RAILROAD COMPANY.

York. Opinion December 12, 1906.

Accident without negligence. No recovery in such case.

The plaintiff was travelling along a highway when she discovered extending nearly across the road a locomotive upon the defendant's railroad. Finding that the locomotive obstructed so much of the highway that it was not safe to pass, she stopped some four hundred feet from the crossing and remained there ten or fifteen minutes. She then moved up to within three hundred and fifteen feet of the crossing and there waited a period of fifteen or twenty minutes more, until the sound of the whistle frightened her horse, and caused the injury of which she complains. The horse was frightened by four blasts of the whistle sounded for the pur pose of calling in the brakeman who had been sent out to flag the trains.

Held: (1) that under the circumstances of this case, it was not negligence on the part of the defendant to blow its whistle according to the rules and regulations governing the operation of its trains; (2) that the injuries received were due to one of that class of accidents that happen without the fault of any one.

On motion by defendant. Sustained. New trial granted.

Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant.

The plaintiff, accompanied by her mother, was driving a horse attached to a sleigh along a highway in the town of Buxton which crosses the defendant's tracks at grade near the station known as "Saco River." As the plaintiff approached the crossing she discovered extending nearly across the highway a locomotive and several freight cars upon the defendant's railroad, which made it unsafe to pass. The plaintiff stopped some four hundred feet from the crossing and remained there ten or fifteen minutes. She then moved up to within three hundred and fifteen feet of the crossing and there waited fifteen or twenty minutes more, until the whistle of the locomotive was sounded four times to call in the flagman who had been sent out to protect the train while doing its

work of shifting cars and handling freight. The horse being frightened by the whistle suddenly whirled around and threw the plaintiff and her mother from the sleigh and caused the injuries to the plaintiff for which this suit was brought.

Tried at the September term, 1905, of the Supreme Judicial Court, York County. Plea, the general issue. Verdict for plaintiff for $3,386.33. The defendant then filed a general motion for a new trial.

The case appears in the opinion.

Cleaves, Waterhouse & Emery, for plaintiff.

George C. Yeaton, for defendant.

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

SPEAR, J. This is an action in which the plaintiff recovered, against the Boston and Maine Railroad, a verdict for the sum of $3386.33 for the alleged negligence on the part of the servants of said defendant in sounding several unusual blasts of a steam whistle from one of the defendant's engines, thereby frightening the plaintiff's horse and causing the accident which produced the injuries complained of. The case comes here on motion by the defendant to set the verdict aside as against the law and the evidence.

The plaintiff's own statement of the case is as follows: "The evidence fairly warranted the jury in concluding that the plaintiff was lawfully upon this public way upon the day in question. That she was a woman of mature years, who had quite a portion of her life been accustomed to the use of horses and for quite a period of time had used this particular horse. That this animal was under all ordinary circumstances well behaved, having been used about the cars under all sorts of conditions and circumstances, driven through the public streets of Biddeford and Saco where the electric cars and automobiles were constantly being met with, and the experience of herself and others with this animal warranted her and them in concluding that this animal was unusually safe. The harness and sleigh were also in the best of condition. She therefore had no reason to

expect that this horse would be frightened by any ordinary noises such as might be expected in a public highway of our county and of this particular vicinity. Travelling with her mother along a highway in Buxton, she sees extending nearly across the track a locomotive upon the defendant's railroad. Finding that this locomotive obstructed so much of the highway that it was not safe to pass, this plaintiff stopped some four hundred feet away from the crossing and remained there ten or fifteen minutes, at the end of which time she moved up to within three hundred and fifteen feet of the crossing, and there waited a period of fifteen or twenty minutes, until the sound of the whistle frightened her horse and the accident and injury to the plaintiff resulted. Now then was this plaintiff negligent?"

Under the plaintiff's own statement of facts and the evidence in the case, it may be equally pertinent to ask, was this defendant negligent? We have read the testimony carefully and our conclusion is that neither party could properly be charged with negligence. On the evidence it appears that the plaintiff had perfect confidence in the kindness and training of her horse to withstand any of the motions or noises connected with the operation of a train three hundred and fifteen feet or one hundred and five yards away. Such reliance did she place in his docility that she had moved one hundred feet nearer the train than she had been.

If she thus manifested such confidence in the disposition of her horse as to move up nearer the train and there wait for its passage over the crossing, we see no reason why, assuming that the engineer saw the team, he should not have been privileged to place equal confidence in the reliability of the horse with respect to fear of the cars. We think he should, and had a right to infer, even if he saw the plaintiff all the time, that she had halted her horse within what she regarded as a perfectly safe distance from the train. One hundred and five yards is a long distance, and we are unprepared to say that a railroad shall be held to anticipate that the blowing of a whistle, in accordance with the rules and regulations of operating its road, is calculated to frighten an apparently kind and well behaved horse at such a distance.

Our conclusion is that the injuries received were due to one of

that class of accidents that happen without the fault of any one. The plaintiff undoubtedly thought her horse was kind and all right to stand where he was without danger of fright from any of the ordinary noises in the operation of trains. The engineer if he saw the horse had a right to presume the same, and, in view of this right, did what he was authorized to do by the rules and regulations of the road, blew the regular steam whistle attached to his engine four times to call in the man who had been sent out to flag the trains. Taking into consideration the distance of the plaintiff from the train, we are unable to discover any negligence in this act.

Some evidence has been introduced tending to show that this particular whistle was sharper and shriller than some other whistles used upon the engines operated upon this road; but even if this is so, it does not charge the act of the defendant with negligence. It cannot be expected that the various whistles used upon different engines would produce a tone of the same pitch, quality and loudness. Some would necessarily be sharper, and some louder, than others; but unless there is such a distinction in the volume of sound as to clearly differentiate this particular whistle from the others, thereby making it a cause of fright which could not have been reasonably anticipated by the plaintiff, the defendant cannot be charged with negligence for using it. That some whistles are louder than others is a matter of common knowledge of which the plaintiff was as much bound to take notice as the defendant, itself. The evidence in this case does not show that the whistle which frightened the horse was of the unusual character above described. Some witnesses say that it was a shrill whistle but they had heard others as shrill. Others that it was sharp. But no one testifies that the whistle was sharper than they had ever heard before. The usual whistle does not attract attention, but four distinct blasts would and, by way of contrast, naturally convey the impression of sharpness.

There must be some limit with respect to the relative location of a train and team, where the train can blow its whistle without danger of incurring legal liability for frightening the team. While ordinarily this distance is a question of fact, taken in connection with all the other circumstances, we are nevertheless convinced that three

hundred and fifteen feet, considered in connection with the circumstances in this case, is beyond the limit. We are unable to find any decided case that holds a railroad responsible for frightening a horse by the blowing of a whistle at such a distance or approximating it. We think the verdict was clearly wrong.

Verdict set aside.
New trial granted.

SAMUEL C. BOEHM et al. *vs.* CALVIN W. ALLEN.

Cumberland. Opinion December 12, 1906.

Intoxicating Liquors. Constitutional Law. Interstate Commerce. R. S., chapter 29, section 64.

The plaintiffs who were wholesale liquor dealers in the City and State of New York and likewise were citizens of that state, brought an action of assumpsit upon an account annexed to recover the purchase price for intoxicating liquors brought by the defendant, a citizen of the State of Maine, with an intent to sell the same in the State of Maine in violation of law. The defendant interposed the statute, R. S., chapter 29, section 64, in defense to the action.

While the defendant bought the liquors for the purpose and with the intent of reselling the same in the State of Maine in violation of the statutes of Maine, yet there is no evidence showing that the plaintiffs participated in this illegal design, or did any act in its furtherance or even had knowledge of the intent upon the part of the defendant to sell the liquors in violation of law. Therefore the sole question presented with reference to the plaintiff's right to maintain the action, in view of R. S., chapter 29, section 64, is whether or not that statute is in violation of the commerce clause of the federal Constitution.

Held: that this is precisely the same question decided by this court in *Corbin* v. *Houlehan*, 100 Maine, 246, and for the reasons stated in the opinion in that case it is again decided that R. S., chapter 29, section 64, is valid and is not in conflict with the federal Constitution.

Corbin v. *Houlehan*, 100 Maine, 246, affirmed.

On exceptions by plaintiffs. Overruled.

Assumpsit on account annexed to recover the purchase price for intoxicating liquors sold by the plaintiffs, to the defendant, in the State of New York, with intent, upon the part of the defendant, to sell such liquors in Maine in violation of law. The plaintiffs were citizens of the City and State of New York at the time of the sale while the defendant was a citizen of Maine.

The action was commenced in the Superior Court, Cumberland County. Writ dated February 4, 1904. Plea, the general issue with the following brief statement: "That no recovery can be had by plaintiffs in the courts of the State of Maine because, he says, the items of the said plaintiffs' account against him were solicited or sold within the State of Maine, contrary to Revised Statutes of Maine, chapter, 27, section 30 as amended, and section 56 of said chapter, and other sections and chapters of laws of Maine applying to sale of intoxicating liquors.

"Also that said contract was for goods intended for illegal sale within State of Maine and no recovery can be had under said chapter 27, section 56."

The matter was heard before the Justice of the Superior Court on an agreed statement of facts, without the intervention of a jury, subject to exceptions in matters of law. The Justice found for the defendant. During the hearing certain rulings were requested by the plaintiffs which were refused, and thereupon the plaintiffs took exceptions.

The pith of the case appears in the opinion.

Barrett Potter, for plaintiffs.

Clarence E. Sawyer, for defendant.

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

WISWELL, C. J. The plaintiffs are wholesale liquor dealers in, and citizens of, the City and State of New York. The defendant is a citizen of this State. The action is one of assumpsit, upon an account annexed to the writ, to recover the purchase price for liquors

bought by the defendant of the plaintiffs, in the State of New York, with intent, upon the part of the defendant, to sell them in this State in violation of law. The action was commenced in the Superior Court for Cumberland County, where the defense interposed the statute, as follows: "No action shall be maintained upon any claim or demand, promissory note or other security contracted or given for intoxicating liquors sold in violation of this chapter, or for any such liquors purchased out of the State with intention to sell the same or any part thereof in violation thereof; but this section shall not extend to negotiable paper in the hands of a holder for a valuable consideration and without notice of the illegality of the contract." R. S., chap. 29, sec. 64.

The plaintiffs' answer is that this statute is invalid because in conflict with the commerce clause of the Federal Constitution; that it is an attempt upon the part of the State Legislature to regulate commerce between the States, and is a direct interference with such commerce. The court below ruled that the statute was valid and that the action could not be maintained. The case comes here upon various exceptions by the plaintiffs, none of which need be considered except that in relation to the validity of this statute.

The question presented is precisely the one recently decided by this court in *Corbin* v. *Houlehan*, 100 Maine, 246. The only distinction between the cases is this: The opinion in *Corbin* v. *Houlehan* contains this statement of facts: "These liquors were bought by the defendant (the word "plaintiffs" in the printed report should be "defendant") for the purpose and with the intention of selling them in this State in violation of the laws of the State, and they were subsequently so sold by him, and the plaintiffs when they accepted the order, and thereby completed the contract, not only knew that they were intended for illegal sale, as practically admitted by one of the plaintiffs in his testimony, but also materially aided the defendant in his attempt, apparently successful, to prevent their seizure, by marking the goods, in accordance with the direction of the purchaser contained in the order, in the name of a person other than the purchaser, which name was adopted by him for this purpose, and it was known by the plaintiffs' agent that the name in which

the liquors were to be shipped was fictitious and adopted by the defendant for the purpose of avoiding their seizure. Later in that opinion it is said: "So far, we have considered only the fundamental proposition that, independently of any statute upon the subject forbidding resort to our courts, and upon common law principles, the courts of a state will not enforce a contract made in another state, and valid where made, provided the purpose of both parties to the contract was to violate the laws of the state of the forum, and if the vendor did some act in furtherance of such purpose. In accordance with this principle it might well be held in this case that the plaintiffs would not be entitled to a remedy in our courts, since they not only knew of the illegal design of the purchaser but furthered that design by having the liquors marked in the name of a fictitious consignee to aid the purchaser in the evasion of our laws."

In this case the defendant bought the liquors in question for the purpose and with the intent of reselling them in this State in violation of the statutes of the State. But there is no evidence in the case showing that the vendors, the plaintiffs, participated in this illegal design, or did any act in its furtherance or even had knowledge of the intent upon the part of the purchaser to sell the liquors in violation of law. So that the sole question in this case, with reference to the plaintiffs' right to maintain this action, in view of our statute above quoted, is, whether or not that statute is in violation of the commerce clause of the Federal Constitution.

That was precisely the question decided by this court in *Corbin* v. *Houlehan*. Although the court in its opinion said that the case might be decided upon another principle, that is, that the plaintiffs not only knew of the illegal design of the purchaser, but also furthered him in that design, the court in fact decided the case upon the ground that the statute relied upon was not in conflict with the Federal Constitution, that for that reason the statute was valid, and the action could not be maintained. In that case the court said: "But the question presented here by the plaintiffs' exceptions is as to the constitutionality of the statute in question which does not make a participation by the vendor in the purchaser's illegal pur-

pose, or even his knowledge of the purchaser's illegal purpose, necessary to prevent his resorting to our courts."

After a careful consideration of the exhaustive and able discussion of the question by the counsel for the plaintiffs, we adhere to the conclusion reached in the case referred to, and again decide, for the reasons stated in the opinion of the court in that case, that the statute above quoted, and relied upon by the defense, is valid and is not in conflict with the Federal Constitution. For a full statement of the reasons upon which this conclusion is based, we adopt as a part of this opinion the opinion of the court in the case of *Corbin* v. *Houlehan*, 100 Maine, 246.

We appreciate that the final and authoritative determination of this question is for the Supreme Court of the United States, and that, very likely, the purpose of the counsel in again presenting the question to this court is that it may be carried to that court. A different conclusion may be reached by that tribunal when the question is presented to it, but we are not aware of any utterances of that court, up to the present time, which have the effect of changing the conclusion reached by us in the previous case.

Exceptions overruled.

EDWARD STETSON et als. *vs.* EDWARD GRANT et als.

Franklin. Opinion December 12, 1906.

Real Actions. Seizin. Burden of Proof. Evidence. Deeds. Presumptions. Lands reserved for public uses. State Land Agent. Taxing soil of public lots. Statute 1830, chapter 480, section 2. Statute 1835, chapter 192, section 5. Statute 1895, chapter 162, section 1. R. S., chapter 9, section 65; chapter 106, section 8.

The legal presumption is that by a deed of conveyance of land, duly executed and recorded, the title passed, that the grantor had sufficient title to enable him to convey, and that the seizin and the title correspond with each other.

The plaintiff in a real action is bound to prove his allegations of seizin within twenty years. To disprove this allegation the defendant under the general issue may show title in a third party under whom he does not claim. Such evidence is received not for the purpose of showing a better title in the tenant, but to show no title in the demandant within the twenty years. If seizin within twenty years is shown by the plaintiff, the defendant under the general issue, cannot show a subsequent conveyance to a third party under whom he does not claim.

Public Laws of 1830, chapter 480, section 2, empowered the land agent to select and designate for public uses one thousand acres of land to average in quality and situation in each township, which is or may be surveyed into small lots for sale or settlement.

Held: that a township, which had been surveyed for sale into lots mostly of six hundred and seventy acres each, fell within this description.

The land agent's return stated that he had selected land of an average value with the rest of the township.

Held: that this showed a substantial compliance with the requirements of the statute.

Held: also that the land agent was made the judge of the quality and situation of the land, and that his decision made in good faith cannot be reviewed or reversed.

There never has been in this State any authority in law for taxing the soil of the public lots or reserved lands, while the fee to the same is held in trust by the State.

In order to recover in a writ of entry the demandant must prove not only a right of entry at the time of the commencement of his action, but also such an estate in the premises as he has alleged.

On report. Judgment for defendants.

Real action. Writ dated September 6, 1905. The declaration in the plaintiffs' writ is as follows:

"In a plea of land wherein the said plaintiffs demand against the said defendants the possession of a certain lot or parcel of land, situate in township numbered three, range four, in Franklin County, and bounded and described as follows, to wit: Commencing on the south line of said township at a point two miles from the south-west corner, thence northerly parallel with the west line of said township to Kennebago Lake, so called, thence in a southeasterly direction following the shore of said Kennebago Lake to the south line of said township thence westerly on the south line of said township to the point begun at. Whereupon the said plaintiffs say that they were lawfully seized of the demanded premises with the appurtenances in their demesne as of fee simple, within twenty years last past and ought now to be in the quiet possession thereof, but that the said defendants have since unjustly entered and hold the plaintiffs out."

Plea, the general issue with brief statement as follows: "That the defendants claim the right to the possession of the land described in the writ at the date of the writ, and also claim to have been in rightful possession thereof for the purpose of occupying the same with sporting camps, and have occupied the same with sporting camps, by virtue of and under the authority vested in them by a certain permit or lease thereof granted by Edgar E. Ring, Land Agent of the State of Maine, for and in behalf of the State of Maine, to Ed. Grant & Sons, dated Oct. 28, 1904, for the term of one year, to wit, from Nov. 1, 1904, to Nov. 1, 1905, and defendants claim still to be rightfully in possession under a like permit for the succeeding year."

Tried at the February term, 1906, of the Supreme Judicial Court, Franklin County. At the conclusion of the testimony, by agreement of the parties the case was reported to the Law Court for decision upon so much of the evidence "as is legally admissible, or as to which objection has been waived."

The case fully appears in the opinion.

Frank W. Butler and Joseph C. Holman, for plaintiffs.

E. E. Richards, H. F. Beedy and Fremont E. Timberlake, for defendants.

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

POWERS, J. This is a real action reported to the Law Court for decision; the writ is dated September 6, 1905, and the demanded premises are a part of lot thirty-three in township 3, R. 4, W. B. K. P. in Franklin County, according to the survey of Uriah Holt made in 1835. In 1860 the south half of the township was again surveyed into lots by Jonathan Russ and the demanded premises are the same as lot one hundred and forty-nine of this survey.

The plea is the general issue with a brief statement that the defendants claim the right to possession of the demanded premises and to have been in rightful possession thereof for the purpose of occupying the same with sporting camps, by virtue of and under the authority vested in them by certain permits or leases thereof granted by the land agent of the State of Maine for and in behalf of the State. Plaintiffs derive their title from duly recorded deeds from the State Land Agent, dated September 1, 1866, of the south half of the township, excepting lots 146, 147 and the south half of lot 135 according to the survey of Russ, reserving five hundred acres for public uses, and by intermediate conveyances. One of the plaintiffs appears to be a grantee in one of these State deeds, and the others are heirs or devisees of such grantees, or they are grantees in intermediate conveyances all of which were duly recorded. This makes a prima facie case for the plaintiffs. The legal presumption is that by a deed of conveyances of the land, duly executed and recorded, the title passed, that the grantor had sufficient seizin to enable him to convey, and that the seizin and the title correspond with each other. *Blethen* v. *Dwinel*, 34 Maine, 133; *Webster* v. *Calden*, 55 Maine, 165.

The demandants, however, declare on their seizin of the demanded premises within twenty years. They are bound to prove the seizin upon which they count, and it is competent for the defendants under the general issue to disprove this allegation of seizin by showing title in a third party even although the defendants do not claim under him. If seizin within twenty years is shown by the plaintiff in a writ of entry, the tenant cannot show a subsequent conveyance by

the plaintiff to a third party under whom the tenant does not claim, for no such issue is raised in the case. He may, however, always show that the plaintiff obtained nothing by his deed. Under the general issue the question is who has the better title. The demandant must recover on the strength of his title, not on the weakness of his adversary's. Possession is better than no title. Evidence to rebut the demandant's seizin within twenty years is received not for the purpose of proving a better title in the tenant, but to show no title in the demandant within that time. *Stanley* v. *Perley*, 5 Maine, 369; *Bussey* v. *Grant*, 20 Maine, 281; *Warren* v. *Miller*, 38 Maine, 108; *Chaplin* v. *Barker*, 53 Maine, 275; *Poor* v. *Larrabee*, 58 Maine, 543; *Rowell* v. *Mitchell*, 68 Maine, 21; *Hewes* v. *Coombs*, 84 Maine, 434.

For the purpose of disproving the alleged seizin of the plaintiff within twenty years, the defendants claim that the evidence shows that the demanded premises are a part of the reserved lands in the township which were duly located in 1836, thirty years before the deeds from the State Land Agent under which the plaintiffs derive title. Certainly, if this contention is borne out by the evidence, the land agent had no authority to sell and convey the public lots, and no title in the demanded premises passed by his deeds.

In 1836 the land agent made the following selection and designation of the public lots in the township:

"Be it known by these presents,

That I, John Hodgdon, agent of the State of Maine, to superintend the sale and settlement of the public lands by the authority in me vested by the laws of the State, do hereby select and reserve for uses by the law designated in township number three of the fourth range of townships west of Bingham's Kennebec Purchase in the County of Oxford, lots numbered twenty-seven and thirty-three according to the survey and return thereof by Uriah Holt in the year 1835, containing one thousand acres, being of average value with the rest of the township.

Given under my hand this second day of January in the year of our Lord one thousand eight hundred and thirty-six.

John Hodgdon, Land Agent."

This designation was made under Public Laws of 1830, chapter 480, section 2, in force at that time, which empowered and made it the duty of the land agent "to select and designate one thousand acres of land to average in quality and situation in each township which is or may be surveyed in small lots for sale or settlement to be reserved for such public uses." This selection was duly recorded in the Oxford registry of deeds on February 4, 1836, as provided by the last named act.

The first objection urged is that at that time the township had not been surveyed into small lots for sale or settlement. In 1835 Uriah Holt was directed by the surveyor general of the State to survey and lot the townships into sections of one mile square so that no section should contain more than seven hundred acres, and to divide such sections as were suitable for farming into lots not exceeding one hundred and seventy acres. His return and plan show that he lotted it mostly into sections of six hundred and seventy acres although some of the blocks on account of water contained less than that amount of land. Block thirty-three contained six hundred and seventy acres and block twenty-seven exclusive of water three hundred and thirty acres, so that the two lots selected for public uses together contained exactly one thousand acres and were both in the south half of the town. The land agent was bound to select and designate the reserved lands in all townships that had or might be surveyed into small lots for sale or settlement. Small lots for settlement might be one thing and small lots for sale another. This distinction was recognized by the legislature in 1831 by enacting that no townships should be sold until the land suitable for farming should be surveyed into lots not exceeding one hundred and seventy acres, and the remaining land into lots not exceeding seven hundred acres. Laws of 1835, chapter 192, section 5. The State was selling land in large quantities by townships and parts of townships, and we have no doubt that the township had been surveyed into small lots for sale within the meaning of the act which directed and empowered the land agent to select and designate the public lots.

It is insisted, however, that the location is invalid, because the land agent was directed to select "land to average in quality and situation

in each township" and the record shows that the land selected was "of an average value with the rest of said township." The force of this objection depends upon whether there is any substantial difference in the significance of the statutory language and that used by the land agent. We are unable to discover any. In speaking of wild land quality includes not only the soil but the kind and amount of the growth upon it, and situation includes proximity to floatable streams and accessibility for operation or settlement upon it. All these elements and none other determine its value. Wild land which averages in quality and situation with other land must average with it in value, and land of average value with other land must be of average quality and situation with it. The terms as used are synonymous. The land agent was not obliged to use the language of the statute in describing his acts; he was obliged to do what the statute authorized him to do, and this the return shows that he did.

Finally it is said that the plans filed in the case show that the land selected does not average in quality and situation with the rest of the township. This may be true, but we are unable to discover it as applied to the conditions existing seventy years ago when the selection was made. Even if true, it does not authorize this court to review or reverse the judgment of the land agent. The statute made him the judge of the quality and situation of the land, and by his judgment, honestly exercised, both the State and its grantees must abide.

The township is wild land, and notwithstanding the demanded premises are a part of the public lots the demandants contend that they have established a right of entry and seizin therein by the payment of state and county taxes thereon under R. S., chapter 9, section 65, formerly chapter 162, section one, of the Public Laws of 1895. It is there provided that when a person claims under a recorded deed describing wild land taxed by the State, and the records of the State Treasurer show that the grantee, his heirs or assigns have paid the State and county taxes thereon continuously for twenty years subsequent to recording such deed, such payment shall give said grantee or person claiming as aforesaid, his heirs or assigns, a

right of entry and seizin in the whole, or such part in common and undivided of the whole tract as the deed states, or as the number of acres in the deed is to the number of acres assessed. Admitting the soundness of the plaintiffs' legal proposition, they fail by their evidence to establish the alleged fact upon which it is based. The only evidence of the payment of state and county taxes produced is the certificate of the State Treasurer that he has examined the records of his department "so far as relates to the payment of state and county taxes in township number 3, range 4, W. B. K. P. Franklin County" from 1881 to 1905 both inclusive, and finds that said taxes have been paid in full continuously by the plaintiffs and their predecessors in title. There is nothing here to show that state and county taxes were either assessed or paid on the public lots in said township. There never was any authority in law for assessing any such taxes, and the presumption is that none were assessed. Since April 26, 1897, the timber and grass upon such lots have been taxed; but the soil, the fee to which the State itself holds in trust for the beneficiaries, has never been subject to taxation. There is nothing in the certificate of the State Treasurer to indicate that any such extraordinary and unauthorized taxes were imposed upon the public lots in this township, It simply shows that whatever state and county taxes were imposed in the township have been paid by the demandants and their grantors.

The evidence shows that the demandants have a right to cut and carry away the timber and grass upon the public lots. Undoubtedly they have a right of entry for this purpose. This however is not sufficient to enable them to maintain this writ of entry. They have alleged in their writ that within twenty years last past they were seized in fee simple of the premises. This they have failed to prove. Proof of both the right of entry at the time of the commencement of the action and of such an estate in the premises as they have alleged is necessary before they can recover, although the defendants show no title in themselves. R. S., chapter 106, section 8; *Rawson* v. *Taylor*, 57 Maine, 343; *Hamilton* v. *Wentworth*, 58 Maine, 101.

The plaintiffs having failed to show any title to the demanded premises, it is unnecessary to determine what, if any, authority the

land agent may have to lease the public lots for the purpose of erecting and maintaining sporting camps upon them.

Judgment for the defendants.

STATE OF MAINE *vs.* ULYSSES T. WALLACE.

Knox. Opinion December 13, 1906.

Fish and Fisheries. Clams. Penal Statutes. Construction. Statute, 1905, chapter 161, section 1. R. S., chapter 41, section 34.

A statutory offense cannot be created by inference or implication, nor can the effect of a penal statute be extended beyond the plain meaning of the language used.

It is a recognized rule that a penal statute is to be construed strictly in favor of a respondent.

Section 1 of chapter 161 of the Public Laws of 1905, amendatory of section 34 of chapter 41 of the Revised Statutes, reads, in part, as follows: "Towns at their annual meetings may fix the times in which clams may be taken within their limits, and the prices for which its municipal officers shall grant licenses or permits therefor, and the number to be granted; and when not so regulated by vote the municipal officers may fix the times and prices for which permits shall be granted, and the number to be granted. No person shall take clams within the limits of any towns having so regulated the taking of clams, without first obtaining a written license or permit from the municipal officers of such town, unless the clams are for the consumption of himself and family, or for the consumption or use of inhabitants of the town or any person temporarily resident therein. Whoever takes clams contrary to the provisions of this section, shall for each offense, be fined not more than ten dollars, or imprisoned not more than thirty days."

This amendatory act was approved and took effect March 24, 1905. The annual town meeting of the town of Cushing for 1905, was held March 13, eleven days before this amendatory act took effect. At this meeting, the town took no action, in relation to clams, under the provisions of the aforesaid section 34 of chapter 41, R. S., which had not then been amended. April 15, 1905, the municipal officers of Cushing voted to issue not to exceed one hundred and fifty licenses to residents of the town of Cushing

to take clams, and also voted not to issue licenses for that purpose to non-residents. The defendant was a resident of the town of Friendship and was arrested for taking clams within the limits of Cushing on October 26, 1905. The clams taken by the defendant were not for the consumption of himself and family, or for the consumption or use of the inhabitants of Cushing or any person temporarily resident therein.

Held: (1) That R. S., chapter 41, section 34, as amended by the statute of 1905, is materially different from R. S., chapter 41, section 34, as it stood before the amendment; (2) that the non-action of the town at its annual meeting, March 13, 1905, in relation to clams, was equivalent to an affirmative action in favor of the free taking of clams in Cushing during the ensuing year; (3) that the omission on the part of the town to act was not made in contemplation of any power then in the municipal officers to act; (4) that the municipal officers of Cushing had no authority to act under the statute of 1905 at the time they assumed to act; (5) that such municipal officers will have no authority to act until after an annual meeting of the town to be held subsequently to March 24, 1905, at which no vote is taken to regulate the taking of clams under the terms of the statute of 1905.

On agreed statement of facts. Complaint dismissed.

Complaint for taking clams within the limits of the town of Cushing, Knox County, contrary to the regulations of the municipal officers of Cushing assuming to act under Public Laws, 1905, chapter 61. The matter came on for hearing at the January term, 1906, of the Supreme Judicial Court, Knox County, at which time an agreed statement of facts was filed and the case was sent to the Law Court for that court to render such judgment as the law and evidence required. (The case does not show how the matter reached the Supreme Judicial Court, but probably on appeal from the court or magistrate issuing the warrant.)

The case appears in the opinion.

Philip Howard, County Attorney, for the State.

Rodney I. Thompson, for defendant.

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

PEABODY, J. This was a complaint for taking clams within the limits of the town of Cushing contrary to the regulation of the municipal officers assuming to act under Public Laws 1905, chapter

161. The case comes before this court on an agreed statement of facts.

The act of the legislature is as follows :— "Towns at their annual meetings may fix the times in which clams may be taken within their limits, and the prices for which its municipal officers shall grant licenses or permits therefor, and the number to be granted; and when not so regulated by vote the municipal officers may fix the times and prices for which permits shall be granted, and the number to be granted. No person shall take clams within the limits of any towns having so regulated the taking of clams, without first obtaining a written license or permit from the municipal officers of such town, unless the clams are for the consumption of himself and family, or for the consumption or use of inhabitants of the town or any person temporarily resident therein. Whoever takes clams contrary to the provisions of this section, shall for each offense, be fined not more than ten dollars, or imprisoned not more than thirty days."

This act was approved on the twenty-fourth day of March, 1905, and took effect on approval. The annual town meeting was held March 13, 1905. On April 15, 1905 the municipal officers of Cushing voted to issue not to exceed one hundred and fifty licenses to residents of the town of Cushing and also voted not to issue licenses to non-residents of the town. The defendant was a resident of the town of Friendship. The complaint alleged that the defendant took clams within the limits of the town of Cushing on the twenty-sixth day of October, 1905, and it was further alleged and admitted that the clams were not dug for the consumption of defendant and family or for the consumption of inhabitants of Cushing or any person temporarily resident therein.

The two contentions of the defendant are; first, that the action of the municipal officers could be of no force because their right to act depended wholly upon whether the town had taken or omitted to take action, and that the town could not take action under a statute which was not enacted until after the date of the meeting; second, that the statute and the regulation of the municipal officers by discriminating in favor of citizens of the town denied to other citizens of the State the equal protection of the law.

It is unnecessary to consider the questions raised by the second defense as a true construction of the statute indicates that the action of the municipal officers was without authority. It is a recognized rule that a penal statute is to be construed strictly in favor of the rights of a respondent. "A statutory offense cannot be created by inference or implication nor can the effect of a penal statute be extended beyond the plain meaning of the language used. *State* v. *Bunker*, 98 Maine, 387.

Another reason for a strict construction of the present act is that it relates to the delegation of a power which is primarily vested in the legislature, that of controlling the subject of seashore fisheries. Such statutes are as a general rule strictly construed, 26 Am. & Eng. Enc. of Law, (2 Ed.) 665; 20 Am. & Eng. Enc. Law, 1140.

It is clear from the language of the act of 1905, if it stood alone, that the municipal officers had no authority to act until after an annual meeting of the town at which no action had been taken. At the annual meeting of the town which was held eleven days prior to the enactment of this law, action might have been taken under the similar provisions of the statute then existing, R. S., ch. 41, sec. 34, but under that statute if the town did not act no authority was otherwise delegated, and no action could be taken until the following year. In other terms the statute was materially different from the one substituted for and repealing it in 1905. The non-action of the town at this annual meeting was equivalent to an affirmative action in favor of the free taking of clams in the town of Cushing during the ensuing year. The omission to act was not made in contemplation of any power then in the municipal officers to regulate the taking of clams. A strict construction of the language of the new act as well as a reasonable interpretation of the words does not indicate a legislative intent to delegate to the municipal officers authority to reverse the will of the inhabitants of the town, but only an intention to give the municipal officers power to act after the town had exercised its option, with the knowledge that on failure to act the subject would devolve upon the municipal officers. It follows therefore that they had no authority to act under this statute, until after an annual meeting of the town held subsequently to the

twenty-fourth day of March, 1905, at which no vote was taken to regulate the taking of clams under the terms of this statute. The act of the respondent charged in the complaint violated no law.

Complaint dismissed.

A. M. IRELAND et als. *vs.* JORDAN WHITE, Administrator.

Androscoggin. Opinion December 13, 1906.

Legal Incompetency. Burden of Proof. Physicians. Evidence.

The law generally presumes mental soundness, and when legal incompetency is alleged for the purpose of showing that an instrument creating an obligation by its terms is thereby invalid, such legal incompetency must be proved by a preponderance of evidence and the burden of proving the same rests upon the defendant.

Skilful and reputable physicians, although not experts upon the subject, may testify to the mental condition of their patients when they have adequate opportunity of observing and judging of their mental qualities. Such condition testified to is a fact observed, which differs from a conclusion as to legal sufficiency or insufficiency of mental capacity to be deduced in each case from facts proved, under correct rules of law.

In the case at bar, the deceased intestate in her lifetime made and delivered a certain promissory note payable after her death, and on which said note suit was brought against her administrator. The defendant contended, among other things, that his intestate was of unsound mind at the time she executed the note. The presiding Justice, against the objection of the plaintiffs, admitted a part of the testimony of two physicians engaged in the general practice of medicine and who had attended the deceased intestate professionally, in reference to the mental capacity of the deceased intestate. *Held:* that the ruling of the presiding Justice admitting this testimony was correct.

The jury specially found that the deceased intestate was of unsound mind at the time she executed the note. *Held:* that the jury did not err in this finding and that the general verdict for the defendant must be sustained.

On motion and exceptions by plaintiffs. Overruled.

Assumpsit on a certain promissory note against Jordan White as administrator of the estate of Melinda P. Tarbox, late of Lewiston, deceased intestate. This note was for the sum of $500 and was given by Mrs. Tarbox on the 29th day of October, 1902, to one Jason Russell, and was payable after her death. After the death of Mrs. Tarbox the payee, Mr. Russell, sold and transferred this note to the plaintiffs.

Tried at the January term, 1906, of the Supreme Judicial Court, Androscoggin County. The defendant's pleadings set up three defenses, viz: "First, that Mrs. Tarbox did not sign the note: Second, that if she did sign it she was induced to do so by fraud, and Third, that at the time of said signing, if she did sign it, she was of unsound mind."

The jury was instructed to make special findings, and in accordance therewith found that Mrs. Tarbox did sign the note, that there was no fraud but that at the time of signing the note she was of unsound mind. The general verdict, therefore, was for the defendant.

The plaintiffs then filed a general motion for a new trial. The plaintiffs also took exceptions to certain rulings of the presiding Justice during the trial admitting certain testimony of certain physicians who had attended Mrs. Tarbox professionally.

The case is fully stated in the opinion.

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.

Edgar M. Briggs, for plaintiffs.

McGillicuddy & Morey, for defendant.

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

PEABODY, J. The plaintiffs bring this action against the administrator of the estate of Melinda P. Tarbox, late of Lewiston in the County of Androscoggin, deceased intestate, on a promissory note

alleged to have been given by the intestate in her lifetime to Jason Russell.

The note is as follows:

"Lewiston, October 29, 1902.

For value received I promise to pay Jason Russell or order the sum of five hundred dollars payable after my death with interest.

Melinda P. Tarbox.

(Endorsed) Jason Russell."

Melinda P. Tarbox died in March, 1904, aged about eighty years. After her death Jason Russell sold and transferred the note in suit to the plaintiffs, who seasonably gave notice to the defendant who had been duly appointed and had qualified as administrator of the promisor's estate.

Three defenses are made under the pleadings: first, that Mrs. Tarbox did not sign the note: second, that if she did sign it she was induced to do so by fraud: and third, that at the time of signing, if she did sign it, she was of unsound mind. The jury were directed to make special findings on each of these points. They found that she did sign the note, that there was no fraud, and that at the time of said signing she was of unsound mind.

The verdict was for the defendant and the case comes before this court on the plaintiffs' motion for a new trial, and exceptions to the ruling of the presiding Justice allowing, against the plaintiffs' objection, part of the testimony of two physicians engaged in the general practice of medicine, in reference to the mental capacity of the deceased promisor. Dr. Ward J. Renwick who resided in Auburn and had been engaged in practice as a physician and surgeon for nearly ten years, attended Mrs. Tarbox professionally, visiting her on the first day of November, 1902, and saw her four times as his patient. In answer to questions, among others, asked by the defendant's attorney, objected to by the plaintiffs, he gave the following testimony:

Q. "What did you observe as to her mental condition, that is, getting at her mental condition by talking to her and her answers and what she said in response to the questions?

A. I observed that her mental condition was very much impaired.

Q. Can you tell, doctor, whether her answers to your questions were wandering or not, whether or not they would meet your questions?

A. I should say that they wouldn't meet my questions. Very incoherent.

Q. Was her trouble chiefly in her mind or in her body?

A. I couldn't answer that question. I should say both.

Q. Was there anything about her case as you observed it then to indicate that her condition was one that came upon her suddenly, the first day of November, or whether it had been a gradual transfer in her mind to reaching that point?

A. It had been gradual.

Q. Were the conditions you observed on the first day of November, 1902 chronic conditions or acute conditions?

A. Chronic."

Dr. George W. Curtis of Lisbon Falls, a physician and surgeon of twenty-one and a half years' practice, who was called to attend Mrs. Tarbox the first day of December, 1902, and made an examination and diagnosis of her case, testified in answer to questions, among others, asked by the defendant's attorney and objected to by the plaintiffs as follows:

Q. "Should you say the condition of her mind that you have described was a condition that was acute or was it a chronic condition?

A. It seemed to me like a senile trouble coming on gradually."

The bill of exceptions relates solely to the ruling of the presiding Justice admitting this testimony of the two physicians.

The motion for a new trial applies only to the finding of the jury, that the maker of the note was at the time of signing of unsound mind; the other special findings were in favor of the plaintiffs.

There is no complaint that the charge of the presiding Justice did not fully present the rules of law by which the mental competency of the promisor of the note in question was to be determined upon the evidence submitted to the jury. The evidence bearing upon this question presented incidents, acts and conditions contradictory in

tendency, but the jury from the whole history of the mental condition of Mrs. Tarbox, shortly before and shortly after she signed the note, decided that she was incompetent. The testimony of the physicians referred to, whether legally admissible or not, constituted a part of the defendant's evidence which the jury must have found was of greater weight than the opposing evidence offered by the plaintiffs. The law generally presumes mental soundness, and when legal incompetency is alleged for the purpose of showing that an instrument creating an obligation by its terms is thereby invalid, it must be proved by a preponderance of evidence. This being a substantive defense to the note the burden of proving it rests upon the defendant. The paper itself although found by the jury not to be fraudulent does not appear to be an ordinary commercial transaction. It was given for $500, while the actual valuable consideration for which it was given was money loaned to her by the payee to the amount of $100, and was made payable after her death. The explanation as to its amount and terms given by the payee is, that she wanted to do something for him and his family, that she wanted them to have something out of her estate. Several witnesses acquainted with her testify to acts and conversations contemporaneous with the date of the note, which they noticed as unusual, and indicating changes in Mrs. Tarbox's personal habits and mental condition. For example, that she was at one time found sitting down close to the track of the electric railroad, near the cemetery, and remained there until the motorman stopped the car and asked her if she was going to Lewiston, to which she replied she guessed so, and was then helped on to the car; when a tenant went to pay her his rent she did not appear to know who he was; at another time when rent was paid to her she offered a receipt so indefinite that another was made for her to sign, although she had been accustomed to collect her rents and give sufficient receipts; that her manners at table indicated a change; that her replies to questions in regard to her property and business affairs showed forgetfulness and failure to comprehend, making repeated explanations necessary: when acquaintances called who had been accustomed to visit her she failed to appreciate what was said to her; and that at times she seemed to understand, and then

her mind would be right off. The testimony of the doctors stated in the bill of exceptions, and also that not objected to, show that her talk was disconnected and incoherent, and that her condition of mind indicated senile decay. Opposing testimony offered by plaintiffs of witnesses, even more numerous, who had transacted ordinary business with Mrs. Tarbox not long previous to the date of the note, showing that she borrowed money to pay taxes to save interest for which she gave her note and paid it in small amounts; and contracted and paid milk and grocery bills; that about the date of the note a deacon of the Friends' Church of which Mrs. Tarbox was a member called upon her, when she remarked that he had not been to see her lately, and said that she would like to hear about the church, that her conversation was connected and responsive to his questions, that a short time previous she made an exhortation in church and he did not see that she was any different from what she had always been; the pastor of the church who had known her for twenty years and had visited her frequently stated that he did not discover any difference in her except that she was more feeble, more tottering, and she was growing old; the pastor's wife saw Mrs. Tarbox in September, 1902 and testified that she was inquiring about the church and seemed very much interested in it, she always wanted us in the berry time to go down and get berries meaning in her garden, and said that when they were ripe she should want us to go down just the same; that she noticed nothing different in her understanding conversation from what it had always been; Dr. A. F. McAllister who had been a practicing physician between twenty-three and twenty-four years, who had lived in Lewiston about eight years and who lived opposite the residence of Mrs. Tarbox, testifies that she called at his house four or six months after her husband's death in 1901, she spoke about being lonesome and missing the care and attention her husband had given her during his life; he noticed nothing in her appearance mentally out of the usual line; her conversation was connected from anything he noticed, and her answers were entirely responsive to the questions which he asked. This testimony offered by the plaintiffs was consistent with

the theory of mental soundness of Mrs. Tarbox, but there is nothing in its nature so inconsistent with the existence of senile impairment of her mind which the defendant claims was manifested by her acts and conduct observed, on different occasions, by the witnesses called by him, as to show that the verdict of the jury was clearly wrong. It is difficult to determine, in all cases where there is decay of the mental faculties in old age, whether there is disease of the mind which would render the individual affected incompetent to transact ordinary business, or mere feebleness of the mental faculties which would not prevent the mind from acting normally. No experts have been called to explain the distinction in this case, but attending physicians have testified not only in the same manner as the other witnesses have testified to acts and conditions observed by them, but have been allowed to state what the facts which they observed and discovered by their examinations indicated as to the condition of the patient's mind; and we see no reason to disturb the verdict of the jury as being against the weight of evidence. We now consider the exceptions to the admission of the opinions of the physicians called by the defendant, formed from what they observed as to the mental condition of Mrs. Tarbox. The testimony of Dr. Renwick is distinctly admissible on the authority of *Fayette* v. *Chesterville*, 77 Maine, 28, and *Hall* v. *Perry*, 87 Maine, 569, in which it is held that skilful and reputable physicians, although not experts upon the subject, may testify to the mental condition of their patients when they have adequate opportunity of observing and judging of their mental qualities, and that having had opportunity to observe the manifestation of the mental disease they may testify as to its nature. The condition testified to is a fact observed, which differs from a conclusion as to legal sufficiency or insufficiency of mental capacity to be deduced in each case from facts proved, under correct rules of law.

The testimony of Dr. Curtis must be considered admissible by the same rule. Under the strict procedure applicable to bills of exception we are not to infer the existence or non-existence of facts necessary to support an exception. Prejudicial error must be shown. It does not appear by the bill of exceptions in this case

that the facts and observations upon which Dr. Curtis based his opinion, "It seemed to me like a senile trouble coming on gradually," were limited to a single professional visit. *Fayette* v. *Chesterville*, supra; *McKown* v. *Powers*, 86 Maine, 291; *Toole* v. *Bearce*, 91 Maine, 209.

Our conclusion is that the exceptions cannot be sustained.

Motion overruled.
Exceptions overruled.

ROBERT H. WHITE *vs.* FRANK FITTS.

Penobscot. Opinion December 15, 1906.

Work and Labor. Oral Contracts. Statute of Frauds. R. S., chapter 113, section 1, clause V.

When upon the reasonable construction of the terms of an oral contract for the performance of work or labor which does not state the time within which such contract is to be performed, it appears to have been understood by the parties thereto that the contract was not to be performed within the year, such contract comes within the statute of frauds.

An oral contract for the performance of work or labor which does not specify the time within which such contract is to be performed must be interpreted in the light of its subject matter and the circumstances surrounding it, and if the manifest intent and understanding of the parties thereto are that it was not to be performed within the year, such contract falls within the statute of frauds.

The plaintiff and the defendant made an oral contract wherein the plaintiff was to cut and saw into suitable lengths all the stave wood on a certain tract of land belonging to the defendant. The contract itself did not specify the time within which this work was to be performed by the plaintiff. The tract of land on which the plaintiff was to operate contained three hundred and fifty acres but about one hundred acres of the same had been cut over previous to the making of the contract. The lowest estimate of the amount of stave wood on this tract of land was 2400 cords. The capacity of the defendant's mill where this stave wood was to be manufactured was three and one-half cords per day, and the plaintiff

was to cut this stave wood only as fast as the defendant needed it for use in his mill. After operating a few weeks, the defendant refused to allow the plaintiff to operate further thereupon the plaintiff brought suit against the defendant to recover damages for breach of the contract. *Held:* that it was not the intention of the parties that this contract should be performed within a year from the making thereof and that the same falls within the statute of frauds.

Also *held* that the death of the plaintiff within the year would not have taken the contract out of the operation of the statute of frauds, for the reason that in such event the contract would not have been fully performed.

On motion and exceptions by defendant. Exceptions sustained.

Action to recover damages for an alleged breach on the part of the defendant, of an oral contract wherein the plaintiff was to cut and saw into suitable lengths all the stave wood on a certain lot of land belonging to the defendant. The alleged breach was the refusal on the part of the defendant to allow the plaintiff to continue to cut and saw said stave wood after he had been operating a few weeks. Plea, the general issue with a brief statement alleging that the agreement was one which was not to be performed within one year from the making thereof and that there was no memorandum or note of the agreement in writing and signed by the party to be charged therewith or by any person thereunto lawfully authorized, and also that the defendant was justified in discharging the plaintiff by reason of the wasteful manner, etc., in which the plaintiff did the work.

Tried at the January term, 1906, of the Supreme Judicial Court, Penobscot County. At the conclusion of the evidence, the defendant requested the presiding Justice to direct the jury to bring in a verdict for the defendant on the ground that the contract was within the statute of frauds, and that the action could not be maintained. The presiding Justice refused to direct such verdict, but ruled, pro forma, to give progress to the case, that the action was maintainable upon oral evidence. The verdict was for the plaintiff for $500. The defendant then filed a general motion for a new trial. The defendant also excepted to the aforesaid ruling of the presiding Justice.

The case appears in the opinion.

Martin & Cook, for plaintiff.

Charles H. Bartlett, for defendant.

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

WHITEHOUSE, J. This is an action to recover damages for the breach of an oral contract to cut and saw into logs the stave wood standing on a lot of land owned by the defendant. The breach alleged is the refusal on the part of the defendant to allow the plaintiff to complete the work after he had entered upon the execution of the contract and cut a part of the wood.

In the brief statement of defense it is alleged first, that the agreement between the plaintiff and defendant set forth in the plaintiff's declaration was an oral one which was not to be performed within one year from the making thereof, and that there was no memorandum of the agreement in writing, and signed by the party to be charged therewith; and second, that the defendant was justified in discharging the plaintiff from the work and terminating the contract by reason of the wasteful and unworkmanlike manner in which the trees were cut and felled and sawed into logs by the plaintiff.

After the introduction of the testimony the defendant requested the presiding judge to direct a verdict for the defendant on the ground that the undisputed evidence clearly showed that the contract was within the statute of frauds, because not in writing and not to be performed within one year as set forth in the defendant's brief statement, and that the action was therefore not maintainable. The presiding judge declined to order a verdict for the defendant as requested and ruled pro forma that the action was maintainable upon oral evidence.

The jury rendered a verdict for the plaintiff for $500, and the case comes to the Law Court on exceptions to this ruling of the presiding judge and also on a motion to set aside the verdict as against the law and the evidence.

In his declaration the plaintiff avers that "in consideration that the plaintiff promised the defendant to cut the timber, suitable for staves, on a certain tract of land of about 380 acres, and saw the same into logs, &c., as fast as the defendant should need the same for use in his mill, the defendant promised the plaintiff to pay him $1.00

per cord, payable weekly, for cutting all of said timber suitable for staves on said tract, &c., said timber to be cut and sawed as aforesaid as fast as the defendant should need the same for use in his said mill." In the brief statement of defense it is alleged that the plaintiff and defendant agreed that the plaintiff should enter on the land of the defendant consisting of 350 acres and there cut timber suitable for staves, &c., at the rate of $1.00 per cord as fast as the defendant should need the same for use in his mill situate on the land."

Thus it will be perceived that according to the pleadings of the parties there was no controversy in regard to the terms of the contract, and the evidence is in entire accord with these allegations in the pleadings. It was undisputed that the plaintiff was to cut down and saw into the desired lengths all of the standing timber on the 350 acres of defendant's timber land, as fast as the defendant needed it for use in his mill. There was no specifications and no further stipulations in regard to the time within which the work was to be completed and the contract performed.

The provision of the statute for the prevention of frauds and perjuries here involved is found in chapter 113 of the Revised Statutes, section 1, as follows: "No action shall be maintained . . . (V) upon any agreement that is not to be performed within one year from the making thereof . . . unless the promise, contract or agreement on which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith," etc.

It is contended in behalf of the defendant that according to the principles of law governing the construction and application of this clause of the statute,

1. The contract must be interpreted in the light of its subject matter and the circumstances surrounding it, and if the manifest intent and understanding of the parties thereto are that it was not to be performed within the year, it falls within this clause of the statute of frauds.

2. Any contingency terminating a contract within the one year clause of the statute of frauds must leave the contract fully and

completely performed in order to take it out of the operation of this clause of the statute.

In Brown on the Statute of Frauds, sections 273, 279 and 281, (5th Ed.) the author says:

"Postponing the questions, what is the performance of such an agreement, and what the meaning of the limitation as to time, we are first to ascertain the force of the words '*to be* performed.' And on these words much reasoning has been expended. The result seems to be that the statute does not mean to include an agreement which is simply not *likely* to be performed, nor yet one which is simply not *expected* to be performed, within the space of a year from the making; but that it means to include any agreement which, by a fair and reasonable interpretation of the terms used by the parties, and in view of all the circumstances existing at the time, does not admit of performance according to its language and intention, within a year from the time of its making."

"The statute, *finding* them perfectly free to make a certain contract without a writing, provides simply that if that contract does by its terms, expressed, or, from the situation of the parties, reasonably implied, *require* more than a year for its performance, they must put it in writing. In other words, it must affirmatively appear from the contract itself and all the circumstances that enter into the interpretation of it, that it cannot in law be performed within the space of a year from the making." And in sect. 281, 'Where the manifest intent and understanding of the parties, as gathered from the words used and the circumstances existing at the time, are that the contract shall not be executed within the year, the mere fact that it is possible that the thing to be done may be done within the year will not prevent the statute from applying. . . . . Such an accomplishment must be an execution of the contract according to the understanding of the parties.'

In 1st Chitty on Cont. (11th Ed.) page 99, the principle is thus stated: "This enactment applies to all contracts, the complete performance whereof is of necessity to extend beyond the space of a year; the rule being, that where the agreement distinctly shows, upon the face of it, that the parties contemplated its performance to

extend over a longer period longer than one year, the case is within the statute. Accordingly, the provisions of the statute render a verbal contract void, if it appears to have been the understanding of the parties at the time, that it was not to be *completed* within a year, although it might be, and was, in fact, *in part* performed within that period." See also A. & E. Encyc. of Law, Vol. 29, p. 94, and Cyc. Vol. 20, p. 198.

In the English case of *Boydell* v. *Drummond*, 11 East, 142, the plaintiff proposed to publish a series of illustrated scenes from Shakespeare in eighteen numbers, one number at least annually. After receiving two numbers the defendant refused to take any more. Although there was no express agreement that the contract should not be performed within a year, the court held that it was "impossible to say that the parties contemplated that the work was to be performed within a year," but that, on the contrary, "the whole scope of the undertaking shows that it was not to be performed within a year and was therefore within the statute of frauds. That decision has been confirmed by both English and American Courts in numerous cases. *Hill* v. *Hooper*, 1 Gray, 131.

In *Peters* v. *Westborough*, 19 Pick. 364, the court say: "It must have been expressly stipulated by the parties, or it must appear to have been so understood by them, that the agreement was not to be performed within a year. But who can doubt what the express and specific understanding of the parties in the case at bar was? and that it was not to be performed within one year? Or, at any rate, that it appears to have been so understood by them."

In *Doyle* v. *Dixon*, 97 Mass. 208, it was held that an agreement not to go into business in a certain place for five years was not within the statute as the death of the promisor would complete the performance of the contract, but the court, after comparing the case with *Peters* v. *Westborough*, 19 Pick. 364, say, "On the other hand, if the agreement cannot be completely performed within a year, the fact that it may be terminated, or further performance excused or rendered impossible, by the death of the promisee or of another person within a year, is not sufficient to take it out of the statute." See also *Carnig* v. *Carr*, 167 Mass. 544;

DeMontague v. *Bacharach*, 187 Mass. 128; *Warner* v. *Texas & Pac. Ry.*, 164 U. S. 418; *Metropolitan Trust Co.* v. *Topeka Water Co.*, 132 Fed. Rep. 702.

But it is needless here to attempt a separate examination and analysis of each of the great number and variety of decisions upon this subject in view of the fact that the correct principle has been deduced from the authorities and the question satisfactorily determined by the decisions of our own court.

In *Herrin* v. *Butters*, 20 Maine, 119, which has been extensively cited, there was an agreement to clear and seed a piece of land in three years and it was contended that the defendant might have cleared up the land and seeded it down in one year and thereby have performed his contract, but it was held that while this was within the range of possibility, the contract would not be taken out of the operation of the statute of frauds unless such a performance of it within a year was in accordance with the understanding and intentions of the parties. In the opinion by Whitman, C. J., it is said; "we must look to the contract itself, and see what he was bound to do; and what, according to the terms of the contract, it was the understanding that he should do. Was it the understanding and intention of the parties, that the contract might be performed within one year? If not, the case is clearly with the defendant. But the contract is an entirety, and all parts of it must be taken into view together, in order to a perfect understanding of its extent and meaning. We must not only look at what the defendant had undertaken to do, but also to the consideration inducing him to enter into the agreement. The one is as necessary a part of the contract as the other; and if either, in a contract wholly executory, were not to be performed in one year, it would be within the statute of frauds. Here the defendant was not to avail himself of the consideration for his engagement, except by a receipt of the annual profits of the land, as they might accrue, for the term of three years. But whether this be so or not, it is impossible to doubt that the parties to this contract perfectly well understood and contemplated, that it was to extend into the third year for its performance, both on the part of the

plaintiff and defendant. Its terms most clearly indicate as much; and by them it must be interpreted."

In *Hearne* v. *Chadbourne*, 65 Maine, 302, the court say: "It is true that in the absence of any words or acts of the parties, indicating the contrary, an agreement to work for a year means to work for that time commencing forthwith. The referee reports no express stipulation in the contract to overcome this presumption; but he sets out the acts of the parties showing the contemporary interpretation which both put upon it, and this places the case directly within the doctrine laid down in *Herrin* v. *Butters*, 20 Maine, 119; *Peters* v. *Westborough*, 19 Pick. 364; and *Boydell* v. *Drummond*, 11 East, 142, where the old idea that it must be expressly and specifically agreed that the contract is not to be performed within the year, as expressed in *Moore* v. *Fox*, 10 Johns, 244; and *Fenton* v. *Embler*, 3 Burr, 1278, is so far modified as to include cases where such appears to have been the understanding of the parties."

In *Bernier* v. *Cabot Mfg. Co.*, 71 Maine, 506, (1880) it was held that an oral contract wherein a laborer agreed not to leave the services of his employer for two years, nor in summer, nor without two weeks notice; is within the statute. The court say: "It was oral and was within the statute of frauds. It could not in any contingency have been fully performed within one year. The death of the plaintiff within the year, or some casualty, might have excused performance, but could not have fulfilled the contract."

In *Farwell* v. *Tillson*, 76 Maine, 227, the defendant had a government contract to furnish stone for the custom house at St. Louis, and made a verbal contract with plaintiff for the transportation of the stone from Maine to Baltimore. The government contract required defendant to furnish the stone "at such times as may be required" by the government. No time was specified. The court held that the circumstances showed that the parties did not intend or understand that the contract was to be performed within one year, and hence the contract was within the statute of frauds.

The presiding Judge instructed the jury inter alia as follows: . . . . "Was it within the understanding and intention of the two contracting parties, as declared by the contract, that it might

be performed within a year? . . . . The subject matter of a contract might be a thing which could not possibly be done within a year. A consideration of the subject matter would show just as clearly that it was not to be performed within a year, as if there was an express agreement in the terms of the contract, that it was not to be performed within a year. So, also, a consideration of the circumstances and subject matter might show that performance of it, within a year, would require such extraordinary methods, such extraordinary appliances or resources as could not by fair construction be regarded as within the intention of the parties, at the time when the contract was made; and the question is, considering the subject matter, and the situation of the parties as known to each other, and reading the contract in the light which these give, whether by fair construction, it was within the understanding and intention of the parties as expressed in the contract, that it might be performed within a year, or not." These instructions were held to be correct.

In the opinion the court say: "The meaning of the terms of a contract, it need not be said, is to be ascertained by interpreting them in the light of the subject matter to which they relate. They may mean one thing when used in reference to one subject, or by parties in one situation, and another thing when used under other circumstances in regard to another subject, and the true construction in each instance will be that which applies the contract to the res about which the parties were dealing, and reproduces the intent which they themselves have expressed in it. A description of the nature and extent of the work stipulated to be done, in the absence of express provision on the subject, may be an indispensable element in determining whether the work was by the contract to be done in a year, or whether the contract was one not to be performed in that time. It may show performance impossible in that period, or so impracticable as to be plainly beyond the scope and intent of the agreement as expressed in the language used. The duty of the defendant to deliver the granite 'at such times and in such quantities as might from time to time be ordered,' as was said in the ruling, did not require of him immediate performance, upon demand, of the whole contract. Time must be allowed to execute the work, and

the limitations upon the right of demand, which necessarily result from that fact, must apply." . . . .

"Notwithstanding dicta and some decisions, especially among the earlier cases, which tend to sustain the position assumed for the plaintiffs, we regard the rule of law as established in this State by the opinions in *Herrin* v. *Butters*, 20 Maine, 119, and *Hearne* v. *Chadbourne*, 65 Maine, 302, in conformity with the rulings which were made at the trial."

What was in the contemplation of the parties in the case at bar? What was understood by them as a matter of contract respecting the time within which the work of cutting all the stave wood on the 350 acres of timber land, was to be completed? As already seen it was not in controversy that the plaintiff was to cut the whole lot except that one hundred acres which had already been cut over and that it was to be cut only as fast as the defendant needed it for use in his mill. Before the agreement was concluded, the plaintiff went upon the lot and gave the defendant a "sample" of what he would do, by cutting for a week or more within a quarter of a mile from the mill. He was a contractor of twenty years experience, and substantially all of that time he had been engaged in the business of cutting logs and wood. Not only had the defendant explained to him in Massachusetts the nature and extent of the work, and how fast he desired to have it cut, but before closing the trade, the plaintiff entered upon the work, noted the situation and circumstances and the capacity of the mill and as a practical man must have made some estimate of the time required to complete the work. He admits in his testimony that he had "made up his mind" to live here for a year or two, "perhaps more." In answer to an inquiry by the court he says he "could finish the lot in a year and a half if it was necessary or a year for that matter." If he had been permitted by the defendant to strip the lot in violation of the agreement to cut only as fast as the wood was needed for use at the mill, it is probably true that he could have finished the work in a single year by employing a sufficient crew. But the contract did not allow him to do this, and that he so understood it, is evident from his conduct in suspending operations during July and August, at the request of the defendant, and resuming the

work September 1, when the defendant was ready to start the mill.

Four experienced lumbermen, two of them entirely disinterested witnesses testify that with a mill of the capacity of the defendant's, operated as it ordinarily was by the defendant, at least three years and probably four years would be required to complete the work. And this testimony is confirmed by a mathematical calculation based upon undisputed facts. The capacity of the mill was $3\frac{1}{2}$ cords per day. Of the 350 acres of timber land, about one hundred acres had been cut over before the plaintiff went there. The plaintiff estimated that there were 35 cords to the acre where he began to cut, and at this rate 250 acres would yield more than 8000 cords. But the minimum of all the estimates was 2400 cords, and upon this basis it would require between three and four years for this mill to saw it, as it was ordinarily operated. During the time the plaintiff was cutting in 1904 it is not in controversy that he cut at the rate of less than 1000 cords a year, and the plaintiff was satisfied with the progress of the work. Such was the practical interpretation placed upon the contract during the execution of it, by the plaintiff himself.

Considering then the terms and subject matter of the contract the nature and extent of the work to be done and the knowledge of the parties respecting the capacity of the mill and all the circumstances governing the progress of the work, the conclusion is irresistible that it was not contemplated or understood by the parties that the contract was to be performed within one year from the making of it, and that no other reasonable inference can be drawn from the testimony.

Nor would the death of the plaintiff within the year have taken the contract out of the operation of the statute of frauds, for the reason that in such an event the contract would not have been fully performed.

It is accordingly the opinion of the court that the action is not maintainable upon the evidence, and that a verdict for the defendant should have been ordered by the court.

Exceptions sustained.

ALBERT A. YOUNG *vs.* JAMES E. CHANDLER.

Cumberland. Opinion December 15, 1906.

Directing Verdict. Fixtures. Annexations. Realty. Personalty. Mortgagor and Mortgagee. Landlord and Tenant.

At a jury trial the presiding Justice is authorized to direct a verdict for either party when a contrary verdict could not be sustained by the evidence.

Also if a plaintiff's evidence when taken to be true, is not sufficient to make out a prima facie case, the presiding Justice may direct a verdict for the defendant.

But when different conclusions might be drawn from the evidence by different minds, then the evidence should be submitted to the jury.

Where a structure is affixed to the premises of another by a temporary occupant thereof, or by a licensee, it is deemed temporary in its purpose and not part of the realty.

Annexations with the consent of the owner or mortgagee of the realty, made by a bare licensee, are presumed to be removable and to remain the property of the one annexing, in the absence of facts indicating a contrary intention, even against a subsequent purchaser without notice.

By agreement between the owner or mortgagee of the realty, personal property may retain its status after annexation, and such agreement or intention may be inferred by circumstances.

As to what are fixtures, substantially the same rules prevail between grantor and grantee, as between mortgagor and mortgagee, but different rules apply in relation to landlord and tenant from considerations of public policy and because of the temporary nature of the tenure.

In the case at bar, the plaintiff purchased from James Fyles, Sr., a greenhouse with its contents, consisting of potted plants, and plants maturely grown but not severed from the soil, and loam prepared for gardening purposes. The greenhouse had been removed by the vendor from its original location and placed on posts upon land belonging to his son, James G. Fyles, with his consent, and had attached it to the barn, through which he cut a door and in the cellar of which he had set up a boiler and connected pipes into the greenhouse for heating the same, and subsequently he and his son carried on business as florists, using the greenhouse in connection therewith. The land on which this structure was erected had been previously mortaged by James G. Fyles to the defendant. The mortgage was subsequently foreclosed and the equity purchased by the defendant, and James

Fyles and son became his tenants at will until their tenancy was terminated by notice immediately before the date of the alleged trespass. The plaintiff had already removed the plants which had been in the greenhouse, and had taken down the structure. He was in the act of removing the glass frames when the defendant ordered him not to remove his property. The plaintiff testified that the defendant ordered him to remove nothing from the premises. The defendant testified that he forbade the removal of anything which was a part of the realty and that his interference was confined to the class of property which the plaintiff was at the time removing.

Held: (1) That the evidence should have been submitted to the jury.

(2) That the greenhouse was a part of the realty and belonged to the defendant.

(3) That the plants in the pots and fertilized loam remaining on the premises at the termination of the tenancy were not of the nature of fixtures, but movable personal property.

(4) That the stock plants which though matured had not been severed from the soil, were emblements and the tenant or his vendee had the right to remove them during the term, or within a reasonable time after its termination.

Bryant v. *Pennell*, 61 Maine, 108, distinguished.

On exceptions by plaintiff. Sustained.

Action of trespass. The writ contained three counts. The first count alleged the detaining with force and arms, by the defendant, of certain goods and chattels consisting of greenhouse frames, plants, loam and compost, property of the plaintiff, from the plaintiff's possession. The second count alleged the conversion by the defendant of the goods and chattels described in the first count. The third count alleged the forcible taking and carrying away by the defendant of the same goods and chattels.

The writ was sued out of the Superior Court, Cumberland County. Plea, the general issue. Tried at the February term, 1906, of said Court. At the conclusion of the plaintiff's testimony, the presiding Justice, on motion of the defendant, directed the jury to return a verdict for the defendant. To this instruction the plaintiff excepted.

The case is fully stated in the opinion.

Dennis A. Meaher, for plaintiff.

L. L. Hight and H. P. Sweetsir, for defendant.

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

PEABODY, J. This was an action of trespass commenced by writ declaring under three counts, the first alleging the detaining, with force and arms, by the defendant, of certain goods and chattels, consisting of greenhouse frames, plants, loam and compost, property of the plaintiff, from his possession, the second the conversion of the goods and chattels described in the first count and the third, the forcible taking and carrying away of the same property.

After the evidence of both the plaintiff and defendant was presented the presiding Justice, on motion of the defendant's counsel, directed the jury to render a verdict for the defendant. To this instruction the plaintiff excepted, and upon his exceptions the case is before the Law Court.

At a jury trial the presiding Justice is authorized to direct a verdict for either party when a contrary verdict could not be sustained by the evidence, *Bank* v. *Sargent*, 85 Maine, 349; *Bennett* v. *Talbot*, 90 Maine, 229; *Coleman* v. *Lord*, 96 Maine, 192; *Thompson* v. *Missouri Pacific R. R. Co.*, 51 Neb. 527; *Stearn* v. *Frommer*, 30 N. Y. Supp. 1067; or if the plaintiff's evidence, when taken to be true, is not sufficient to make out a prima facie case, the court may properly direct a verdict for the defendant. *Heath* v. *Jaquith*, 68 Maine, 433; *Co-operative Soc.* v. *Thorpe*, 91 Maine, 64; *Jewell* v. *Gagne*, 82 Maine, 430. But when the case is doubtful, and when different conclusions might be drawn from the evidence by different minds, the facts should be submitted to the jury. *Luhrs* v. *Brooklyn Heights R. R. Co.*, 42 N. Y. St. 606.

The plaintiff contends that he had the title and right of possession to all the property specified in the writ, and that the defendant forcibly took and withheld it from him; and the defendant claims that a portion, at least, of the property was his as part of the realty, he having acquired title thereto by accession, which alone he withheld from the defendant at the time of the alleged trespass.

There are four classes of property which are the subject matter of this action. The material which had entered into the construc-

tion of a greenhouse which James Fyles, who was a florist, had placed on land then owned by his son, James G. Fyles, with his consent; potted plants; growing stock plants; and loam and compost prepared for gardening purposes. The correctness of the ruling directing a verdict depends upon two propositions: (1) whether the evidence, that submitted by the plaintiff being taken as true, shows prima facie that the defendant forcibly took and withheld from the plaintiff, converted, or took and carried away, any of this property; (2) whether such evidence so proves that the plaintiff at the time of the alleged taking had title and the right of possession to any part thereof.

It appears that in September, 1905, the plaintiff purchased from James Fyles, Sr., a greenhouse with its contents, consisting of potted plants, and plants maturely grown but not severed from the soil, and loam prepared for gardening purposes. The greenhouse had been removed by the vendor from its original location and placed on posts upon land belonging to his son, James G. Fyles, with his consent, and had attached it to the barn, through which he cut a door and in the cellar of which he had set up a boiler and connected pipes into the greenhouse for heating the same, and subsequently he and his son carried on business as florists, using the greenhouse in connection therewith. The land on which this structure was erected had been previously mortgaged by James G. Fyles to the defendant. The mortgage was subsequently foreclosed and the equity purchased by the defendant, and James Fyles and son became his tenants at will until their tenancy was terminated by notice immediately before the date of the alleged trespass. The plaintiff had already removed the plants which had been in the greenhouse, and had taken down the structure. He was in the act of removing the glass frames when the defendant ordered him not to remove his property. The plaintiff testifies that he was ordered to remove nothing from the place, and the defendant testifies, in effect, that he forbade the removal of anything which was a part of the reality, and that his interference was confined to the class of property which the plaintiff was at the time removing. The plaintiff's theory is somewhat

supported by the testimony of James Fyles as to the claim of the defendant when informed of the sale to the plaintiff, "He said everything belonged to him; what I claimed was mine he said belonged to him because they were on the place." If the plaintiff had the right to understand, from the words and acts of the defendant, that he intended to take and detain from him not only the frame of the greenhouse but the other property specified in the writ, there was no technical necessity for him to make any specific demand before bringing his action, the words and acts being equivalent to the defendant's exercise of control over the property, inconsistent with the plaintiff's possessory and property rights therein. At least, it is not clear that his inference was not warranted, and if his right of action depended upon this point alone, it should have been submitted to the jury; but we must still decide whether the plaintiff owned any of the classes of property specified in the writ as against the proprietor of the land at the time of the alleged trespass.

Where a structure is affixed to the premises of another by a temporary occupant thereof, or by a licensee, it is deemed temporary in its purpose and not part of the realty. *Berwick* v. *Fletcher*, 41 Mich. 625; *O'Donnell* v. *Burroughs*, 55 Minn. 91; Meigs's Appeal, 62 Pa. St. 28; *Andrews* v. *Auditor*, 28 Gratt. 115.

Annexations with the consent of the owner or mortgagee of the realty, made by a bare licensee, are presumed to be removable and to remain the property of the one annexing, in the absence of facts indicating a contrary intention, even against a subsequent purchaser without notice. *Nelson* v. *Howison*, 122 Ala. 573; *Fisher et al.* v. *Johnson et al.*, 106 Ia. 181; *Sager* v. *Eckert*, 3 Ill. App. 412; *Walton* v. *Wray*, 54 Ia. 531; also by agreement between the owner of personal property and the owner or mortgagee of the realty, personal property may retain its status after annexation. *Smith* v. *Odom*, 63 Ga. 499; *Marshall* v. *Bachelder*, 47 Kan. 442; *Handforth* v. *Jackson*, 150 Mass. 149; *Peaks* v. *Hutchinson*, 96 Maine, 530; *Russell* v. *Richards*, 10 Maine, 429; *Tapley* v. *Smith*, 18 Maine, 12; *Hilborne* v. *Brown et al.*, 12 Maine, 162; *Salley* v. *Robinson*, 96 Maine, 474; *Readfield Telephone, etc. Co.* v. *Cyr*, 95

Maine, 287; and such agreement or intention may inferred from circumstances. 19 Cyc. 1048, 1049.

As to what are fixtures, substantially the same rules prevail between grantors and grantees as between mortgagors and mortgagees, but different rules apply in relation to landlords and tenants from considerations of public policy and because of the temporary nature of the tenure. *Maples* v. *Millon*, 31 Conn. 598; *Arnold* v. *Crowder*, 81 Ill. 56; *Bishop* v. *Bishop*, 11 N. Y. App. 123.

In some jurisdictions it is held that, even without their consent or agreement, the rights of prior mortgagees, they having parted with nothing on the faith of the fixtures, are subject to those having rights therein. *Broaddus* v. *Smith*, 121 Ala. 335; 19 Cyc. 1051; but in others, including Maine, it is held that a mortgagor cannot, by any agreement with a third party, diminish the rights of a prior mortgagee. *Ekstrom* v. *Hall*, 90 Maine, 186; *Wight* v. *Gray*, 73 Maine, 297; *Meagher* v. *Hayes*, 152 Mass. 228; *Thompson* v. *Vinton*, 121 Mass. 139; *Fiske* v. *Peoples Nat. Bank*, 14 Cal. Apps. 21; *Watertown Steam Engine Co.* v. *Davis*, 5 Houst. 192; *Fuller-Warren Co.* v. *Harter*, 110 Wis. 80; *Dame* v. *Dame*, 38 N. H. 429; *Tyson* v. *Post*, 108 N. Y. 217; Jones on Mortgages, 429.

If the defendant's title to the realty had been acquired simply by his deed from James G. Fyles, by whose consent the greenhouse was erected, his rights would have been subject to the owner of the fixture, but as he was the mortgagee of the realty at the time the structure was erected, it became part of the mortgage security and by foreclosure he became the owner by accession, in accordance with the doctrine recognized in *Ekstrom* v. *Hall*, supra, unless his consent to its erection is shown. There seems to be no evidence of his consent, and no fact or circumstance from which any agreement on his part may be presumed that the greenhouse should remain personal property after annexation.

The status of the other classes of personal property described in the writ is to be determined by the more liberal rule which prevails between landlord and tenant. The plants in pots and fertilized loam remaining on the premises were not of the nature of fixtures, but movable property which the florist had the same right to sell as was

his admitted right to sell the hot house plants. The stock plants, which though matured had not been severed from the soil, were emblements which the tenant, or his vendee, had the right to remove during the term, or within a reasonable time after its termination. *Davis* v. *Thompson*, 13 Maine, 209; *Cutler* v. *Pope*, 13 Maine, 377. As to this class of property the case is to be distinguished from *Bryant* v. *Pennell*, 61 Maine, 108, where the mortgage included plants and shrubs, and it was there held that the cuttings passed to the mortgagee by accession; but these plants were a new acquisition of property, having no relation to any class existing at the time the mortgage was given, and belonged to the tenant as the fruits of his industry. *Cannon* v. *Matthews*, 75 Ark. 336. According to these views the case should have been submitted to the jury; directing a verdict for the defendant was error prejudicial to the plaintiff.

Exceptions sustained.

MADUNKEUNK DAM AND IMPROVEMENT COMPANY

vs.

E. F. ALLEN CLOTHING COMPANY.

Penobscot. Opinion December 17, 1906.

Logs and Lumber. Scale Bills. Surveyors. Assistant Surveyors. Stumpage Scale. Evidence. Contracts. Assignee of Permit. Stream Improvements. Tolls.

The scale bill of a surveyor agreed upon between the parties in a logging or log-driving operation or similar transaction requiring a survey, is, in the absence of fraud, binding upon them, and the scale book is evidence of the scale.

When a surveyor agreed upon by the parties to scale logs employs an assistant to count and scale the logs under his direction, and the surveyor from time to time tests the scale made by his assistant, and the assistant has a book in which he keeps a daily record of the count and scale made by him

and put down by him from time to time in the book, and the book is turned over to the surveyor and retained by him and from it he makes up the final figures of the scale, such scale book though kept and made up by the assistant may be used by the surveyor to refresh his recollection of the scale and the testimony of the surveyor so given is competent evidence as to the quantity of logs cut or driven, and if not contradicted is conclusive.

When a dam and improvement company is authorized to collect tolls on logs driven over its dams at a rate "not exceeding fifteen cents per thousand feet stumpage scale," and such company and the owner of the logs driven over such dams did not expressly agree upon a surveyor or scaler to determine the quantity of logs driven over such dams, it must be deemed that there was an implied contract that they would be bound by a scale made in accordance with the method customarily adopted by surveyors or scalers and between landowners and operators and recognized as the stumpage scale.

When by its charter a dam and improvement company is given a lien for tolls on logs driven down a stream which such company is authorized to improve "for the purpose of facilitating the driving of logs and other lumber down the same," the party whose interest is directly affected by such lien must be considered liable for such tolls.

When a contract or permit for cutting, hauling or driving logs has been assigned, the assignee becomes a party in interest and his rights under the contract are subject to the conditions and burdens of the contract.

When a dam and improvement company authorized by its charter to collect tolls for logs and other lumber driven down a stream improved by it, undertakes to collect such tolls it is mainly a question of fact whether or not the improvements made by the company have facilitated the driving of logs. If the improvements are of little value, and there is no substantial compliance with the terms of its charter, such company cannot maintain an action for the collection of tolls. But if the improvements are substantial and facilitate the driving of logs, then they are sufficient to comply with the condition upon which toll may be demanded, although it might be possible for the owner or driver of the logs to drive the same at times without the aid of improvements.

On report. Judgment for plaintiff.

Assumpsit on account annexed brought by the plaintiff, a corporation organized under the provisions of chapter 316 of the Private and Special Laws of 1903, against the defendant, also a corporation, to recover tolls on two million feet of poplar and spruce logs at fifteen cents per thousand feet.

Tried at the January term, 1906, of the Supreme Judicial Court, Penobscot County. At the conclusion of the evidence the case was

"reported to the Law Court for determination upon so much of the evidence as is legally admissible."

The case appears in the opinion.

W. B. Pierce and B. L. Fletcher, for plaintiff.

W. H. Powell and Martin & Cook, for defendant.

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

PEABODY, J. This was an action of assumpsit brought by the plaintiff, a corporation organized under the laws of Maine, against the defendant, also a Maine corporation, to recover on account annexed tolls on two million feet of poplar and spruce logs at fifteen cents per thousand feet, $300.

The case is before this court on report. The organization of the plaintiff corporation under chapter 315 of the Private Laws, 1903, of Maine, and the rate of toll at fifteen cents per thousand is admitted.

The defense put in issue three material propositions necessary for the plaintiff to establish in order to entitle it to recover under the act of its incorporation: 1. The quantity of logs which are the subject of the tolls must be proved by competent evidence. The defendant contends that no admissible evidence was offered on this point. By the act of incorporation the plaintiff was "authorized to erect and maintain dams, sluices, and side dams on the Madunkeunk stream in the County of Penobscot and its tributaries, to remove rocks therefrom and to widen, deepen and otherwise improve said stream and its tributaries for the purpose of facilitating the driving of logs and other lumber down the same." Its charter conferred upon it also authority to demand and receive a toll upon all logs and other lumber which passed over or through its dams and other improvements, not to exceed fifteen cents per thousand feet, stumpage scale, or when such logs or other lumber have not been scaled for stumpage, by the scale rendered at the place of destination, and gave it a lien thereon to be enforced by attachment, to continue for ninety days after the logs and lumber arrived at their destination. The logs specified in the writ were cut from land of O. S. Townsend and

J. M. Pierce, owners of fourteen-sixteenths, and Engel and McNulty owners of two-sixteenths. A stumpage scale was made for them by Joseph J. Porter, a scaler of lumber. The logs were hauled by E. W. Annis who landed most of them on the ice, leaving a few only on the bank of the Madunkeunk Stream. The scale was made there and Francis M. Burr the assistant of Porter, under his direction counted and scaled the logs, and Porter went there three different times and tested his scales. The assistant kept on shingles a record of the number of logs and the number of feet each log scaled for his superior to see, and he also had a book in which he kept his daily records where they were put down from time to time. Mr. Porter retained the book and from it he made up the final figures for his scale bills; he sent a scale bill so made to each of the landowners by whom he was employed to make the stumpage scale, and mailed one also to the treasurer of the F. E. Allen Clothing Company, E. F. Gellison, Bangor, at his request. The returns he made show 990,720 feet of logs, and 1,650 cords scaled by the cord, reckoned at two cords to the thousand feet, a total of 1,815,720 feet of lumber. The scaler testifies that he had been a scaler of lumber about eighteen years, and in scaling this lumber he followed the usual manner of himself and other scalers in scaling for stumpage.

The scale bill of a surveyor agreed upon between the parties in a logging, log-driving or similar transaction requiring a survey, is in the absence of fraud, binding upon them. *Haynes* v. *Hayward*, 41 Maine, 488; *Bailey* v. *Blanchard*, 62 Maine, 168; and the survey book is evidence of the scale. *Whitman* v. *Freeze*, 23 Maine, 212; *Fornette et al.* v. *Carmichael*, 41 Wis. 200.

The scale book though kept and made up by his assistant acting under his direction, inspected and retained by him, may be used by Mr. Porter to refresh his recollection of the stumpage scale, and his testimony so given is competent evidence as to the quantity of logs in question. If the plaintiff and the defendant did not expressly agree upon a scaler, as the act of incorporation bases the toll the corporation was authorized to collect on logs driven over its dams and improvements, on the stumpage scale, it must be deemed that there

was an implied contract that they should be bound by a scale made in accordance with the method customarily adopted by scalers and between landowners and operators and recognized as the stumpage scale. *Smith* v. *Kelley*, 43 Mich. 390; *Peterson* v. *Anderson*, 44 Mich. 441. The scale proved by the uncontradicted testimony of the surveyor must be regarded as proving the amount of toll to be paid by the defendant if otherwise liable.

2. That the defendant was liable as the party in interest to pay the tolls on the logs. The defendant contends that Edward W. Annis should have been made the party defendant. As the charter gave the plaintiff a lien on logs, the party whose interest would be directly affected by such a lien must be considered liable for the tolls. The evidence shows that a contract for the stumpage of pine, fir, spruce and cedar logs was made with the landowners and Edward W. Annis, on the fifth day of September, 1904, which was to be fulfilled on the part of Annis on or before the first day of June, 1905; the logs were "all to be landed in a suitable place and manner for scaling, so as to be easily counted and scaled by the scaler, who shall be appointed by the parties of the first part, and whose scales shall be final and binding between the parties hereto." Another contract for the sale and delivery of poplar logs was made on the fourth day of May, 1904, between Edward W. Annis and the Penobscot Mechanical Fiber Company; the logs were to be delivered by Annis during the rafting season of 1905, and were to be measured by some competent surveyor, when so delivered, to be appointed and paid by the company. Both these contracts were assigned to the defendant, the first October 1, 1904, and the second August 18, 1904. Whatever may have been the purpose of these assignments, the defendant, became in fact the party in interest, and its rights under the contracts are subject to their conditions and burdens. In the nature of the case and by the obligations the assignee assumed, it was necessary to float the logs down the Madunkeunk Stream; and as it received the benefit of the facilities furnished by the plaintiff for floating the logs it should be held liable for the tolls, as well as for other bills for driving the logs which it paid. *Johnson* v. *Cranage*, 45 Mich. 14; *Bohanan* v. *Pope*, 42 Maine, 93. The evidence direct and circum-

stantial shows that this was the understanding of the defendant's managers. The treasurer requested the scale bill, directed the logging operations, furnished teams for hauling the logs in question, and communicated with the plaintiff in reference to the payment of the tolls, from which it clearly appeared that it did not deny that the defendant was the party in interest, but questioned the right of the plaintiff to receive toll on the logs.

This brings the discussion of the case to the remaining ground of defense.

3. That the improvements made by the plaintiff facilitated the driving of logs. This is mainly a question of fact to be determined by the nature and extent of the improvements. The only question of law involved has relation to the degree of perfection in the improvements necessary to give the plaintiff the right to exercise the franchise and to claim its benefits. If the improvements were of little value, there being no compliance with its charter, the plaintiff cannot maintain the action. *Improvement Co.* v. *Brown*, 77 Maine, 41; but if they were substantial and facilitated the driving of logs, although it might have been possible for the owner or driver to float the logs at times without the aid of the improvements, they were sufficient to comply with the condition upon which toll may be demanded. *Genesee Park Improvement Co.* v. *Ives*, 144 Pa. 114; 13 L. R. A. 427. There is testimony somewhat negative in character which tends to show that there was little improvement in the facilities for floating logs down the Madunkeunk Stream and its tributaries, by any work done by the plaintiff; but there is clearly a preponderance of the evidence proving that important improvements had been made by the plaintiff, in the removal of rocks, widening and deepening the stream, improving and erecting dams and constructing and maintaining piers and dams, before the logs in question were floated down the stream. Accordingly we find that the plaintiff has sustained the burden of proof upon these propositions by competent evidence.

Judgment for plaintiff for $272.36 and interest from the date of the writ.

In Equity.

PENOBSCOT LOG DRIVING COMPANY

vs.

WEST BRANCH DRIVING AND RESERVOIR DAM COMPANY et als.

Penobscot. Opinion December 17, 1906.

Water Courses. Detention. Rights of Dam Company. Private and Special Laws, 1903, chapter 174, section 15.

The West Branch Driving and Reservoir Dam Company, the original defendant, was incorporated by an act of the Legislature approved March thirteenth, 1903, chapter 174, Private and Special Laws of 1903. By its act of incorporation the company was given the right to exercise the power of eminent domain for the purpose of taking certain real estate, dams and other property of the Penobscot Log Driving Company, the plaintiff, and it was therein provided that when the West Branch Company had acquired the property of the old company, enumerated in the act, that "all the powers, rights and privileges of the Penobscot Log Driving Company pertaining to the driving of logs and the improving of the West Branch of the Penobscot River above the head of Shad Pond on said West Branch but not below the head of said Shad Pond shall be and become the powers, rights and privileges of the West Branch Driving and Reservoir Dam Company, and all the duties of said Penobscot Log Driving Company pertaining to the driving of logs between the head of Chesuncook Lake and the head of Shad Pond shall be and become the duties of said West Branch Driving and Reservoir Dam Company which shall thereafter be holden to perform said duties except as modified by the provisions of this act."

Section 10 of the act of incorporation provides in part as follows: "Said company in any and all dams which may be owned or controlled by it may store water for the use of any mills or machinery which may use West Branch water, subject to the provision that day and night throughout the year the flow of water down the West Branch, so long as there there shall be any stored water shall not be less than two thousand cubic feet per second, measured," etc.

Section 15 of the act of incorporation is in part as follows: "After said West Branch Driving and Reservoir Dam Company shall have delivered the rear of any annual drive of logs into Shad Pond in manner aforesaid it shall allow to flow out of North Twin Dam at such times and at such rates of

discharge as the Penobscot Log Driving Company may request for the purpose of driving said logs to the Penobscot boom of their several places of destination above said boom, water equivalent to the amount of water held back by said dam as now constructed when there is a thirteen foot head at said dam measured from the bottom of the dam, or so much thereof as shall be called for by said Penobscot Log Driving Company for said purpose, and in determining the quantity of water which the Penobscot Log Driving Company shall be entitled to request for driving purposes, the two thousand cubic feet per second specified in section ten shall be considered a part thereof at such times and at such times only as water is being allowed to flow from said dam at the instance and request of the Penobscot Log Driving Company."

The West Branch Company, as contemplated by its charter, destroyed the old dam at North Twin, and substituted therefor a new dam, located a short distance below on the river. While the water which the company was to allow to flow, by the charter, was from this new dam, the amount of water to be allowed to flow was to be measured by "the amount of water held back by said dam as now constructed (that is the old dam) when there is a thirteen foot head at said dam measured from the bottom of the dam."

Held: that the thirteen foot head of water at the old dam is to be ascertained by measuring from the bottom of the dam. Not from the flooring of any gates through the dam, nor from the bottom of any part of the structure, nor from the bottom of the superstructure but from the bottom of the whole structure of the dam.

Also, *held:* that to ascertain the amount of water held back by the old dam, when there was a thirteen foot head of water at that dam, measured as provided by said section 15, a measurement must be taken from the bottom of the dam, in the thread of the stream, where the dam rests upon the natural bed of the stream and holds back water by reason of its being immediately above the natural bed of the stream. The equivalent of that amount of water at the old dam must be allowed to flow from the new dam "at such times and at such rates of discharge as the Penobscot Log Driving Company may request for the purpose of driving said logs to the Penobscot boom or their several places of destination above said boom." In determining this quantity of water, the two thousand cubic feet of water per second, which, by section 10 of the act, must be allowed to flow at all times, may be taken into consideration only when it is being allowed to flow from the dam at the instance and request of the Penobscot Log Driving Company.

In equity. On exceptions and appeal by plaintiff. Exceptions not considered. Decree below reserved. Decree in accordance with opinion.

Bill in equity the substance of which appears in the opinion.

Heard before the Justice of the first instance on bill, answers and evidence. After the hearing, the Justice signed and filed a decree dismissing the bill with one bill of costs for the defendant and at the same time filed a memorandum in which he stated that, for reasons therein given, he had made this ruling pro forma, without consideration of the merits of the controversy between the parties. The plaintiff then appealed from this decree to the Law Court as provided by statute, and also took exceptions to certain rulings made on the hearing. The exceptions were not considered.

The case fully appears in the opinion.

P. H. Gillin and Orville Dewey Baker, for plaintiff.

F. H. Appleton, Hugh R. Chaplin, Louis C. Stearns, E. C. Ryder and Charles F. Woodard, for defendant.

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

WISWELL, C. J. The West Branch Driving and Reservoir Dam Company, the original defendant, was incorporated by an Act of the Legislature approved March thirteenth, 1903, Chap. 174, Private Laws of 1903. By its act of incorporation the company was given the right to exercise the power of eminent domain for the purpose of taking certain real estate, dams, and other property of the Penobscot Log Driving Company, the complainant, and it was therein provided that when the West Branch Company had acquired the property of the old company, enumerated in the act, that "all the powers, rights and privileges of the Penobscot Log Driving Company pertaining to the driving of logs and the improving of the West Branch of the Penobscot River above the head of Shad Pond on said West Branch but not below the head of said Shad Pond shall be and become the powers, rights and privileges of the West Branch Driving and Reservoir Dam Company, and all the duties of said Penobscot Log Driving Company, pertaining to the driving of logs between the head of Chesuncook Lake and the head of Shad Pond shall be and become the duties of said West Branch Driving and Reservoir Dam Company which shall thereafter be holden to perform said duties except as modified by the provisions of this act."

So much as is material of section 10 of the act of incorporation is as follows: "Said company in any and all dams which may be owned or controlled by it may store water for the use of any mills or machinery which may use West Branch water, subject to the provision that day and night throughout the year the flow of water down the West Branch, so long as there shall be any stored water, shall not be less than two thousand cubic feet per second, measured" etc.

By section 15 of this act it was provided: "After said West Branch Driving and Reservoir Dam Company shall have delivered the rear of any annual drive of logs into Shad Pond in the manner aforesaid it shall allow to flow out of North Twin Dam at such times and at such rates of discharge as the Penobscot Log Driving Company may request for the purpose of driving said logs to the Penobscot boom or their several places of destination above said boom, water equivalent to the amount of water held back by said dam as now constructed when there is a thirteen foot head at said dam measured from the bottom of the dam, or so much thereof as shall be called for by said Penobscot Log Driving Company for said purpose, and in determining the quantity of water which the Penobscot Log Driving Company shall be entitled to request for driving purposes the two thousand cubic feet per second specified in section ten shall be considered a part thereof at such times and at such times only as water is being allowed to flow from said dam at the instance and request of the Penobscot Log Driving Company."

The defendant corporation was duly organized, accepted its charter, acquired certain property of the plaintiff corporation together with all the powers, rights, privileges and duties of the latter company in relation to the driving of logs above the head of Shad Pond on the West Branch of the Penobscot River, but the plaintiff corporation still retained the power and duty of driving all logs from the head of Shad Pond to the Penobscot boom.

In this bill in equity, filed August 15, 1905, the complainant alleged among other things, and in addition to the facts already stated, that in the exercise of its public powers and duties in the then log driving season of 1905 it was required to drive, and had

accepted and undertaken to drive below Shad Pond a large quantity of logs which had been delivered to it at Shad Pond on or about the fifth day of August; that it thereby became the duty of the defendant under its charter to allow water to flow out of the North Twin Dam in accordance with the requirement of section fifteen above quoted; that although the defendant had water stored at its various dams, all available to North Twin Dam, and all within its control, more than sufficient to comply with the requirements of this section, and although requested by the complainant, that the defendant had refused to allow to flow out of the North Twin Dam either the full amount of water to which the complainant was entitled or such parts thereof as the complainant had from time to time demanded, to the great injury of the complainant in the performance of its public duty of completing the drive to the Penobscot boom. In the prayer for relief the complainant asked for a temporary and permanent injunction to restrain the defendant corporation and its employees from further holding back the waters of the West Branch then or thereafter stored or available to its North Twin Dam, and to command the defendant to allow the water to flow continuously, as requested by the complainant, for its purposes to the full extent described by the defendant's charter.

A preliminary injunction, as prayed for, was shortly after ordered to be issued upon the filing by the complainant of the statutory bond. On the twenty-sixth of August, 1905, an arrangement was made between the complainant, the defendant and other defendants who had intervened, and reduced to writing, wherein the parties agreed as to the amount of water that should be allowed to flow from the North Twin Dam during the year 1905, and wherein it was also agreed upon the one hand that the plaintiff company should make no claim for damages against the defendant company for its refusal to deliver water from and after the tenth of August up to the date when the water began to be delivered under the terms of the preliminary injunction, and the defendant, and the other corporations which had intervened, upon the other hand, agreed that they would make no claim for damages against the complainant under the statutory injunction bond, or otherwise.

The case came on for final hearing before a Justice of this court on February 15, 1906, when it was claimed upon the part of the defendants that the bill could no longer be sustained since it related wholly to the drive of logs of 1905, and asked for relief only in relation to the logs which the complainant was then engaged in driving to their destination, and because, prior to the time of the hearing that drive had been entirely concluded. Various other objections to the maintenance of the bill were made. Thereupon, and after all of the evidence had been introduced, the complainant offered an amendment to the bill which was allowed by the sitting Justice who ruled that no new answer or demurrer to the amended bill was necessary or would be allowed, which rulings were made subject to the defendant's exceptions.

By this amendment, the bill, which originally related wholly to the 1905 drive, and in which relief was sought with reference to the completion of that drive, became, in substance, and effect one in which was sought a determination of the respective rights and duties of the parties, depending especially upon a construction of the defendant's charter and of section fifteen thereof above quoted. After the hearing the sitting Justice signed and filed a decree dismissing the bill with one bill of costs for the defendants, and at the same time filed a memorandum in which he stated that, for reasons therein given, he had made this ruling pro forma, without a consideration of the merits of the controversy between the parties. The case comes to the Law Court upon the complainant's appeal from this decree.

In view of our conclusion we deem it unnecessary to consider or determine the defendants' exception to the allowance of the amendment, accompanied with the ruling that no new answer would be allowed to the amended bill; the propriety of a pro forma ruling when a case is heard by a single Justice, or the other objections made by the defendants to the maintenance of the bill as amended. It is sufficient to say that, as to the original bill, that bill might have been properly dismissed, since the whole necessity for the relief sought had terminated prior to the time of the final hearing, and since, by virtue of the agreement between the parties, no question

of damages remained for determination. Upon the other hand we have no question as to the power of this court to take jurisdiction of a bill, the purpose of which is to have judicially ascertained and determined the respective rights and duties of the parties relating to the use of water upon a navigable or floatable stream, when such water has been accumulated by a dam erected under a legislative charter, or otherwise.

Because of our conclusion as to the merits of the controversy, and of the necessity for an early and authoritative determination of the important question involved, we express no opinion as to the propriety of the allowance of an amendment, at that stage of the proceeding, the ruling connected therewith, or as to other objections raised by the defendants, but come to a consideration of the merits of the case, viz; the construction of section fifteen of the defendant's act of incorporation.

Prior to the time of the commencement of this bill, the West Branch Company, as contemplated by its charter, had destroyed the old dam at North Twin, and had substituted therefor a new dam, located a short distance below on the river. While the water which the company was to allow to flow, by the charter, was from this new dam, the amount of water to be allowed to flow was to be measured by "the amount of water held back by said dam as now constructed (that is the old dam) when there is a thirteen foot head at said dam measured from the bottom of the dam." The complainant's contention is that the standard of measurement of the water to be allowed to flow is a thirteen foot head of water at the old dam measuring from the bottom of the deep gates through that dam, that the important and principal part of the clause specifying the amount of water to be allowed to flow is the expression, "a thirteen foot head at said dam," in regard to the meaning of which numerous witnesses were called to testify at the hearing, and much is said in regard thereto by counsel in argument. Upon the other hand the contention of the defendants is, that these words are limited and explained by the following language, "measured from the bottom of the dam," that this means the bottom of the whole structure, and that to ascertain the thirteen foot head, referred to in the act, a measurement must be taken from the bottom of the whole dam.

If the act had not contained the words "measured from the bottom of the dam" there might have been considerable question as to precisely what was meant by the expression, "thirteen foot head," because that expression may have different meanings under different conditions and situations. As said by the court in *Cargill* v. *Thompson*, 57 Minn. 534, 59 N. W. 638, that expression is a technical term in hydraulics, and experts might be called to testify as to its meaning, or non-experts, who were acquainted with the meaning with which the term was locally used, might testify in relation thereto. But it must be remembered that the old North Twin Dam was not a power dam, that is, no water wheels were ever operated in immediate connection with that dam. It was built and always used exclusively as a storage dam, which is equally true of the new dam substituted therefor.

Apparently the framers of this act appreciated the difficulty that might arise in the construction of the term, a thirteen foot head of water, and added the following words for the purpose of making certain and readily ascertainable that which otherwise might have been the subject of much doubt and controversy. These words cannot be rejected. Their importance is shown by their connection with the other language of the section. They were evidently adopted for the purpose of explaining precisely what was meant by the words "a thirteen foot head at the dam." They limit that phrase and show precisely what was meant by it and how that head of water was to be ascertained. With these words of limitation and explanation the whole phrase becomes plain and free from ambiguity and doubt to such an extent that no parol evidence as to its meaning, either from experts in hydraulics or others can be effective in changing the plain and obvious meaning of the whole language.

The thirteen foot head of water at the old dam is to be ascertained by measuring from the bottom of the dam. Not from the flooring of any gates through the dam, nor from the bottom of any part of the structure, nor from the bottom of the superstructure but from the bottom of the whole structure of the dam. The lower part of a dam down to the bed of the stream is just as much a part of, and, certainly, as important a part of the dam as is the upper part.

For the purposes of this case the definition given by Webster is as good as any. He thus defines it: "A barrier to prevent the flow of a liquid; especially a bank of earth, or wall of any kind as of masonry or wood, built across a water course, to confine and keep back flowing water." In 12 Cyc. 1193, and in 8 Am. & E. Encyl. of L. 2d. Ed. 700, the definition is given in the same language as follows: "The work or structure raised to obstruct the flow of the water in a river." The lower part of a dam holds back water and obstructs the flow of a stream as well as does the upper part and comes equally within these definitions.

It is of course true that for some dams there may be a foundation laid in the soil under the surface of the bed of the stream or water course, which does not hold back water or obstruct the flow of the stream, because it does not come in contact with the water of the stream, and the only purpose of which is to provide a secure base for the dam itself. No part of such a foundation, below the surface of the bed of the stream, should be considered as a part of the dam, as the word was used in this section, but whatever part of the structure is above the bed of the stream, and does hold back water by coming in contact with the water of the stream is a part of the dam. That this is in accordance with the understanding of the legislature is somewhat confirmed by a further analysis of the section. The standard of measurement is not a thirteen foot head of water at the old dam, but the amount of water held back by that dam when there is a thirteen foot head at such dam, measured from the bottom of the dam. Water in a stream is held back by all parts of the dam in which it comes in contact.

Our construction, then, of this part of this section is this: To ascertain the amount of water held back by the old dam, when there was a thirteen foot head of water at that dam, measured as provided by the section, a measurement must be taken from the bottom of the dam, in the thread of the stream, where the dam rests upon the natural bed of the stream and holds back water by reason of its being immediately above the natural bed of the stream. The equivalent of that amount of water at the old dam must be allowed to flow from the new dam "at such times and at such rates of discharge as the

Penobscot Log Driving Company may request for the purpose of driving said logs to the Penobscot boom or their several places of destination above said boom." In determining this quantity of water, the two thousand cubic feet of water per second, which, by section ten of the act, must be allowed to flow at all times, may be taken into consideration only when it is being allowed to flow from the dam at the instance and request of the Penobscot Log Driving Company.

Decree below reversed. Amended bill sustained. Decree in accordance with the opinion. Costs to be determined by the Justice who makes the decree.

In Equity.

INHABITANTS OF HOULTON *vs.* FRANK W. TITCOMB et al.

Aroostook. Opinion December 18, 1906.

Municipal Corporations. Towns. Ordinances. Nuisances. Equity Jurisdiction. Towns may enjoin nuisances, when. R. S., chapter 4, section 93, paragraph VIII; chapter 28, sections 13, 20, 22, 25 26, to 45; chapter 79, section 6, paragraph V.

R. S., chapter 4, section 93, among other things, provides as follows: "Towns, cities and village corporations may make by-laws or ordinances, not inconsistent with law, and enforce the same by suitable penalties, for the purposes and with the limitations following: . . . . (VIII.) Respecting the erection of buildings therein and defining their proportions, dimensions and the material to be used in the construction thereof; and any building erected contrary to a by-law or ordinance adopted under this specification is a nuisance."

Municipal ordinances are in derogation of the common law and must be strictly construed. They cannot be enlarged by implication.

A bill in equity cannot ordinarily be maintained for the mere violation of a municipal ordinance. The threatened act of violation must amount to a nuisance, if done.

A thing is not a nuisance simply because a municipal ordinance declares it to be such, but the State may declare what may, at law, be deemed a nuisance, and this State has declared that buildings erected contrary to ordinances legally made in accordance with the provisions of R. S., chapter 4, section 1, are nuisances.

A court in equity at common law has jurisdiction to restrain nuisances, and has specific jurisdiction in this State "in cases of nuisance and waste." Therefore equity will take jurisdiction for the threatened violation of a municipal ordinance when such violation contemplates an act which is a nuisance in law, not because the act is a violation of the ordinance but because it is a nuisance.

A municipal corporation as the representative of the equitable rights of its inhabitants may enjoin nuisances affecting matters with reference to which a portion of the power of the State has been confided to it. The prevention of fires is a matter which the State has confided to towns.

In the case at bar, the plaintiff town had legally adopted an ordinance which provided that "no wooden or frame building shall hereafter be erected nor any building now erected or hereinafter to be erected, be altered, raised, roofed, enlarged, or otherwise added to or built upon with wood," etc., within certain prescribed limits called the "Fire District." By the provision of another ordinance the municipal officers of the plaintiff town were authorized to "grant licenses to erect, alter, raise, roof, enlarge or otherwise add to or build upon or move any wooden building" within the limits of said District, etc. The defendant Titcomb undertook "to complete, erect, alter, raise, roof, enlarge, add to and build upon with wood" a certain wooden building within the limits of said "Fire District" without a license therefor from the municipal officers of the plaintiff town. But at a special town meeting of the plaintiff town previously held, it was voted to authorize and allow the defendant Titcomb "to repair and put in an inhabitable condition" the aforesaid wooden building. *Held:* (1) that this vote did not contravene or modify the application of the ordinances; (2) that the violation of the ordinances constituted a nuisance against the public as a violation of a police regulation.

In equity. On report on agreed statement of facts. Decree in accordance with opinion.

Bill in equity brought by the inhabitants of Houlton in the name of their selectmen against the defendants, Frank W. Titcomb and the Houlton Savings Bank to restrain them from the alleged, and intended, violation of certain municipal ordinances of the town of Houlton regulating the erection, alteration and enlargement of wooden buildings within the limits of the "Fire District" in said town.

The bill, omitting formal parts, is as follows:

"The inhabitants of the town of Houlton, in the county of Aroostook, by Thomas P. Putman, Frank W. Pearce and Wallace A. Dykeman, the selectmen of said town, complain against Frank W. Titcomb, of said Houlton, and the Houlton Savings Bank, a corporation duly existing by the laws of said State of Maine, and having its place of business at said Houlton, and say:

"First. At a legal meeting of the inhabitants of said town of Houlton, held on the 31st day of March, 1890, being the regular annual meeting of said town for the year 1890, and the warrant for which meeting contained a sufficient article for that purpose, said town made and adopted the following by-laws or ordinances respecting the erection of buildings therein, and defining their proportions, dimensions and the material to be used in the construction thereof, and establishing a Fire District in the village of said Houlton, and to regulate the building and prohibit the construction of wooden and frame buildings therein:

"'Sec. 1. For the purpose of securing the prevention of fire in the village of Houlton, a Fire District is hereby established therein, the boundaries of which shall be as follows: (The boundaries of said "Fire District" here follow.)

"'Sec. 2. No wooden or frame building shall hereafter be erected, nor any building now erected, or hereafter to be erected, be altered, raised, roofed, enlarged or otherwise added to or built upon with wood, nor any wooden building be removed from other territory, to and upon the territory described in section one, nor from any portion of said Fire District to another portion thereof, except as hereinafter provided, and any such building so erected, added to, or removed contrary to the provisions of this ordinance, shall be deemed a public and common nuisance and abated as such.

"'Sec. 3. The municipal officers may grant licenses to erect, alter, raise, roof, enlarge or otherwise add to or build upon, or move any wooden building within said District, upon such terms and conditions and subject to such limitations and restrictions as they may prescribe; but before any such license is granted, a notice of the application

therefor shall be published in a newspaper printed in said town, at the expense of the petitioner.

"'Sec. 4. Any person, whether owner, lessee, contractor or agent, who shall violate the provisions of this ordinance shall forfeit and pay for the use of the town the sum of fifty dollars, to be recovered by an action of debt in the name of the town treasurer;' which said by-laws and ordinances were, thereafterwards, on the same day, duly entered, and recorded in the town records of said town of Houlton, and are still in force.

"Second. Said Frank W. Titcomb and said Savings Bank are now, and for a long time heretofore, have been seized in fee or otherwise entitled to and in possession of a certain tract or parcel of land situated within the boundaries named and set forth in section one, and bounded and described as follows: (The boundaries of said land here follow.)

"Third. Said Frank W. Titcomb and said Savings Bank are now erecting, altering, raising, roofing, enlarging and otherwise adding to, and building upon with wood, a certain two story wooden or frame building upon their said lot or parcel of land hereinbefore named and described, without any license from the municipal officers of said town of Houlton to do the same, and in violation of said by-laws and ordinances, and in violation of law.

"Fourth. Said Frank W. Titcomb and said Savings Bank threaten, purpose, intend, and are about to proceed forthwith to fully complete, erect, alter, raise, roof, enlarge, add to, and build upon with wood, said wooden building, without any license from the municipal officers of said town of Houlton to do so, and are now at work upon the same in violation of said by-laws and ordinances.

"Fifth. That said wooden building if so erected, altered, raised, roofed, enlarged, added to, and built upon with wood, as threatened, intended, and purposed by said Frank W. Titcomb and said Savings Bank, and as they are now doing the same, will be a public and permanent nuisance, by force of said by-laws and ordinances, and

the statute in such case made and provided; that it is situated in the most compact part of the village of said Houlton, and closely surrounded by other buildings; that it will jeopardize the other property and buildings, situated in said village, and render them much more liable to damage and destruction by fire, and greatly lessen the value of all other property situated in said village, and that the damage so arising as aforesaid will be great, irremediable and permanent; and that unless prevented by the order of your Honorable Court a great, irreparable and permanent injury will be at once done to your complainants.

"Wherefore inasmuch as your complainants have no plain or adequate remedy at law, and great, irreparable and permanent injury will result to them unless your Honorable Court will interfere to prevent the same, may it please your Honors, as a court in equity, forthwith, on due notice first given, to require of the defendants full, true, and perfect answer to make all and singular, the several allegations of this bill; and that thereupon, on proper hearing had of the parties, you would order and decree that said defendants be perpetually enjoined and restrained against erecting, altering, raising, roofing, enlarging, or otherwise adding to, or building on with wood, said wooden building, in any way as threatened, intended or purposed by them as aforesaid, and that such other or further decree may be made as to your Honors may seem fit and proper in the premises; and further for the reasons aforesaid, may it please your Honors to grant an immediate preliminary injunction, such as above prayed for to continue until a full hearing of the parties and a final adjudication shall be arrived at; and it may please your Honors to decree costs to the complainants."

This bill is dated May 19, 1903.

The answer of the defendant Titcomb, omitting formal parts, is as follows:

"First. The said defendant admits that the inhabitants of said town of Houlton, on the thirty-first day of March, 1890, adopted the ordinance set forth in paragraph one of the plaintiffs' bill.

"Second. The said defendant admits that he and the Houlton

Savings Bank are the owners of the land and premises named and described in paragraph two of the plaintiffs' bill.

"Third. The said defendant admits that on the nineteenth day of May, 1903, said Frank W. Titcomb was about to raise, roof and enlarge the building situate on the premises described in paragraph two of the plaintiffs' bill, and referred to in paragraph three and four of the plaintiffs' bill.

"Fourth. The said defendant admits that he the said Frank W. Titcomb on the said nineteenth day of May, 1903, did purpose and intend to alter, raise, roof and enlarge the building then and there situate on the premises named in paragraph two of the plaintiffs' bill, and referred to in paragraphs three and four of plaintiffs' bill; but the defendant denies that he was altering, raising, roofing or enlarging, or that he intended then and there to alter, raise, roof, and enlarge the said building without license, but he avers and declares that he the said Frank W. Titcomb then and there had authority and license from the inhabitants of the said town of Houlton, then and there to alter, raise, roof and enlarge said building, as he was proceeding to do.

"Fifth. The said defendant denies that the said wooden building named and referred to in paragraphs two, three and four of the plaintiffs' bill, if erected, altered, raised, roofed, enlarged, added to, and built upon with wood as intended and proposed, then and there by said Frank W. Titcomb, would be a public and permanent nuisance by force of any by-laws, ordinances or statute in such cases made and provided, because they say, that in truth and in fact, the said building is not situate in the most compact part of the village of said Houlton, and is not closely surrounded by other buildings, and that said building would not jeopardize the other property and buildings situate in said village, and would not render much more liable to damage and destruction by fire, and would not greatly lessen the value of other property situate in said village, and that there would be no damage arising therefrom, and that there would be no irreparable, and no permanent injury done to said plaintiffs or any one else; but in truth and in fact the said defendant Frank W.

Titcomb says: for the defendant to raise, alter, repair and complete said building as he proposed to do, would be a permanent benefit to said village of Houlton, and an increase of the value of property in said Houlton.

"Sixth. And the said defendant further says, that the said plaintiffs are estopped from setting up the claim made by them in their bill, and that the defendant should not be enjoined and restrained as requested in the plaintiffs' bill, by virtue of the ordinance set forth and named in paragraph one of the plaintiffs' bill, because he says, that on the twenty-seventh day of April, 1903, at a legal meeting of the voters and inhabitants of said town of Houlton duly called for that purpose, the said plaintiffs so assembled in their town meeting as aforesaid, voted to allow the said Frank W. Titcomb to rebuild, alter, enlarge, raise and repair the said building referred to in said plaintiffs' bill, in any manner which the said Frank W. Titcomb saw fit, as by the record thereof in the office of the town clerk in said Houlton will appear, which said records, the said defendant offers to produce to said Court; and the defendant claims that by reason of said votes of said town, the said Frank W. Titcomb, and the building so owned by him as aforesaid were exempt from the provisions of the ordinance named and set forth in paragraph one of the plaintiffs' bill.

The answer of the defendant, Houlton Savings Bank, omitting formal parts, is as follows:

"First. Said defendant admits that the inhabitants of said town of Houlton adopted the ordinance set forth in paragraph one in the plaintiffs' bill, as therein specified.

"Second. Said defendant is informed and believes that said Frank W. Titcomb is the owner of the premises described in the plaintiffs' bill, and the only interest that said Houlton Savings Bank has in and to the premises is under and by virtue of a mortgage thereon held by said Bank.

"Third. Said Houlton Savings Bank denies that it is now or has been erecting, altering, raising, roofing, enlarging, or otherwise adding to and building upon a wooden building on said premises, as set out in the third paragraph of the plaintiffs' bill, but neither admits

nor denies that said Frank W. Titcomb may have been so engaged.

"Fourth. Said defendant denies all and singular the allegations contained in the fourth paragraph of the plaintiffs' bill so far as the same relates to the said Houlton Savings Bank.

"Fifth. Said Houlton Savings Bank neither admits nor denies the allegations contained in the fifth paragraph of the plaintiffs' bill, except to say that said Bank has not been engaged and has not intended to engage in the erection or maintenance of anything on said premises which would constitute a public nuisance."

At the hearing before the Justice of the first instance, an agreed statement of facts was filed and then by agreement the cause was reported to the Law Court for decision.

The agreed statement of facts is as follows:

"It is hereby agreed by the plaintiffs and defendants in this case that the by-laws and ordinances set forth in paragraph one of the plaintiffs' bill were legally enacted and adopted by said town of Houlton, and since their enactment and adoption have been in full force and virtue in said town of Houlton ever since, except so far as the same may have been modified, changed, altered, amended or repealed by the special town meeting of said town, held April 27th, 1903, as set forth in the sixth paragraph of the answer of said defendant, Frank W. Titcomb.

"That said defendants were duly seized and possessed of the real estate as set forth in paragraph two of plaintiffs' bill, that the defendants admit the acts complained of by said plaintiffs in paragraph three and four of plaintiffs' bill and claim to justify said acts by the action of said special town meeting set forth in paragraph six of the answer of said defendant Frank W. Titcomb.

"That on the 27th day of April, 1903, at a legal meeting of the legal voters of said town of Houlton, duly called for that purpose by a legal warrant containing the following article: 'Art. 3. To see if the town will authorize and allow Frank W. Titcomb to repair and put in an inhabitable condition the old Sleeper House, so called, on the north side of Bangor Street, in said Houlton, opposite the foundry.' Said town voted under said article as follows: 'Art. 3. Voted to authorize and allow Frank W. Titcomb to repair,

and put in an inhabitable condition the old Sleeper House, so called, situate on the north side of Bangor Street, in said Houlton opposite the foundry.'

"That the premises described in said Article Three of said town warrant and in said vote above set forth, are the same premises set forth and described in paragraph two and three of plaintiffs' bill, and that said premises and buildings at the time of the filing of plaintiffs' bill, and ever since, were and are within the fire limits as described in the ordinance set forth in the first paragraph of the plaintiffs' bill, except so far as the same may have been removed from said fire limits by the act of the said special town meeting held April 27th, 1903, as aforesaid.

"That said defendants prior to the filing of the bill in this case had never received any license from the municipal officers of said Houlton, to erect, alter, raise, roof, enlarge or otherwise add to or build upon any wooden building described in paragraph two, three, four and five of plaintiffs' said bill."

Ira G. Hersey, for plaintiffs.

Shaw & Lewin, for defendant Frank W. Titcomb.

Powers & Archibald, for defendant Houlton Savings Bank.

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

SPEAR, J. This is a bill in equity brought by the inhabitants of Houlton in the name of their selectmen against Frank W. Titcomb and the Houlton Savings Bank, to restrain them from the alleged, and intended, violation of the town ordinances regulating the erection, alteration and enlargement of wooden buildings within the fire district of said town. The case comes to this court upon the bill, answer, replication and agreed statement of facts.

The bill properly sets out the ordinances alleged to have been violated, their adoption at a legal town meeting, the ownership of property by the respondents and their violation and intended violation of the ordinances and that, if their intention is carried into effect, it will produce the existence of a public and permanent nuisance

against the by-laws and ordinances of the town and statutes of the State. We think it is unnecessary to specifically refer to any of the allegations of the bill except the third and fourth items which we insert in full. The third is as follows: "Said Frank W. Titcomb and said Savings Bank are now erecting, altering, raising, roofing, enlarging and otherwise adding to, and building upon with wood, a certain two story wooden or frame building upon their said lot or parcel of land hereinbefore named and described, without any license from the municipal officers of said town of Houlton to do the same, and in violation of said by-laws and ordinances, and in violation of law."

The fourth reads: "Said Frank W. Titcomb and said Savings Bank threaten, purpose, intend, and are about to proceed forthwith to fully complete, erect, alter, raise, roof, enlarge, add to, and build upon with wood, said wooden building, without any license from the municipal officers of said town of Houlton to do so, and are now at work upon the same in violation of said by-laws and ordinances."

These are the two items, it will be observed that respectively charge the defendants with the actual and intended violations of the ordinances of the town. The Houlton Savings Bank in its answer avers that the only interest which it has in the premises described is by virtue of a mortgage thereon held by the Bank. But by the agreed statement, this defendant admits its joint ownership and the acts complained of in paragraph three and four of the bill. It must therefore stand or fall with the defendant Titcomb.

Titcomb in his answer admits the truth of the allegations of fact in the third and fourth items of the plaintiffs' bill but denies, in the fourth item of his answer, that the acts done and proposed to be done are in violation of the town ordinances, and avers that he had authority and license from the inhabitants of the town of Houlton to alter, raise, roof and enlarge said building as he was proceeding to do. He also denies in the fifth item that his proposed alterations upon the building would make it a public nuisance.

The ordinances upon which the plaintiffs rely to prevent the defendants from the prosecution of the work which they have undertaken upon the building in question, reads as follows: "Sec. 2.

No wooden or frame building shall hereafter be erected, nor any building now erected, or hereafter to be erected, be altered, raised, roofed, enlarged or otherwise added to or built upon with wood, nor any wooden building be removed from other territory, to and upon the territory described in section one, nor from any portion of said Fire District to another portion thereof, except as hereinafter provided, and any such building so erected, added to, or removed contrary to the provisions of this ordinance, shall be deemed a public and common nuisance and abated as such.

"Sec. 3. The municipal officers may grant licenses to erect, alter, raise, roof, enlarge, or otherwise add to or build upon, or move any wooden building within said District, upon such terms and conditions and subject to such limitations and restrictions as they may prescribe; but before any such license is granted, a notice of the application therefor shall be published in a newspaper printed in said Town, at the expense of the petitioner."

The defendants concede that the above by-laws and ordinances were legally enacted and adopted by the town and since their enactment and adoption have been in full force and virtue. The agreed statement also shows that the defendants admit the acts complained of by said plaintiffs in paragraph three and four of their bill, but claim to justify said acts by the action of the special town meeting, set forth in paragraph six of the answer of the defendant Titcomb, that on the 22nd day of April, 1903, the town of Houlton at a legal meeting called for the purpose authorized him to operate upon the building as he was doing and intended to do. Article three of the warrant calling this town meeting, under which he claims to justify his acts, was as follows: "Art. 3. To see if the Town will authorize and allow Frank W. Titcomb to repair, and put in an inhabitable condition the old Sleeper House, so called, on the north side of Bangor Street, in said Houlton, opposite the Foundry." The town voted upon this article as follows: "Art. 3. Voted to authorize and allow Frank W. Titcomb to repair and put in an inhabitable condition the old Sleeper House, so called, situate on the north side of Bangor Street, in said Houlton opposite the Foundry."

It is further conceded that the premises described in said article

three are the ones involved in this controversy and are within the fire limits described in the ordinances herein set forth "except so far as the same may have been removed from said fire limits by the act of the said special town meeting." Nor is it claimed that the defendants had ever received the license, authorized by article three of the ordinances above quoted, to perform any of the acts prohibited by the ordinances and complained of in plaintiffs' bill. The defendants in their argument also admit the legality and constitutionality of the fire ordinances in question.

The only issue, therefore, raised in this case is whether the vote of the special town meeting above quoted under article three of the warrant relieved the defendants from the operation of the ordinances with reference to the wooden building, which they were seeking to alter as set forth in the plaintiffs' bill and admitted in their answer. The defendants claim in item six of their answer that on account of the vote in this special town meeting, the town should be estopped to invoke the application of the ordinances to their proposed action. Without determining whether the doctrine of estoppel would apply if the vote in the special town meeting had authorized the defendant to do all that the ordinance prohibited, let us first discover whether, as a matter of fact or legal inference, the vote in the special town meeting did authorize the defendants to do any of the things which the ordinances prohibited. In other words, does the subject matter of the vote conflict with the subject matter of the ordinances?

The language of section two of the ordinances which directly applies to the issue raised in this case reads, "No wooden or frame building shall hereafter be erected nor any building now erected or hereinafter to be erected, be altered, raised, roofed, enlarged, or otherwise added to or built upon with wood," etc. The defendants admit in their answer that they were "about to raise, roof and enlarge the building," that is they were about to do just what the ordinances inhibit. Now, did the vote of the town at its special meeting authorize the defendants to do any of these inhibited things? We think not. This vote, strictly following the article in the warrant, simply authorized the defendants "to repair and put in an inhabitable condition the old Sleeper House" etc. which is the house

in question. By a comparison of the phraseology of this vote with the language of the ordinances, it will be observed that it does not repeal or modify the inhibitions or become inconsistent with the complete application of the ordinances to the facts set out in the plaintiffs' bill and admitted by the defendants' answer. The ordinances do not pretend or assume to prevent the ordinary repair of a house and putting it into inhabitable condition. It was not intended by the ordinances to prohibit such action on the part of the householder. It would be clearly unreasonable if it did. Undoubtedly many of the houses in Houlton require more or less repairs every year to make them inhabitable. A house might become uninhabitable for want of shingling, yet it would hardly be contended that the above ordinances were intended to prevent the repair of shingling to make it inhabitable, without a license from the municipal officers. We are indeed at a loss to know just what the town meant by the passage in its town meeting of the above vote. There is nothing in the case or the vote, which tends to show the condition of the house which it authorized the defendant to repair, or what repairs would be necessary to make it inhabitable; whether it was shingling, clapboarding, inserting sills or putting on a roof; or that any of the repairs permitted by the vote came within the scope of the ordinances. Our conclusion consequently is that the vote of the town authorizing the defendants to repair and make their house inhabitable, in no way contravenes or even modifies the application of the ordinances invoked by the plaintiffs.

The ordinances are in derogation of the common law and must be construed strictly. They cannot be enlarged by implication. The defendants had a right therefore to do anything to their property not strictly inhibited by the ordinances. Hence it seems, so far as the case or the vote shows, that the town only authorized the defendants to do what they had a right to do without any such vote, and without any violation of the ordinances in question. But when the defendants proceed to go farther, and, as is alleged in the plaintiffs' bill and admitted in the answer, attempt "to complete, erect, alter, raise, roof, enlarge, add to and build upon with wood, said wooden building without any license from the municipal

officers" they then clearly bring themselves within the prohibition of the ordinances.

But the mere fact that the proposed act of the defendants is in violation of the ordinances will not enable the plaintiffs to sustain their bill.

A bill in equity cannot ordinarily be sustained for the mere violation of a municipal ordinance. The threatened act of violation must amount to a nuisance, if done. 13 Am. and Eng. Encyc. 401; *The Mayor of Manchester* v. *Smyth*, 64 N. H. 380; *President and Trustees of the Village of Waupun* v. *Moore*, 34 Wis. 450; Dillon on Munic. Corp., sec. 405.

Nor is a thing a nuisance merely because a municipal ordinance declares it to be such. *Hutton* v. *City of Camden*, 10 Vroom, 122; 23 Am. Rep. 212; *ExParte O'Leary*, 65 Miss. 180; 7 Am. St. Rep. 640; *Jackson* v. *Castle*, 82 Maine, 579; *Pine City* v. *Munch*, 42 Minn. 342.

But the State may declare what may, at law, be deemed a nuisance, *Metropolitan Board of Health* v. *Heister*, 37 N. Y. 661; 23 Am. Rep. 212; note. Dillon on Munic. Corp. 1, sec. 93.

This State has declared, R. S., ch. 4, sec. 93, par. VIII, that buildings erected contrary to the ordinances for which this section provides, are nuisances.

The court in equity at common law has jurisdiction to restrain nuisances, and has specific jurisdiction in this State "in cases of nuisance and waste." R. S., ch. 79, sec. 6, par. V.

Therefore it is clear that equity will take jurisdiction for the threatened violation of a municipal ordinance when such violation contemplates an act which amounts to a nuisance in law, not because the act is a violation of the ordinance but because it is a nuisance.

Another question which arises in the discussion of this case is, how and when a municipal corporation may maintain a bill to restrain a nuisance in the violation of an ordinance which constitutes a nuisance. Some cases uphold the right when it appears that the municipality would sustain special damages or be put to additional responsibility by reason of the threatened acts. *Coast Co., Applt.* v. *Mayor, etc., of Spring Lake*, 58 N. J. Eq. 586; 51 L. R. A., 657, note; *E. & A.*

R. R. Co. v. *Inhbts. of Greenwich*, 25 N. J. Eq. 565; *Jersey City* v. *Central R. R. Co.*, 40 N. J. Eq. 417; *Hutchinson Twp.* v. *Filk*, 44 Minn. 536. And when no special damages or additional responsibility was shown, relief was denied. *Ward* v. *City of Little Rock*, 41 Ark. 526; 48 Am. Rep. 46; *Dover* v. *The Portsmouth Bridge Co.*, 17 N. H. 200; *Mayor* v. *Smyth*, 64 N. H. 380; *Town of Sheboygan* v. *Sheboygan & Fond du lac R. R. Co. et al.*, 21 Wis. 675.

But some courts have held that a municipal corporation as the representative of the equitable rights of the inhabitants may enjoin nuisances affecting matters with reference to which a portion of the power of the State has been confided to it. The right is limited to such matters, with respect to other matters, the right depends upon the same conditions as the right of individuals, namely, special damages, etc. 51 L. R. A. 657 supra, note. *The Metropolitan City Railway Co.* v. *The City of Chicago*, 96 Ill. 620; 42 Minn. 342, supra; *Winthrop* v. *Farrar*, 11 Allen, 398; *Watertown* v. *Mayo*, 109 Mass. 315; *Taunton* v. *Taylor*, 116 Mass. 254. *The Board of Health of the City of Yonkers, Respondent*, v. *John Copcutt, Applt.*, 140 N. Y. 12.

This last proposition seems to be logical and sound and would appear to authorize a town to maintain injunction proceedings against threatened nuisances affecting matters of which the State has confided to it either control or regulation.

The prevention of fires is a matter which the State has confided to the town. R. S., ch. 28, sects. 13, 20, 22, 25, 26 to 45 inclusive.

As the violation of the ordinances in the case at bar constituted a nuisance against the public as a violation of a police regulation, the entry must be,

Bill sustained with costs.

Perpetual injunction to issue.

Case remanded to the court below for a decree in accordance with this opinion.

JOHN A. HOLMES *vs.* THE CONTINENTAL CASUALTY COMPANY.

Aroostook. Opinion December 18, 1906.

Insurance. Accident Policy. Illness Indemnity. "Rheumatism."

The plaintiff was insured by a policy of accident insurance issued by the defendant, in which the latter, upon the conditions named in the policy, promised to pay the insured "an illness indemnity of thirty dollars per month, or at that rate for any proportionate part of a month for the time, after the first week, the insured is necessarily and continuously confined strictly in the house, and being regularly visited by a legally qualified physician, by reason of acute illness that is contracted and begins after this policy has been in full force and effect, without delinquency, for thirty consecutive days immediately preceding the commencement of such illness." The policy also contained this clause: "or in case of illness resulting from tuberculosis, rheumatism, paralysis, lumbago, or lame back sciatica, varicose veins, venereal diseases, dementia or insanity; then, in all such cases referred to in this paragraph, the limit of the company's liability shall be one-tenth of the amount which would otherwise be payable under this policy, anything to the contrary herein notwithstanding."

During the period covered by the policy, the plaintiff was sick with rheumatic fever and was entitled, under the contract of insurance, to recover the sum of forty dollars unless that amount should be reduced to one-tenth thereof by reason of the provision in the policy above quoted. *Held:* that the disease with which the plaintiff suffered although acute, was one form of rheumatism and must be considered to have been included within the meaning of the word "rheumatism" as it was used in the policy.

On report. Judgment for plaintiff.

Action of assumpsit to recover $40 as an illness indemnity for total disability under a policy of insurance issued by the defendant company.

Tried at the December term, 1905, of the Supreme Judicial Court, Aroostook County. At the conclusion of the evidence it was agreed to report the case to the Law Court for decision.

The material facts appear in the opinion.

E. A. Holmes and John E. Magill, for plaintiff.

Shaw & Lewin, for defendant.

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

WISWELL, C. J. The plaintiff was insured by a policy of accident insurance issued by the defendant, in which the latter, upon the conditions named in the policy, promised to pay the insured, quoting from the policy: "An illness indemnity of thirty dollars per month, or at that rate for any proportionate part of a month for the time, after the first week, the insured is necessarily and continuously confined strictly in the house, and being regularly visited by a legally qualified physician, by reason of acute illness that is contracted and begins after this policy has been in full force and effect, without delinquency, for thirty consecutive days immediately preceding the commencement of such illness." The policy also contained this clause; "or in case of illness resulting from tuberculosis, rheumatism, paralysis, lumbago or lame back sciatica, varicose veins, venereal diseases, dementia or insanity; then in all such cases referred to in this paragraph, the limit of the company's liability shall be one-tenth of the amount which would otherwise be payable under this policy, anything to the contrary herein notwithstanding."

It is admitted that the plaintiff had performed all the conditions of the policy; that during the period covered by the policy he was sick with rheumatic fever, and that he is entitled to recover, under the contract of insurance, the amount sued for, forty dollars, unless that amount should be reduced to one-tenth thereof by reason of the provision in the policy last quoted. The question is, therefore, whether rheumatic fever is included by the term "rheumatism" as that word is used in the policy. The contention of the plaintiff is that by the use of this word the parties meant chronic rheumatism; that rheumatic fever is an acute sickness or disease and consequently was not included within the meaning of the word; that there was no reason why the company should have excluded from the full benefit of its indemnity a person suffering with any acute sickness. But the parties did not use any adjective descriptive of the kind of rheumatism intended, they simply used the word "rheumatism," which is defined in the Century Dictionary as follows: "The disease

specifically known as acute articular rheumatism. The name including also sub-acute and chronic forms apparently of the same causation." In the same dictionary acute articular rheumatism is thus defined: "An acute febrile disease, with pains and inflammation of the joints as the prominent symptoms."

The plaintiff suffered with rheumatic fever which is acute articular rheumatism, this is the first definition given in the Century Dictionary of the word "rheumatism," as above quoted. Rheumatism may be either articular or muscular, and it may be either acute or chronic. We are unable to say that by the use of this word in the contract the parties intended to include one form and exclude another. Apparently they used the word with its ordinary meaning, which includes all forms, articular and muscular, acute and chronic. The disease with which the plaintiff suffered although acute, was one form of rheumatism, and must be considered to have been included within the meaning of the word as it was used.

The plaintiff's argument that the language in the clause last quoted from the policy was only intended to reduce the indemnity when the insured was suffering from one of the diseases mentioned in a chronic form, loses much of its force from the fact that, by the contract, the insurer only agreed to pay an illness indemnity when "the insured is necessarily and continuously confined strictly in the house, and being regularly visited by a legally qualified physician, by reason of acute illness." But this particular acute illness was specially provided for, and the amount of indemnity reduced by the provision which we have quoted.

Under the terms of the stipulation by which the case was reported to the Law Court, the plaintiff is entitled to a judgment for the reduced amount.

Judgment for plaintiff for $4.
One quarter costs will follow.

STATE OF MAINE *vs.* JOHN B. MORIN.

York. Opinion December 18, 1906.

Evidence. Admissions. Explanations. R. S., chapter 29, section 49.

The defendant was tried upon an indictment charging him with keeping and maintaining a liquor nuisance. The State proved that during the period covered by the indictment, the defendant had paid a United States special tax as a retail liquor dealer. The defendant offered to show the circumstances in relation to his taking out this license, and why the tax had been paid by him, which evidence was excluded.

The fact of the payment of this special tax is equivalent to an admission claimed to have been made. But it is always competent, not only to deny the fact of an admission, but, as well, to explain its significance by showing other facts which may have that effect. The real question as to the importance and weight of the fact of the payment of this tax, is as to the intent of the person who made the payment at the time, and whenever the intent of a person is relevant to the issue that person may testify as to what his intention was, although the value of such testimony is always for the jury.

Held: that the defendant was entitled to make an explanation of the fact relied upon by the State and to have the jury consider it in connection with that fact.

On exceptions by defendant. Sustained.

Indictment against the defendant for keeping and maintaining a liquor nuisance at Biddeford. Tried at the May term, 1906, of the Supreme Judicial Court, York County. Verdict, guilty. During the trial, the State proved that in January, 1905, during the period covered by the indictment, the defendant paid a United States special tax as a retail liquor dealer. (See Revised Statutes, chapter 29, section 49.) The defendant then "offered to explain why and how he came to pay the tax," which evidence was excluded by the presiding Justice. To this ruling the defendant took exceptions.

The case appears in the opinion.

George L. Emery, County Attorney, for the State.

George F. & Leroy Haley and John P. Deering, for defendant.

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

WISWELL, C. J. The defendant was tried upon an indictment charging him with maintaining a liquor nuisance between July 1, 1904, and the day of the finding of the indictment, at the May term, 1905, of the court. The State proved that in January, 1905, during the period covered by the indictment, the defendant paid a United States special tax as a retail liquor dealer. Thereupon counsel for the defendant sought by various questions asked of the defendant to show the circumstances in relation to his taking out this license, and why the tax had been paid by him, one question being: Why did you pay this special tax?" The question, and others of a similar character asked for the same general purpose were excluded. We think that this was erroneous.

It is provided by one of the clauses of R. S., c. 29, sec. 49, that: "The payment of the United States special tax as a liquor seller . . . . shall be held to be prima facie evidence that the person or persons paying said tax, ... are common sellers of intoxicating liquors, and the premises so kept by them common nuisances." This provision was construed in *State* v. *Intoxicating Liquors*, 80 Maine, 57, wherein it was declared by the court that the meaning of this clause was that "such evidence is competent and sufficient to satisfy a jury in finding the defendant guilty, provided it does, in fact, satisfy them of his guilt beyond a reasonable doubt, and not otherwise." This was affirmed in *State* v. *O'Connell*, 82 Maine, 30.

That is the weight to be given to the fact of the payment of this special tax, upon the question of the guilt of the person paying the tax, is entirely for the jury. The process of reasoning, by which guilt may be inferred from this fact, is that it is probable, or, at least, more probable than otherwise, that a person would not pay a tax as a liquor dealer unless he intended to engage in that business, and that consequently it is a proper inference by induction from the fact of such payment that he is engaged in such business. But it is not impossible that the fact of the payment of this tax may be con-

sistent with some other hypothesis. For instance, suppose a duly appointed liquor agent should be informed by an official connected with the internal revenue department of the United States that it was necessary for him as a liquor agent to pay this special tax, and believing that this was necessary, and solely for the purpose of complying with the requirements of the United States laws, he pays the special tax, would it not be admissible for him to explain the circumstances of the payment and the reasons why he made the payment. It is equally true that the payment of the tax may be consistent with some other hypothesis besides that of an intention to engage in the business of unlawfully selling liquor.

As said by Prof. Wigmore in his work on evidence, Vol. I, sec. 31: "The peculiar danger, then, of inductive proof is that there may be other explanations than the desired one for the fact taken as the basis of proof." For this reason, whenever a fact is relied upon as tending to prove a proposition, it must be competent and proper to offer an explanation of that fact for the purpose of showing that whatever inference may be ordinarily drawn therefrom, that the fact relied upon is consistent with some other hypothesis or to show, by the explanation offered, that the probable inference, or the inference desired to be drawn from the fact, is not the true one. "On the general logical principle of explanation the opponent may always introduce such facts as serve to explain away on some other hypothesis the apparent significance of the fraudulent conduct." Wigmore on Evidence, sec. 281. The rule is, of course, the same when the explanation offered is to explain away on some other hypothesis the apparent significance of some fact relied upon.

The fact of the payment of this special tax is equivalent to an admission claimed to have been made. But it is always competent, not only to deny the fact of the admission, but, as well, to explain its significance by showing other facts which may have that effect. The real question as to the importance and weight of the fact of the payment of this tax, is as to the intent of the person who made the payment at the time. It is well settled that whenever the intent of a person is relevant to the issue that person may testify as to what his intention was. The value of such testimony is, of course, always

for the jury. The explanation offered in any case may be valueless and unsatisfactory, but the defendant in this case was entitled to make an explanation of the fact relied upon by the State, and to have the jury consider it in connection with that fact.

Exceptions sustained.

STATE OF MAINE *vs.* AWILDA BREWER.

Lincoln. Opinion December 18, 1906.

"Short Lobsters." Indictment. Duplicity. Allegations. Statute 1885, chapter 275, section 3. Statute 1901, chapter 284, section 21. R. S., chapter 41, section 17.

In an indictment under R. S., chapter 41, section 17, it was charged that the respondent, at the time and place named therein, "did have in her possession sixty-seven live lobsters and 53 cooked lobsters, each less than ten and one-half inches in length, then and there measured in manner as follows:" then followed the language of the statute as to the method by which the lobsters were measured. To this indictment the respondent filed a general demurrer.

Held: (1) that the indictment does not charge two offenses; (2) that as the statute now reads, it is not necessary to allege that the lobsters were not liberated alive, and if such lobsters were liberated alive, that fact may be shown in defense; (3) that it was not necessary to allege that the live lobsters were less than ten and one-half inches in length when caught, but that it was necessary to make this allegation with reference to the cooked lobsters; (4) that the indictment must be regarded as charging the defendant as having in her possession the sixty-seven live lobsters only, and to that extent, the indictment is good.

On exceptions by defendant. Overruled.

Indictment against the defendant for violation of the "short lobster statute," R. S., chapter 41, section 17. The indictment, omitting formal parts, is as follows:

"The Grand Jurors for said state upon their oath present, that Alwilda Brewer of Boothbay Harbor in the County of Lincoln, at Boothbay Harbor in said County of Lincoln, on the thirty-first day of January, in the year of our Lord one thousand nine hundred and six, did have in her possession sixty-seven live lobsters and fifty-three cooked lobsters, each less then ten and one-half inches in length, then and there measured in manner as follows: by taking the length of the back of each lobster, measured from the bone of the nose to the end of the bone of the middle flipper of the tail, said length being then and there taken in a gauge with a cleat upon each end of the same, measuring ten and one-half inches between said cleats, with the lobster laid and extended upon its back its natural length upon the gauge, without stretching or pulling, against the peace of the state and contrary to the form of the statute in such case made and provided."

The defendant demurred generally to this indictment, and the demurrer was overruled, and thereupon the defendant took exceptions.

The case appears in the opinion.

Weston M. Hilton, County Attorney, for the State.

C. R. Tupper, for defendant.

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

WISWELL, C. J. In an indictment under R. S., c. 41, sec. 17, it was charged that the respondent at the time and place named therein, "did have in her possession sixty-seven live lobsters and fifty-three cooked lobsters, each less than ten and one-half inches in length, then and there measured in manner as follows;" then followed the language of the statute as to the method by which the lobsters were measured.

The respondent filed a general demurrer to this indictment, which was overruled and the case comes here upon exceptions thereto. It is argued that the indictment is bad in three respects. 1. Because of duplicity, two distinct offenses, it is claimed, being charged in one count of the indictment. 2. Because of the want of an allegation

that the lobsters were not liberated alive at the risk and cost of the parties taking them. 3. Because it is not alleged that the lobsters were less than ten and one-half inches in length, when caught.

We do not think that two offenses are charged in the same indictment. It is simply an allegation that the respondent had in her possession a certain number of short lobsters, a part of them alive and a part of them cooked. It is one offense only. Under this indictment, so far as this point is concerned, the respondent might be found guilty of illegally having in her possession any number of short lobsters less than the whole number alleged. *Thompson* v. *Smith*, 79 Maine, 160. The indictment is not bad for duplicity.

Under chapter 275, sec. 3, of the Public Laws of 1885, in force when the indictment in *State* v. *Bennett*, 79 Maine, 55, was drawn, the omission to allege that the lobsters were not liberated alive would have been fatal. It was so decided in that case, and affirmed in *State* v. *Dunning*, 83 Maine, 178. The statute then was "it is unlawful to catch . . . . or possess for any purpose" between the dates named "any lobsters less than ten and one-half inches in length, alive or dead, ... and any lobsters shorter than the prescribed length when caught shall be liberated alive at the risk and cost of the parties taking them, under a penalty of one dollar for each lobster so caught . . . . or in possession — not so liberated." In both of these cases it was decided that the statutory offense, and the penalty prescribed therefor, was for not liberating such lobsters alive. But by chapter 284, section 21, of the Public Laws of 1901, the words at the end of the clause "not so liberated" were omitted. As the statute now reads the offense, and the penalty therefor, is, among other things, having in possession short lobsters for any purpose. The fact that such lobsters were liberated alive by the person having them in possession may be shown in defense, but it is not now necessary to allege in the indictment that they were not so liberated alive.

It was unnecessary to allege that the live lobsters mentioned in the indictment were less then ten and one-half inches in length when caught. But it was necessary to make this allegation with reference to the cooked lobsters. This was decided in *Thompson* v.

Smith, 79 Maine, 160, wherein the court, in construing the statute then in force, said: "It must mean this: That it is illegal for any person to have in his possession a live lobster less than nine inches long, or a dead lobster, no matter what the length which was less than nine inches long when alive — that is, when taken from the sea. No person can have a lobster in his possession which, when alive, was less than nine inches long. But if a person has in his possession a boiled lobster less than nine inches long, and the same lobster was nine inches long when alive, in such case no offense is committed by the possession." No change has been made which would affect the meaning of the statute, in this respect, since this construction by the court of a prior act in 1887. The result is that the indictment must be regarded as charging the respondent as having in her possession the sixty-seven live lobsters only. To that extent the indictment is good. By stipulation made at the time the demurrer was filed the respondent has a right to plead over.

Exceptions overruled. Indictment adjudged good.

In Equity.

MARY C. FARNSWORTH et als.,

vs.

GEORGE F. WHITING et als.

Knox. Opinion December 18, 1906.

Wills. Construction. Lapsed Legacy. Words and Phrases. R. S., chapter 76, section 10.

It is the general rule that a legacy or devise will lapse when the legatee or devisee dies before the testator. A testator however may by express provisions in his will, or by language from which a clear implication may be drawn that such was his intention prevent a lapse of the devise in case of the death of the legatee or devisee before the testator.

But it is also well settled that the use of mere words of limitation will not prevent the lapsing of a devise, and that the phrases, in different forms frequently and commonly used in a devise such as "and his heirs," or "and his heirs or assigns" are words of limitation merely, descriptive of the nature of the estate devised, and do not create a substituted devise.

In the case at bar, the first and second clauses of the will of the deceased testator read as follows:

"First. I give, devise and bequeath unto my wife Helen A. Farnsworth and her heirs, one half of all my estate, both real and personal, in whatever it may consist or wherever situated at the time of my decease."

"Second. I give, devise and bequeath unto my wife, Helen A. Farnsworth the remaining one half of all my said estate, both real and personal, to be by her used and disposed of during her natural life, precisely the same as I myself might do were I living; and giving my said wife full power to sell, exchange, invest and reinvest the same, in the same manner I might do if living, but if any of the said remaining one half of my said estate shall remain undisposed of, by my said wife at the time of her decease, and my mother, Mary C. Farnsworth, shall then be living, then I give, devise and bequeath all such residue and remainder of said remaining one half of my estate unto my mother, Mary C. Farnsworth, but in the event that my wife shall survive my mother then, on the decease of my mother I give, devise and bequeath all said residue and remainder of said one half of my estate unto my wife Helen A. Farnsworth and her heirs, it being my intention herein, that on the decease of my mother, all of my estate, real and personal shall become the property of my wife, she to have full power to dispose of the same, by will or otherwise, as she may think proper." The testator died on May 9, 1905, his wife, Helen A. Farnsworth one of the beneficiaries named in his will, died May 5, 1905, four days prior to the death of the testator. The testator and his wife left no issue. Mary C. Farnsworth, the mother of the testator, to whom, by the will, a remainder in a portion of the estate was given in case she survived the wife, is still living.

Held: (1) that the devise of one-half of the testator's estate under the first clause of the will, lapsed by the death of the devisee prior to that of the testator, that there was no devisee by substitution, and no other testamentary disposition of this one-half of the testator's estate upon the decease of the testator, therefore, this one-half of his estate descended as intestate property according to the statutes of descent and distribution; (2) that to the other half of the testator's estate, mentioned in the second clause of the will the death of the life tenant merely accelerated the taking of the remainder by the mother. Upon the death of the testator his mother took under the will this one-half of the estate in fee simple.

The common law rule that a devise to a devisee who dies prior to the death of the testator, will lapse, has been modified under certain conditions in this state by R. S., chapter 76, section 10, wherein it is provided: "When a relative of the testator, having a devise of real or personal estate, dies

before the testator, leaving lineal descendants, they take such estate as would have been taken by such deceased relative if he had survived." But this statutory provision in no way changes the rule in the case at bar for two reasons, viz: The deceased devisee, the wife of the testator, was not a relative of the testator within the meaning of the statute, and she did not leave any lineal descendants.

See *Farnsworth, Appellant,* v. *Whiting,* post.

In equity. On report. Decree according to opinion.

Bill in equity asking for the construction of the will of James R. Farnsworth, late of Rockland, deceased. Heard on bill, answer and evidence at the April term, 1906, of the Supreme Judicial Court, Knox County. At the conclusion of the evidence the cause was reported to the Law Court, and "upon so much of the evidence as is legally admissible" that Court "to enter such judgment as the legal rights of the parties require." (See *Mary C. Farnsworth et als., Appellants,* v. *George F. Whiting et al.,* next following this case.)

All the material facts appear in the opinion.

Orville Dewey Baker, for plaintiffs.

D. N. Mortland and Rodney I. Thompson, for defendants.

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

WISWELL, C. J. Bill in equity asking for the construction of the will of James R. Farnsworth, late of Rockland, deceased.

The two clauses of the bill to be construed, are as follows: "First. I give, devise and bequeath unto my wife, Helen A. Farnsworth and her heirs, one half of all my estate, both real and personal, in whatever it may consist or wherever situated at the time of my decease."

"Second. I give, devise and bequeath unto my wife, Helen A. Farnsworth the remaining one-half of all my said estate, both real and personal, to be by her used and disposed of during her natural life, precisely the same as I myself might do were I living; and giving my said wife full power to sell, exchange, invest and re-invest the same, in the same manner I might do if living, but if any of the said remaining one-half of my said estate shall remain undisposed of, by my said wife at the time of her decease, and my mother, Mary C.

Farnsworth, shall then be living, then I give, devise and bequeath all such residue and remainder of said remaining one-half of my estate unto my mother, Mary C. Farnsworth, but in the event that my wife shall survive my mother then, on the decease of my mother, I give, devise and bequeath all such residue and remainder of said one-half of my estate, unto my wife Helen A. Farnsworth and her heirs, it being my intention herein that on the decease of my mother, all my estate, real and personal shall become the property of my wife, she to have full power to dispose of the same, by will or otherwise, as she may think proper."

James R. Farnsworth died on May 9, 1905, his wife, Helen A. Farnsworth, one of the beneficiaries named in his will, died May 5, 1905, four days prior to the death of the testator. The testator and his wife left no issue. Mary C. Farnsworth, the mother of the testator, to whom, by the will, a remainder in a portion of the estate was given in case she survived the wife, is still living. The parties to the bill are Mary C. Farnsworth, mother of the testator, Lucy C. Farnsworth and Josephine Farnsworth Rollins, both sisters of the testator, complainants, and George F. Whiting and Isabella F. Martin, the brother and sister and only next of kin of Helen A. Farnsworth, defendants.

If the testator's wife had survived him, the construction of these two clauses of the will would have been very simple. Under the first clause she would have taken an estate in fee simple in one-half of all the testator's property at the time of his decease. Under the second clause she would have taken an estate for life, with full power of disposal, in the remaining one-half of her husband's property, with a remainder to the testator's mother in fee simple, if the latter survived the wife, of all that remained of this half undisposed of at the time of the wife's decease, and in the event of the death of the mother, leaving the wife surviving, the latter would have then taken an estate in fee in this remaining one-half of the testator's property.

How were these results affected by the fact that the death of the wife occurred before that of the testator? The contention of the defendants, the heirs of Mrs. Farnsworth, is that they, as her heirs,

took the first one-half of the property devised, as substituted devisees, in her place; that the devise in the first clause was equivalent to a devise to her, if living at the time of the testator's death, if not, to them described as her heirs; that by the use of the words in the devise to the wife, "and her heirs," the testator evinced an intention, by implication, at least, that the devise should not lapse, upon her death prior to his, but that they should take under the will as substituted devisees.

The general rule is that a legacy or devise will lapse when the legatee or devisee dies before the testator. A testator may by express provisions in his will, or by language from which a clear implication may be drawn that such was his intention prevent a lapse of the devise in case of the death of the legatee or devisee before the testator. But it is equally well settled that the use of mere words of limitation will not prevent the lapsing of the devise, and that the phrases, in different forms frequently and commonly used in a devise, such as "and his heirs," or "and his heirs or assigns" are words of limitation merely descriptive of the nature of the estate devised, and do not create a substituted devise. Numerous cases from many jurisdictions in support of these general rules may be found in 18 A. & E. Encycl. of L., 2d Ed., 749 et seq.

This rule of interpretation has been adopted in very clear and emphatic language in this State in *Keniston* v. *Adams*, 80 Maine, 290, followed by *Morse* v. *Hayden*, 82 Maine, 227, and *Stetson* v. *Eastman*, 84 Maine, 367. A leading case in Massachusetts upon the subject is that of *Kimball* v. *Story*, 108 Mass. 384, wherein it is said: "The general rule, prevailing in equity as at law, that if a legatee dies after the making of the will and before the death of the testator, the legacy lapses, is not affected by the insertion, after the name of the legatee, of the words 'his heirs, executors, administrators and assigns,' unless a declaration that the legacy shall not lapse is superadded; for those words, according to their uniform and well established interpretation, only express the intention of the testator to pass the absolute property in the estate real or personal to the legatee." This case has been followed in three recent Massachusetts cases, *Wood* v. *Seaver*, 158 Mass. 411; *Bryson* v. *Holbrook*, 159

Mass. 280, and *Horton* v. *Earle*, 162 Mass. 448. In all of which cases it was held by the court that similar expressions were only words of limitation, descriptive of the estate devised; that the death of the devisee or legatee having occurred prior to that of the testator, the legacy lapsed, and that the words did not show an intention upon the part of the testator to create a devisee by substitution.

It is true that courts have not infrequently held that the addition of the words "or heirs," instead of, as in this case, "and heirs" implies a substitution so as to prevent a lapse of the devise upon the death of the devisee. As said by this court in *Keniston* v. *Adams*, supra: "Although a very refined interpretation, it has been resorted to in instances where justice can be best administered only by its application." It is also true, as remarked in that case: "But courts have in some instances gone so far as to bring under the same rule devises running to a person named 'and' his heirs, by making the word 'and' read as if it were the word 'or,' but this has never been done unless the other provisions in the will require such a construction, and we can find no case where it has been permitted, if the devise runs to assigns as well as to heirs." As expressed in the case of Gilmore's estate, 154 Penn. St. 523, "Courts will transpose the clauses of a will, and construe 'or' to be 'and' and 'and' to be 'or' only when absolutely necessary to do so in order to support the evident meaning of the testator."

There is nothing in this will which would require or permit the substitution of the word 'or' for that used, and there can nowhere be found in the will the slightest intimation of any intention upon the part of the testator to make the heirs of his wife his beneficiaries in case her death should occur before his. It is argued upon the part of the wife's heirs that such an intention may be discovered from the fact that the testator divided his estate into two halves, making a different disposition of each, but his purpose in doing this seems to us perfectly apparent. He desired that his wife should have one-half of the estate absolutely. As to the other half he desired to make a provision for the benefit of his mother in the contingency that she should outlive his wife, but that, if the wife outlived the mother, then his purpose was that the wife should have the whole of his

estate absolutely and in fee simple. And this obvious purpose was carried into effect by appropriate language.

This common law rule that a devise to a devisee who dies prior to the death of the testator, will lapse, has been modified under certain conditions in this State by R. S., c. 76, sec. 10, wherein it is provided: "When a relative of the testator, having a devise of real or personal estate, dies before the testator, leaving lineal descendants, they take such estate as would have been taken by such deceased relative if he had survived." But this statutory provision in no way changes the rule in this case for two reasons. The deceased devisee, the wife of the testator, was not a relative of the testator within the meaning of the statute. *Keniston* v. *Adams,* supra. And she did not leave any lineal descendants. *Morse* v. *Hayden,* supra.

The parol testimony offered in this case is utterly useless as affording any assistance in the construction of the will, much of it was inadmissible and the rest of it of no value. In the construction of a will parol testimony is frequently of some assistance for the purpose of identifying the beneficiary, or the subject matter of the devise, or explaining the situation and circumstances surrounding the testator at the time of making the will to be construed, or for the purpose of throwing some light upon the sense in which words of doubtful and ambiguous meaning were used. But, the testator's "declarations of intention, whether made before or after the making of the will, are alike inadmissible." I Greenl. on Evidence, sec. 290.

As to the first clause, then, the devise lapsed by the death of the devisee prior to that of the testator, there was no devisee by substitution, and no other testamentary disposition of this one-half of the testator's estate. Upon his death, that one-half of his property, therefore, descended as intestate property according to the statutes of descent and distribution. As to the other half of his estate, mentioned in the second clause of the will, the death of the life tenant merely accelerated the taking of the remainder by the mother. Upon the death of the testator his mother took this one-half of the estate in fee simple, under the will.

A decree may be made in accordance with the opinion and at that

time an order may be made for the allowance of reasonable counsel fees for both sides, to be paid out of the estate.

So ordered.

MARY C. FARNSWORTH et als., Appellants,

vs.

GEORGE F. WHITING et al.

Knox. Opinion December 18, 1906.

Administration. Decree. Appeal. Order by Supreme Court of Probate. R. S., chapter 66, sections 8, 18, 22.

A certain person who was not of the next of kin, was appointed administrator with the will annexed of the estate of James R. Farnsworth by the Probate Court of Knox County. From this decree an appeal was taken to the Supreme Court of Probate. After hearing in the Supreme Court of Probate, the presiding Justice made the following order: "That the appeal be sustained, and the decree of the Probate Court appealed from be reversed; that the cause be remanded to the Probate Court below for further proceedings in accordance with this decision; and the Judge of the Probate Court below is hereby directed to appoint the said Lucy C. Farnsworth, (one of the next of kin) administratrix, with the will annexed on said estate, if she shall be found by said Judge to be qualified and suitable for the trust, as requested by all those interested in said estate as heirs, devisees or legatees. If for legal and substantial reasons the said Lucy C. Farnsworth is adjudged by him to be unsuitable for said trust, the said Judge of Probate shall commit administration of the estate with the will annexed to another of the said next of kin, or two of them as he thinks fit, if qualified for the trust; but if none of said next of kin are qualified and suitable for said trust, he shall commit the administration on said estate with the will annexed, to such person as he deems suitable."

Held: that this order of the Supreme Court of Probate was in accordance with the provisions of the statutes.

See *Farnsworth* v. *Whiting*, ante.

On exceptions by defendants. Overruled.

Appeal from the decree of the Probate Court, Knox County,

appointing an administrator with the will annexed, of the estate of James R. Farnsworth. This case is an outgrowth of the controversy involved in the preceding equity case, *Mary C. Farnsworth et als.* v. *George F. Whiting et al.*

The case fully appears in the opinion.

Orville Dewey Baker, for plaintiffs.

D. N. Mortland and Rodney I. Thompson, for defendants.

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

WISWELL, C. J. This case, an appeal from the appointment of an administrator by the Probate Court, is an outgrowth of the controversy involved in the preceding one.

Upon the petition of George F. Whiting and Isabella A. Martin the next of kin of Helen A. Farnsworth, the deceased wife of James R. Farnsworth, Joseph E. Moore, Esq., was appointed administrator with the will annexed of James R. Farnsworth by the Probate Court of Knox County, apparently upon the assumption that these petitioners were interested in his estate as beneficiaries under his will. This assumption was erroneous, as we have seen in the preceding case. From this decree the mother and two sisters of James R. Farnsworth, the deceased, appealed to the Supreme Court of Probate.

After a hearing in that court, the Justice presiding made the following order: "That the appeal be sustained, and the decree of the Probate Court appealed from be reversed; that the cause be remanded to the Probate Court below for further proceedings in accordance with this decision; and the Judge of the Probate Court below is hereby directed to appoint the said Lucy C. Farnsworth administratrix, with the will annexed on said estate, if she shall be found by said Judge to be qualified and suitable for the trust, as requested by all those interested in said estate as heirs, devisees or legatees. If for legal and substantial reasons the said Lucy C. Farnsworth is adjudged by him to be unsuitable for said trust, the said Judge of Probate shall commit administration of the estate with the will annexed to another of the said next of kin, or two of them

as he thinks fit, if qualified for the trust; but if none of said next of kin are qualified and suitable for said trust, he shall commit the administration on said estate with the will annexed, to such person as he deems suitable." To which ruling and order the appellees alleged exceptions.

There can be no question as to the propriety of this order. By R. S., c. 66, sec. 22, "If there is no person whom the judge can appoint executor of any will according to section eight, or if the only one appointed neglects to file the required bond within the time therein allowed, he may commit administration of the estate, with the will annexed, to such person as he might appoint if the deceased had died intestate." As Helen A. Farnsworth, whose death occurred prior to that of the testator, was the sole executrix named in the will, section eight referred to in the section quoted, is not applicable, it therefore became the duty of the Judge of Probate to appoint "such person as he might appoint if the deceased had died intestate." By section eighteen of the same chapter, administration should have been granted to the next of kin, or to two or more of them, "if the applicants are more than twenty one years old and are in other respects qualified for the trust." There was no adjudication by the Probate Court that the next of kin of James R. Farnsworth, the deceased, were unsuitable for the trust. The order of the Supreme Court of Probate was in accordance with the provisions of the statutes. As no order in relation to costs was made by the Supreme Court of Probate, none will be made upon these exceptions.

Exceptions overruled.
Decree of Supreme Court of Probate affirmed.

THE PUBLIC WORKS COMPANY *vs.* CITY OF OLD TOWN.

Penobscot. Opinion December 18, 1906.

Water Contract. Construction. Election. Meters.

A contract made in 1890 by the plaintiff's predecessors, to whose right it has succeeded, with the defendant in relation to furnishing water for fire protection and other public purposes, and for the compensation to be charged for water for domestic purposes contained in this clause: "Said First Party agrees to furnish water at its mains without extra charge, for the following municipal purposes: . . . . . for eighteen (18) taps or faucets in computing which each orifice beyond the main shall be counted as one tap, except that in the town hall and in school houses one faucet may be connected with all the water closets and urinals in any one building. But float or spring valves shall be used in all water closets and urinals and water troughs, and no waste of water shall be allowed."

In addition to the water charged in the account annexed, the plaintiff has for many years furnished without charge water for the city hall with thirteen separate taps or faucets, for the city farm with six faucets, and for the city farm stable with one faucet, each building being connected with the main by one service pipe. The plumbing for each water closet and for the urinal in the town hall is entirely separate and distinct from that of each other.

Held: that each of these faucets was an orifice beyond the main and must be counted as one tap, and that the plaintiff had performed its part of the contract in this respect, by furnishing water at its mains for at least eighteen faucets in these public buildings.

The city having failed to notify the company of its election as to what particular faucets the company should furnish without extra charge, *Held:* that the company had a right to make such election and to charge for water furnished in addition to that to be supplied free of charge.

There being no contract to the contrary, *Held:* that the company had the right to put on meters and charge for the water at fair and reasonable meter rates.

On report. Judgment for plaintiff.

Assumpsit upon account annexed in which the plaintiff sought to recover for water furnished by it to the defendant for municipal purposes at its school houses and its pest house, upon an implied promise.

Tried at the January term, 1906, of the Supreme Judicial Court, Penobscot County. Plea, the general issue. At conclusion of the testimony, the case was "reported to the Law Court for determination."

The case appears in the opinion.

Charles H. Bartlett, for plaintiff.

F. J. Whiting, for defendant.

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

WISWELL, C. J. This is an action of assumpsit upon an account annexed to the writ in which the plaintiff seeks to recover for water furnished by it to the defendant for municipal purposes at its school houses and its pest house, upon an implied promise. The city admits that it has received and used the water charged for, but claims that this water was to be furnished by the plaintiff to the city free of extra charge under a contract made in the year 1890 between the predecessors of the plaintiff and the then town of Oldtown. Both parties, it is agreed, have succeeded to, and are now bound by, this contract.

In the contract of 1890, in relation to furnishing water for fire protection and other public purposes, and for the compensation to be charged for water for domestic purposes, there was this clause: "Said First Party agrees to furnish water at its mains without extra charge, for the following municipal purposes: . . . . For eighteen (18) taps or faucets in computing which each orifice beyond the main shall be counted as one tap, except that in the town hall and in school houses one faucet may be connected with all the water-closets and urinals in any one building. But float or spring valves shall be used in all water closets and urinals and water troughs, and no waste of water shall be allowed."

In addition to the water charged in the account annexed, the plaintiff has furnished for many years water for the city hall, with thirteen separate taps or faucets, for the city farm with six faucets, and the city farm stable with one faucet, each building being con-

nected with the main by one service pipe. The contention of the defense is that under this clause for water to be furnished to the municipality without extra charge, "for eighteen taps or faucets" the service pipe from the company's main to each public building should only be counted as one tap or faucet, and that consequently the company has not furnished water for all the public buildings and school houses, both that charged in the account annexed, and that not charged, in excess of the requirements of the contract for water without extra charge.

But this contention is answered by the express stipulation of the parties wherein this language is used: "In computing which each orifice beyond the main shall be counted as one tap." The parties seem to have anticipated that without this language a question might arise as to the meaning of the clause, and to have used the language quoted for the very purpose of making the meaning clear and unmistakable. It was clearly provided that each connection at the main should not be counted as one of the eighteen taps for which the company should furnish water without extra charge, but that each opening beyond the main should be so counted. This is made even more unmistakable by the exception immediately following, "except that in the town hall and in school houses one faucet may be connected with all the water closets and urinals in any one building."

Again, the defense claims that under the exception above quoted the water company has not furnished water, exclusive of the water charged in the account annexed, for the number of faucets specified in the contract, and that consequently some, at least, of the water charged should be included in the water which was to be furnished without extra charge. The contract provided, as we have seen, that "one faucet may be connected with all the water closets and urinals in any one building," in the town hall and school houses. But the undisputed testimony shows that this has not been done, that, upon the contrary the plumbing for each water closet and for the urinal in the town hall is entirely separate and distinct from that of each other, so that each opening in the water pipe for these fixtures must be counted as one tap or faucet.

Under this construction of the contract the plaintiff has performed

its part of the contract in this respect, by furnishing water at its mains for at least eighteen faucets in these public buildings, apart from the water sued for in this suit. It is true that the city has never notified the company of its election as to what particular faucets the company should furnish water for without extra charge, but on account of this failure on the part of the city to elect the company have the right to do so, and to charge for water furnished in addition to that to be supplied free of extra charge.

The account sued is made up in part of flat or annual rates and in part of meter rates, which are admitted to be fair and reasonable if the company had the right to put on meters. That it had such a right, there being no contract to the contrary, and the rates being reasonable, cannot be doubted. *Robbins* v. *Bangor Railway Company,* 100 Maine, 496.

No question is raised by the defense as to the liability of the city upon an implied promise to pay for services rendered for a municipal purpose, where, as in this case, the city received the beneficial use of the services rendered, and where, from the fact that bills for this water furnished were rendered by the company to the city at the end of each six months, the city may be presumed to have known that the water was furnished under an expectation and claim of payment therefor.

Under this construction of the contract of 1890, and the defendant's admissions, the plaintiff is entitled to judgment for the sum of $1457.50, and interest upon various portions thereof from the dates of demand therefor to the date of judgment. The case may be remanded to nisi prius for the computation of this interest.

So ordered.

STATE OF MAINE *vs.* DANIEL H. HERLIHY.

Hancock. Opinion December 18, 1906.

Criminal Law. Evidence. Deceased Witness. Implied Confessions. Nolo Contendere. Constitution of Maine, Article I, section 6. R. S., chapter 84. section 119.

At the trial of the respondent before the Ellsworth Municipal Court, upon the charge of keeping intoxicating liquors intended for unlawful sale, one J. M. McFarland testified as a witness called by the State. The respondent was found guilty in that court and sentenced, and the case was then brought to the Supreme Judicial Court for Hancock County upon the respondent's appeal. Prior to the trial in the appellate court, McFarland died; at that trial the death of McFarland having been shown, the State offered to prove his testimony at the first trial of the case, before the Municipal Court, by the judge of that court who presided at the trial. This testimony was admitted subject to the respondent's exception.

The rule is so general as to have become practically universal that the testimony of a witness, since deceased, given at a trial in which he was cross-examined by the opposite party, or where there was an opportunity for cross-examination, is admissible in evidence at a subsequent trial of the same action or proceeding.

The testimony of a deceased witness, on a former trial of the same action, may be given in evidence, if the substance of it can be proved, although the exact language cannot be. That it is sufficient to prove the substance of the testimony of a deceased witness, as held by the court of Maine, is now the almost universal doctrine.

Held: that the testimony of the Judge of the Ellsworth Municipal Court, who did not pretend to be able to recollect the precise words of the deceased witness, but who testified that he could give the substance of the whole of his testimony at the former trial of the case, that testimony having been given in the presence of the accused, where he had an opportunity to cross-examine the witness, was properly admitted in evidence.

At the trial in the appellate court the respondent took the stand and testified in his own behalf. Thereupon the State, for the purpose of affecting the credibility of the respondent as a witness, offered the records of this court which, it was claimed, showed the respondent's conviction of criminal offenses upon two occasions. The record offered in each case contained a summary of the indictment against the respondent, certain statements as to the apprehension of the respondent, and a continuance of the case,

and concluded as follows: "And now at this term, the respondent is set at the bar of the court and the reading of the indictment waived, and the respondent says that he is not willing to contend against the State. Whereupon, the court orders and sentences that the said Daniel H. Herlihy pay a fine of one hundred dollars and no costs. Fine paid April 18, 1904." These records were admitted in evidence for the purpose stated, subject to the respondent's exceptions.

The plea of nolo contendere is an implied confession of the offense charged, and the judgment of conviction follows that plea as well as the plea of guilty. It is not necessary that the court should adjudge that the respondent was guilty, for that follows by necessary legal inference from the implied confession.

Held: that the records offered and admitted in the case at bar, were admissible for the purpose or affecting the credibility of the respondent who had become a witness in his own behalf.

On exceptions by defendant. Overruled.

Search and seizure process on a complaint and warrant under R. S., chapter 29, section 49, issued out of the Ellsworth Municipal Court. On this warrant search was made and certain liquors were seized in a certain building at Bar Harbor, and the defendant was arrested and arraigned before the Ellsworth Municipal Court where he was tried and found guilty and sentenced to pay a fine of $100 and costs and to be imprisoned sixty days. The defendant then appealed to the Supreme Judicial Court.

During the trial in the Ellsworth Municipal Court, one J. M. McFarland testified against the defendant in behalf of the State, but before the case came on for trial in the Supreme Judicial Court on the defendant's appeal, the witness McFarland had died which fact was duly shown. Thereupon at the trial in the Supreme Judicial Court, the Judge of the Ellsworth Municipal Court, before whom the case was first tried, was allowed to testify against the defendant's objection, for the purpose of proving the testimony of the deceased witness McFarland at the former trial. Also at the trial in the Supreme Judicial Court, the defendant took the stand and testified in his own behalf. After his testimony was in, the State, for the purpose of affecting the credibility of the defendant, and against the defendant's objection, was allowed to introduce certain records of the Supreme Judicial Court which, it was claimed, showed the defendant's conviction of criminal offenses upon two occasions. These records

show that the defendant had previously been indicted for being a common seller of intoxicating liquors, and also for keeping and maintaining a drinking house and tippling shop, and that upon his arraignment on these indictments he had plead "nolo contendere" in each case, and had been duly sentenced in each case.

To the aforesaid rulings admitting the testimony of the Judge of the Ellsworth Municipal Court and the aforesaid records, the defendant took exceptions.

At the trial in the Supreme Judicial Court, the defendant was found guilty and was sentenced to pay a fine of $100 and costs and to be imprisioned sixty days.

Charles H. Wood, County Attorney, for the State.

E. S. Clark and Elliott N. Benson, for defendant.

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

WISWELL, C. J. This case comes to the Law Court upon two exceptions by the respondent.

I. At the trial of the respondent before the Ellsworth Municipal Court, upon the charge of keeping intoxicating liquors intended for unlawful sale, one J. M. McFarland testified as a witness called by the State. The respondent was found guilty in that court and sentenced, and the case was then brought to the Supreme Judicial Court for Hancock County upon the respondent's appeal. Prior to the trial in the appellate court, McFarland died; at that trial the death of McFarland having been shown, the State offered to prove his testimony at the first trial of the case, before the Municipal Court, by the judge of that court who presided at the trial. This testimony was admitted subject to the respondent's exception.

The rule is so general as to have become practically universal that the testimony of a witness, since deceased, given at a trial in which he was cross-examined by the opposite party, or where there was an opportunity for cross-examination, is admissible in evidence at a subsequent trial of the same action or proceeding. This rule is supported by so many authorities throughout the country that it would

be impracticable to make any attempt to enumerate them. They may be found in the notes in 11 A. & E. Encycl. of L., 2d Ed., 523 and 526, and in 12 Cyc. 544. It was early held to be the rule in Massachusetts in *Melvin* v. *Whiting*, 7 Pick. 79, and in *Commonwealth* v. *Richards*, 18 Pick. 534. In this State the doctrine was first established in *Watson* v. *Proprietors of Lisbon Bridge*, 14 Maine, 201, wherein the court says: "We doubt not it was competent for the plaintiff to prove what a deceased witness had testified to at a former trial of this cause. It is liable to no legal objection, and is well sustained by authority and the practice of our courts." This case was followed by *Emery* v. *Fowler*, 39 Maine, 326, and *Lime Rock Bank* v. *Hewett*, 52 Maine, 531.

It is true that in some jurisdictions it has been thought that the rule was not applicable in criminal trials because of the right of confrontation, so-called, secured to respondents in most states by a constitutional provision similar to that contained in our constitution, as follows: "In all criminal prosecutions the accused shall have a right . . . . to be confronted by the witnesses against him." This whole subject, including the effect of such a constitutional provision, is very philosophically considered in Wigmore on Evidence, vol. 2, sec. 1395 et seq. wherein it is shown that the main and essential purpose of confrontation is to secure the opportunity of cross-examination, that, although there is a secondary purpose, that of having a witness present before the tribunal which is engaged in the trial of the case, this is merely desirable, and, where it cannot be obtained, need not be required. In section 1396, it is said: "If there has been a cross-examination, there has been a confrontation. The satisfaction of the right of cross-examination disposes of any objection based on the so-called right of confrontation." In section 1398, after referring to a contrary decision in an early Virginia case, which served for awhile to keep a doubt alive, and of a few cases in other jurisdictions in which the Virginia case was followed, it is said: "Apart from these rulings, it is well and properly settled that such evidence — assuming always that there has been a due cross-examination — is admissible for the State in a criminal prosecution, without infringing the constitution. And see the cases therein cited.

In the Massachusetts case above referred to of *Commonwealth* v. *Richards*, it was held that testimony of this character was admissible in a criminal trial against the accused.

But the principal contention of counsel for the respondent in regard to this exception is, that where it is sought to prove the testimony of a witness at a former trial, since deceased, it must be proved by some witness who can remember not only the substance of the whole testimony of the deceased witness, but absolutely the whole testimony, even to his precise words. In support of this contention he relies upon the case of *Commonwealth* v. *Richards*, supra, where that doctrine was laid down, and upon certain other Massachusetts cases in which it was followed. This has never been the rule in this State. Upon the contrary, in *Emery* v. *Fowler*, supra, and in *Lime Rock Bank* v. *Hewett*, supra, the opposite doctrine was distinctly held. In the latter case, the court said: "The testimony of a deceased witness, on a former trial of the same action, may be given in evidence, if the substance of it can be proved, although the exact language of the witness cannot be."

The almost utter uselessness of a rule which permits the testimony of a deceased witness at a former trial to be given at a subsequent trial of the same cause, but which requires it to be repeated in the precise language of such witness, is so apparent that this qualification of the rule has never been generally adopted. That it is sufficient to prove the substance of the whole testimony of the deceased witness, as held by the Maine cases, is now the almost universal doctrine. See the cases cited in an extensive note to *Atchison, etc. R. R. Co.* v. *Osborn*, 64 Kansas, 187, in 91 Am. St. R. 189. See also 2 Greenl. on Evidence, sec. 169, cited and adopted in *Lime Rock Bank* v. *Hewett*, supra. The testimony of the judge of the Ellsworth Municipal Court who did not pretend to be able to recollect the precise words of the deceased witness, but who testified that he could give the substance of the whole of his testimony at the former trial of the case, that testimony having been given in the presence of the accused, where he had an opportunity to cross-examine the witness, was properly admitted in evidence.

II. At the trial in the appellate court the respondent took the

stand and testified in his own behalf. Thereupon the State, for the purpose of affecting the credibility of the respondent as a witness, offered the records of this court which, it was claimed, showed the respondent's conviction of criminal offenses upon two occasions. The record offered in each case contained a summary of the indictment against the respondent, certain statements as to the apprehension of the respondent, and a continuance of the case, and concluded as follows: "And now at this term, the respondent is set at the bar of the court and the reading of the indictment waived, and the respondent says that he is not willing to contend against the State. Whereupon, the court orders and sentences that the said Daniel H. Herlihy pay a fine of one hundred dollars and no costs. Fine paid April 18, 1904." These records were admitted in evidence for the purpose stated, subject to the respondent's exceptions. The contention of counsel for the respondent is that the records do not show the conviction of the respondent, because there was no adjudication of guilt by the court, and because the plea was that of nolo contendere, rather than of guilty.

By R. S., c. 84, sec. 119, "No person is incompetent to testify in any court or legal proceeding, in consequence of having been convicted of an offense; but such conviction may be shown to affect his credibility." The question, then, is what must the record contain in order to make it admissible for the purpose of proving the conviction of a witness and as affecting his credibility. This question has been recently settled in this State, with reference to the admissibility of the record of a conviction, for this precise purpose in the case of *State* v. *Knowles*, 98 Maine, 429, wherein it is said: "It matters not whether the guilt of the accused has been established by plea or by verdict of guilty. When no issue either of law or of fact remains to be determined, and there is nothing to be done except to pass sentence, the respondent has been convicted; and the record of that conviction, or the docket entries where no extended record has been made, are admissible against him to prove such conviction."

The records of these convictions show that there was no issue of law or of fact to be determined, both cases were ready for sentence, and sentence was in fact imposed in both cases. The plea of nolo

contendere is an implied confession of the offense charged, the judgment of conviction follows that plea as well as the plea of guilty. "And it is not necessary that the court should adjudge that the party was guilty, for that follows by necessary legal inference from the implied confession." *Commonwealth* v. *Horton*, 9 Pick. 206. "A plea of nolo contendere, when accepted by the court, is, in its effect upon the case, equivalent to a plea of guilty." . . . . If the plea is accepted it is not necessary or proper that the court should adjudge the party to be guilty, for that follows as a legal inference from the implied confession." *Commonwealth* v. *Ingersoll*, 145 Mass. 381. In the case of *State* v. *Knowles*, supra, the docket entries, the record not having been extended, did not show an adjudication of guilt by the court, or sentence, each case having been continued for sentence, but these docket entries were held admissible for this purpose.

We have no doubt of the admissibility of the records offered and admitted in the case at bar, for the purpose of affecting the credibility of the respondent who had become a witness in his own behalf.

Exceptions overruled.

INHABITANTS OF PALMYRA *vs.* WAVERLY WOOLEN COMPANY.

Somerset. Opinion December 18, 1906.

Waters and Water Courses. Freshets. Dam. Lost Bridge. Injuries. Liability. Evidence.

This is an action originally brought for the recovery of damages for the loss of a bridge erected and maintained by the plaintiffs across Sebasticook River in the town of Palmyra, alleged to have been destroyed by reason of a dam built by the defendant across the river, below the bridge. By amendment it was converted into an action for the recovery of the money expended in erecting a new bridge to take the place of the one carried away. After the plaintiffs had presented all their evidence, the presiding Justice ordered a nonsuit, to which the plaintiffs excepted.

The case has once been before the Law Court and is reported in 99 Maine, 134. In the first trial the plaintiffs recovered a verdict and upon motion by the defendant the court set the verdict aside. The ground upon which the court proceeded in concluding to set the verdict aside was that the freshet which carried the bridge away was very unusual although not unprecedented. In the opinion in that case the court said: "In the freshet in 1901, the water of the river rose suddenly and so high that at the bridge it reached the bottom of the structure, and the cakes of ice floating down struck the bridge and threw it down into the river. There was no evidence that the defendant company did not exercise all due diligence to give the freshet free vent through the gates and waste ways of the dam. The only complaint was that the dam was too high." . . . . "The bridge was not injured by the highest water of any freshet for a decade. The freshet, in which it was carried away by the ice brought down by the current, was a very extraordinary one, caused by unusually heavy rains at the season of melting snows. This was to human ken a fortuitous and very infrequent combination of powerful natural causes, unusual and unexpected. The resulting loss must, therefore, remain where it fell."

Held: that the court is unable to discover in the testimony in the second trial any new evidence which sufficiently changes the aspect of the case with reference to the duty of the defendant or the severity of the freshet which carried away the bridge, so as to warrant the court in sustaining the exceptions to the ruling of the presiding Justice ordering a nonsuit.

See *Same* v. *Same*, 99 Maine, 134.

On exceptions by plaintiffs and by defendant. Plaintiffs' exceptions overruled. Defendant's exceptions not considered.

Action on the case originally brought for the recovery of damages for the loss of a bridge erected and maintained by the plaintiffs across the Sebasticook River in the town of Palmyra, alleged to have been destroyed by reason of a dam built by the defendant across said river, below the bridge. By amendment the action was converted into an action for the recovery of money expended by the plaintiffs in erecting a new bridge to take the place of the one carried away. To the allowance of said amendment the defendant took exceptions but the same were not considered by the Law Court. At the conclusion of the plaintiffs' evidence, in the second trial, the presiding Justice ordered a nonsuit and thereupon the plaintiffs took exceptions.

This case has once been before the Law Court and the same is reported in 99 Maine, 134.

The case appears in the opinion.

Forrest Goodwin, for plaintiffs.

Moore & Anderson and Manson & Coolidge, for defendant.

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

SPEAR, J. This is an action originally brought for the recovery of damages for the loss of a bridge erected and maintained by the plaintiffs across Sebasticook River in the town of Palmyra, alleged to have been destroyed by reason of a dam built by the defendant across the river, below the bridge. By amendment it was converted into an action for the recovery of the money expended in erecting a new bridge to take the place of the one carried away. After the plaintiffs had presented all their evidence, the presiding Justice ordered a nonsuit, to which the plaintiffs excepted. To the allowance of the amendment the defendant also excepted. Therefore the case comes up on exceptions by both parties. As the plaintiffs' exceptions are decisive of the case, we need not consider those of the defendant.

The case has once been before the Law Court and is reported in 99 Maine, 134. In the first trial the plaintiffs recovered a verdict

and upon motion by the defendant the court set the verdict aside. The ground upon which the court proceeded in concluding to set the verdict aside was that the freshet which carried the bridge away was very unusual although not unprecedented. The court say: "In the freshet in 1901, the water of the river rose suddenly and so high that at the bridge it reached the bottom of the structure, and the cakes of ice floating down struck the bridge and threw it down into the river. There was no evidence that the defendant company did not exercise all due diligence to give the freshet free vent through the gates and waste ways of the dam. The only complaint was that the dam was too high." Again they say upon this same point: "The bridge was not injured by the highest water of any freshet for a decade. The freshet, in which it was carried away by the ice brought down by the current, was a very extraordinary one, caused by unusually heavy rains at the season of melting snows. This was to human ken a fortuitous and very infrequent combination of powerful natural causes, unusual and unexpected. The resulting loss must, therefore, remain where it fell."

If this was a correct basis for setting the first verdict aside, we are unable to discover in the testimony in the second trial any new evidence which sufficiently changes the aspect of the case with reference to duty of the defendant or the severity of the freshet which carried away the bridge, to warrant us in sustaining the exceptions to the ruling of the Justice ordering a nonsuit.

The plaintiffs, however, claim that they have produced such new and material evidence, both upon the frequency and degree of the freshets occurring upon this river previous to 1901, that the question of fact whether the defendant should not have been held to anticipate the occurrence of just such a freshet as took away the bridge and to have provided measures to prevent it, should have been submitted to the jury.

Practically all the new evidence that bears upon these points is obtained from witnesses who lived many miles below the locus of the bridge, at a point where the witnesses themselves admit the status of recurring freshets may be influenced by conditions that do not obtain at all at the locus in question. Most of these witnesses

live in the vicinity of Winslow and Benton and have observed the freshets at these points below the dam at Benton Falls and upon the course of the Sebasticook River almost at its junction with the Kennebec. These witnesses admit that the height of the freshets at Winslow and vicinity may be to a greater or less degree controlled by the condition of the water in Kennebec River. Consequently it appears that the height of the freshet in April, 1901, upon the Sebasticook near the Kennebec cannot be safely taken as a criterion from which to determine the nature of the freshet existing at Palmyra.

It may be said, however, that the testimony of the witnesses from the vicinity of Winslow shows that the freshet at this point was one which, if not unusual and unexpected, so excited the interest of the town officers that they initiated preparations for the protection and safeguarding of their property upon the river. The testimony of these witnesses, or one of them at least, also establishes the fact that above Benton Falls at one time an ice gorge existed occasioning a rise of water so high as to overflow the electric road and intervales. This class of evidence, if submitted to the jury, should not have the effect in the mind of the court, if it did in that of the jury, of overcoming the testimony of numerous witnesses who lived in the vicinity of, and many in close proximity to, the bridge that was carried away, the exact point of inquiry, whose evidence certainly tends to show that the freshet at this point, taken in connection with the floating mass of ice was under the rule of law already laid down in 99 Maine, unprecedented, and of such a character that the defendant should not be legally held to have anticipated its occurrence.

It is not our purpose to review all this testimony. It is from the plaintiffs' own witnesses, and we think a fair conclusion from the summary of all of it brings the decision of this case within the rule above stated. The defendant is certainly entitled to have its rights tested upon inferences drawn from the plaintiffs' witnesses, who had the best opportunity to know and the intelligence to comprehend the situation and conditions surrounding the negligence with which it is charged.

We have read the testimony of all the witnesses and we find that

Thomas F. French is a good representative of this class. He was a resident of Palmyra and lived about fifty rods west of the bridge at the time of the freshet. His testimony satisfies us that the freshet of April 10, 1901, was the highest since 1887. While he testifies that he has seen the water run over the road at the ends of the bridge two or three times, yet he says it would not come within a foot or fifteen inches of the bridge. In answer to direct questions, he says: Q. The highest water you ever saw at the bridge was when? A. In 1901. Q. April? A. April, yes sir. With respect to the height of the water in April, 1901, this witness testified: Q. And did the water come up to the bridge? A. It did. He also said it remained there for a period of three or four days. He further testifies that the water alone did not take the bridge away, and would not have done so if it had flowed over the bridge at a height of five feet, but that a large field of ice, formed in a cove like the one he and others were trying to fasten to prevent it from escaping and striking the bridge, was raised and carried by an extraordinary height of water and the course of the winds, into the channel and down the river to the destruction of the bridge; also that this river is a warm stream, that the ice melts away and the flowage of ice is uncommon.

J. F. Rand, of the town of Palmyra, another witness who had opportunity to know, says that in this freshet of 1901, the water was the highest he ever knew and that it was the "biggest freshet" he had ever seen. While other witnesses testify to the existence of very high water at several times between 1887 and 1901, we are unable to discover that the testimony of any one of them when fairly analyzed and compared with the monuments by which they seek to determine the height of the water is in serious conflict with that of the two witnesses above quoted. They speak of the water running over the road at the ends of the bridge, but as before suggested, when the height of the water over the road to which they testified is compared with the height of the bridge, it will be seen that at these times the water was considerably below the bottom of the bridge, while at this time it was almost up to it, within an inch or two of it. Under certain conditions a six inch rise of water may

change an ordinary freshet to an extraordinary and damaging one. In the case at bar we are inclined to think that this was the case. Mr. French, in speaking of the ice in this river says, "There never any ice comes down that river; it is a warm river, and we never see any ice in it in the spring coming down; it always thaws before the ice breaks up, there is never any ice any way up in that river for it thaws out and comes down and that is all we see in the river. In speaking of the flowage of the ice this witness says, "We went up upon this piece of ice that came out of the cove. The river was clear but there was a cove up above there, perhaps an acre or two and the wind was to the eastward then, but we went up there to that piece of ice, and I thought I would stick down poles through it to fasten it, and if we could fasten that cake of ice the bridge would stay where it was; but the wind swung around into the northwest and took this on the Billy Moore and Mike Dyer place and it moved that out into the river, while we were up on the right of the river fastening this other piece." Q. Was that a large cake of ice? A. It was, yes sir. Q. And thick? A. It was some twelve or fifteen inches thick, I should think.

No witness in the case testifies to any previous occasion when any menance or injury was threatened to structures upon this river from fields of floating ice. We think that the combination of the elements which produced this floating mass of ice should relieve the defendant from the charge of negligence in not anticipating and providing against it. While they should be held as a matter of common knowledge to anticipate and forestall the ordinary or even the unusual flow of ice in the ordinary or even unusual freshets, yet we do not think the rule of law governing this class of cases required them to anticipate the unprecedented raising and loosening of a great square of ice and its passage down the river in one solid mass.

The case falls fairly within the principles laid down in *China* v. *Southwick et al.*, 12 Maine, 238. The two cases are somewhat similar. In both cases the dam was legally erected and maintained and not calculated to cause any damage to the plaintiffs' bridge at the usual and ordinary stages of the water throughout the year including the usual recurring and to be expected freshets at the different seasons

as they occurred in the series of years. In the Southwick case, the loss was occasioned by great rains and by the violence of the wind, and the court say in this case, "If the dam had not raised the water to a certain height the rain and wind superadded might not have done the damage. . . . . Their connection, however, was fortuitous, and resulted from the extraordinary and unusual state of things." So in the case at bar, while the dam may have contributed to the causes which produced the loss of the bridge, it was not, however, responsible for the combination of wind, water and ice that swept it away.

Exceptions overruled.

SKOWHEGAN WATER COMPANY

vs.

SKOWHEGAN VILLAGE CORPORATION.

Somerset. Opinion December 18, 1906.

Contracts. Substantial Performance. Equitable Relief. Actions. Recoupment. Damages. Burden of Proof. Water Contracts.

By the strict rules of the common law in cases where services have been rendered or materials furnished in an honest endeavor to perform a contract, but are found to be at variance with the requirements of its express terms, and yet in some degree beneficial to the party to whom the services have been rendered or for whom the materials have been furnished, full performance was undoubtedly required as a condition precedent to the right of recovery. But in most jurisdictions the rigor of this common law rule has been relaxed, even in courts of law, especially in building contracts and other like agreements, where the defendant is practically forced to accept the result of the work and relief is granted to the plaintiff by applying the equitable doctrine of substantial performance.

Although a plaintiff cannot recover upon a contract from which he has departed, yet he may recover upon the common counts for the reasonable value of the benefit which upon the whole the defendant has derived from what the plaintiff has done. If a plaintiff endeavors in good faith to

perform, and does substantially perform an agreement he is entitled to recover the fair value of his services having regard to and not exceeding the contract price after deducting the damages sustained by the defendant on account of the breach of the stipulations in the contract.

In some of the decided cases, reference is made to the "deduction" "recoupment" or "set off" of the defendant's damages for the obvious purpose of indicating a convenient process or method of ascertaining what the services rendered by the plaintiff were reasonably worth, and not with the intention of casting upon the defendant the burden of proving the value of a plaintiff's services. It is incumbent upon the plaintiff in such cases to prove the value of the work done or materials furnished by him. The question of recoupment, properly so termed is not involved. But if the plaintiff's breach of contract be such as to subject the defendant to consequential damage, such damage may be the foundation for a legitimate claim in recoupment and the burden of proving such damage would be upon the defendant.

Whether a given stipulation is to be deemed a condition precedent, a condition subsequent or an independent agreement is purely a question of intent. And the intention must be determined by considering not only the words of the particular clause, but also the language of the whole contract as well as the nature of the act required and the subject matter to which it relates.

In view of the pecularities which necessarily characterize the sale and delivery of water through a system of water pipes under a contract where a water company has agreed to furnish, for a term of years, through its hydrants, to a municipal corporation, a constant and ample supply of potable water, under sufficient pressure for the extinguishment of fires, unavoidable accidents excepted, it is manifest that the mere receipt and consumption of water under such contract would not conclusively show an acceptance of the service as a performance of the contract. Considerable time might be required to determine whether or not an imperfect service was caused by the "unavoidable accidents" excepted in the contract, and under such circumstances a due regard for the necessities of the people would render a discontinuance of the use of the water unreasonable and impracticable.

In the case at bar, the plaintiff took exceptions to certain instructions given by the presiding Justice and which are stated in the opinion. *Held:* that these instructions as a whole as applied to the facts in this case were substantially correct and not prejudicial to the plaintiff.

On exceptions by plaintiff. Overruled.

Assumpsit to recover $1037.50 being the semi-annual installment of $1000 alleged to be due the plaintiff under paragraph eight, and $37.50 for six months use of five additional hydrants under paragraph five, of a written contract between the parties.

Tried at the March term, 1906, of the Supreme Judicial Court, Somerset County. Verdict for plaintiff for $519.64. The plaintiff requested the presiding Justice to give a certain instruction to the jury which request was refused and thereupon the plaintiff took exceptions. The plaintiff also took exceptions to certain instructions given by the presiding Justice. The case appears in the opinion.

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.

Gould & Lawrence, for plaintiff.

Walton & Walton, for defendant.

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

WHITEHOUSE, J. This is an action of assumpsit to recover $1037.50, being the semi-annual installment of $1000 alleged to be due the plaintiff under paragraph eight, and $37.50 for six months use of five additional hydrants under paragraph five of the written contract between the parties.

The declaration in the writ contains two counts, one setting out the contract and alleging performance on the part of the plaintiff and a breach on the part of the defendant, and the other on an account annexed specifying the two items of $1000 and $37.50 above mentioned, and making reference to the contract.

The first and eighth paragraphs of this contract are as follows: "First—The said Company hereby agrees to maintain within the limits of said Corporation, and for the use of said Corporation, for fire purposes, seventy-five hydrants, as now located, or as hereafter re-located by said Corporation, under the provisions of section four of this indenture, and to keep and maintain said hydrants in good repair at all times during said term of twenty years. And during said term said Company agrees to furnish at all times, through said hydrants, and through all additional hydrants which may hereafter be put in under the provisions of section five of this indenture, a constant and ample supply of potable water, under sufficient

pressure for the extinguishment of fires, unavoidable accidents excepted."

"Eighth—And in consideration of the above promises and agreements of said Company, the said Corporation hereby agrees to pay to said Company, for the use of the water for the purposes aforesaid, and in the manner and on the conditions aforesaid, the sum of Two Thousand Dollars ($2000) per annum for the said period of Twenty years, said sum to be paid in equal semi-annual payments as follows, viz: One Thousand Dollars ($1000) on the first day of July, and One Thousand Dollars ($1000) on the first day of January of each and every year during said period of twenty years. The first payment under this agreement to become due and payable on the first day of January, A. D. 1890, and the amount then due to be estimated pro rata from said nineteenth day of August, A. D. 1889, to said first day of January, 1890, and thereafter as above."

The plaintiff introduced evidence tending to show a compliance on its part, in general, with the covenants and conditions of the contract, proved non-payment of the sums sued for, and rested.

The defendant introduced evidence tending to show that during the six months prior to July 1, 1905, the water furnished by the plaintiff through its pipes and hydrants for the use of the defendant was not under sufficient pressure for the extinguishment of fires several of which occurred during that period; also that it was not potable. The plaintiff in rebuttal offered evidence tending to show that the pressure was sufficient at all times, except when unavoidable accident prevented, and that the water was potable.

There was no evidence of any damage to the defendant corporation from any breach of contract on the part of the plaintiff, except as may be inferred from the foregoing.

It was insisted by the plaintiff's counsel at the trial that evidence tending to show insufficiency of water pressure and impurity of the water was important only as a basis for recouping damages, and that such damages only could be recouped as might have been suffered by the defendant as a corporation.

The defendant's counsel, on the other hand, claimed that it was not limited to proof of damages in set-off, but that it was incumbent

upon the plaintiff to satisfy the jury that during the six months prior to July 1, 1905, it had furnished the defendant a constant and ample supply of potable water, under sufficient pressure for the extinguishment of fires; that unless it had so done, it could recover only such a sum as the service was reasonably worth to the corporation.

Among other requests the plaintiff asked that the following instruction be given to the jury:

"It is not a condition precedent to recovery that the plaintiff should have furnished a constant and ample supply of potable water under sufficient pressure for the extinguishment of fires, but insufficiency of pressure can be taken advantage of by the defendant for the purpose of recouping in damages."

The presiding Justice declined to give this instruction and upon this branch of the case instructed the jury inter alia as follows:

"Has the plaintiff performed its contract in this particular, during that term? If it has, and if it has supplied potable water, under sufficient pressure, then it is entitled to its contract price. If it has not, then we come to another and very important question. The defendant does not seek, in this case, to recover damages of the plaintiff. The defendant does not seek to have its damages sustained by it through the plaintiff's breach of contract set off, or recouped, as we sometimes say, against the plaintiff's claim. If it did, in order to establish any defense at all it would be necessary to show that the defendant corporation itself had been damaged — had property injured — by reason of the loss of pressure. The losses which individuals in the corporation — that is, the citizens — individuals in the town — may have sustained, are not to be considered. They are not parties to this suit. This is merely a suit between these two parties, both corporations, upon this contract, and in order to have any damages allowed or recouped, it would be necessary to show that the corporation, as a corporation, has been injured in its property by the want of pressure which the contract called for. But this is not the defendant's position. The position between these two parties is simply this: The plaintiff sues for the price of an agreed service, and says that it has kept its agreement, and has furnished the service called for. The defendant says it has not furnished the service, and

therefore is not entitled to the pay. The question of damages does not come in at all. It is merely a question whether the plaintiff has so far performed its service as to be entitled to its pay. And if it had not performed its service, it is not entitled to its pay, at least in full. . . . .

"The general rule is that where a man has agreed to do a service for another, to a certain extent, or in a particular way, and fails to do that service to the extent he agreed to, or does it in a different way, then the plaintiff, with whom he contracts may do one of two things. He may refuse to accept the service, and say 'Here, this isn't what I ordered, —this isn't what I agreed to pay for, and I won't take it,' or he may take it and say 'This isn't what I agreed to pay for,' but impliedly, by taking it he agrees to pay what the service is worth. So, to use an illustration somewhat like that used by counsel, supposing a carpenter agrees to build your house upon your land, or to repair it, and agrees to do it in a particular way, but he doesn't do it right — he leaves some rooms unfinished for instance, or puts in different material — cheaper material than he agreed to put in, or does it in some way that is contrary to the contract. The house is upon your land, and you can't very well tear that house down or refuse to accept it. Practically the man is obliged to accept it, not absolutely obliged to, but practically, and he may take it; but he may say 'I shall not pay you the full contract price, because you have not done what you agreed to do.' In such a case as that, if he takes the work and accepts and uses it — not accepts it as an equivalent of the contract, but accepts it as his own for use, the party performing the work is not debarred from all compensation because he has failed to keep his contract, but he can only recover what the services are reasonably worth.

"Now I apply that same rule in this case. If the plaintiff agreed to perform the agreed service, either as to quality of water or as to sufficiency of pressure, and the service was accepted, as it practically had to be — not absolutely, because the corporation might have terminated the contract if they saw fit — that is, if they had a reason for doing it — but if they allowed it to go on and the water stood here for their use, so they could use it, and did use it, the plaintiff

would not be debarred entirely from recovering merely because the contract had not been fully kept, but would be entitled to recover what the services actually rendered were reasonably worth.

"There are a great many things, especially in a public service like a water service that enter into the value of that service. It is not merely the number of houses that may burn, or may not burn. That isn't it. But here is a village which the municipal corporation has a right to protect, and was trying to protect by its contract. On the other hand, here was the company which necessarily had to lay out large sums of money in order to be able to furnish the service. That was its investment. The value of the service to the purchaser of course does not depend upon the cost of it, the amount of the investment, however, but upon the situation, the length of the pipes, as far as we know anything about them, the size of the village, so far as we know anything about it — all have some bearing as showing what that service which was actually rendered should have been worth. The contract was for $1,037.50 for every six months. That isn't controlling. It may be considered by you. There may have been elements of profit in the contract. It may have been advantageous to the plaintiff, or it may have been advantageous to the defendant. And whatever advantages they would get out of their contract, of course they are entitled to. The plaintiff here is entitled not to its contract price, or to any advantage which it might have by its contract, but is entitled to the reasonable worth of the service to the purchaser.

"So far as the potable water problem is concerned, as bearing upon the question, the rule applies to that feature also.

"In estimating the value of the service to the corporation, as I have already said, you are not to estimate how much less value the service was to the individual water takers, by reason of the water not being drinkable, if that was the case. You are simply to answer, how much less the service was worth to the corporation for corporation purposes, by reason of any impurity in the water, and not because it was not worth so much to individuals. It is merely and purely a contract between the two corporations, and I cannot too

often, perhaps, or too emphatically, say that the loss to individuals — the embarrassment to individuals is not to be weighed."

Verdict was for plaintiff in sum of $519.64, and the case comes to this court on exceptions to the refusal of the presiding Justice to give the requested instruction and to the instructions actually given to the jury.

It is contended in argument in behalf of the plaintiff that the exceptions should be sustained for the following reasons:

1. Because the contract is not properly apportionable, and performance of six months service is not to be held a condition precedent to recovery of a semi-annual installment.

2. Because, if the first contention be overruled, the condition precedent loses its character as such by acceptance of the service and retention of the benefits.

3. Because breach of one portion of a severable contract can be taken advantage of only by recouping in damages.

4. Because the rule of damages was uncertain and incorrect.

It is the opinion of the court, however, that upon the facts disclosed by the record in this case, these contentions in behalf of the plaintiff cannot be sustained. The rulings and instructions of the presiding Judge in regard to the plaintiff's right to recover in case of partial performance were sufficiently favorable to the plaintiff and substantially in accord with the equitable doctrine that has heretofore prevailed in this State in analogous cases. The decisions in other states undoubtedly disclose many different forms of expressions if not a variety of opinions, in relation to the proper rule to be applied in adjusting the rights of parties where services have been rendered or materials furnished in an honest endeavor to perform a contract, but are found to be at variance with the requirements of its express terms, and yet in some degree beneficial to the other party. By the strict rules of the common law in such a case, full performance was undoubtedly required as a condition precedent to the right of recovery, but in most jurisdictions the rigor of this common law rule has been relaxed, even in courts of law, especially in building contracts and other like agreements, where the defendant is practically forced to accept the result of the work and relief

is granted to the plaintiff by applying the equitable doctrine of substantial performance.

Thus in the early case in this State of *Norris* v. *School District*, 12 Maine, 296, the court say "It may now be considered as the settled law that where one party has entered into a special contract to perform work for another and furnish materials and the work is done and the materials furnished, but not in the manner stipulated in the contract, yet if the work and materials are of any value and benefit to the other party, he is answerable to the amount whereby he is benefited, citing *Hayward* v. *Leonard*, 7 Pick. 181.

In accordance with this view, the rule in this class of cases was subsequently stated by Mr. Greenleaf as follows:

"Here though the plaintiff cannot recover upon the contract from which he has departed, yet he may recover upon the common counts for the reasonable value of the benefit which upon the whole the defendant has derived from what he has done." 2 Green. Ev. sect. 108. If he endeavored in good faith to perform, and did substantially perform the agreement he was entitled to recover for his services the contract price after deducting so much as they were worth less, on account of such imperfect performance of the contract." *Hattin* v. *Chase*, 88 Maine, 237, and cases cited. He is entitled to recover the fair value of his services having regard to and not exceeding the contract price after deducting the damages sustained by the defendant on account of the breach of the stipulation in the contract. *Blood* v. *Wilson*, 141 Mass. 25; *Powell* v. *Howard*, 109 Mass. 192; *Veazie* v. *Bangor*, 51 Maine, 509.

In some of these and other similar cases, reference is made to the "deduction" "recoupment" or "set off" of the defendant's damages for the obvious purpose of indicating a convenient process or method of ascertaining what the services rendered by the plaintiff were reasonably worth, and not with the intention of casting upon the defendant the burden of proving the value of the plaintiff's services. It is incumbent upon the plaintiff in such cases to prove the value of the work done or materials furnished by him. The question of recoupment, properly so termed, is not involved. But if the plaintiff's breach of the contract be such as to subject the defendant to consequential

damage, that may be the foundation for a legitimate claim in recoupment, with respect to which the burden of proof would be upon the defendant. *Gillis* v. *Cobe*, 177 Mass. 584.

But in the case at bar the plaintiff contends that the contract is not properly apportionable, and that performance of six months service should not be held a condition precedent to recovery of the semi-annual installment of $1000, which the defendant agreed to pay for the service specified.

Whether a given stipulation is to be deemed a condition precedent, a condition subsequent or an independent agreement is purely a question of intent. "And the intention must be determined by considering not only the words of the particular clause, but also the language of the whole contract as well as the nature of the act required and the subject matter to which it relates." *Bucksport & B. R. R. Co.* v. *Brewer*, 67 Maine, 295, and cases cited.

When the contract in question is examined in the light of these practical considerations, it cannot be doubted that the stipulation for the supply of potable water and the hydrant service specified in paragraph one of the contract was intended and understood by the parties as a condition precedent and that it was to be strictly performed each six months before the defendant could be held liable to pay the $1000 installment.

In *Winfield Water Co.* v. *Winfield*, 51 Kansas, 184, a case strikingly analogous to that at bar, the court say: "Where suit is brought, as in this case, to recover hydrant rentals for six months, if it be shown that the plaintiff has failed to substantially comply with its contract, the burden rests on the plaintiff to show the value of the service, actually performed by it for the city, and the defendant would be entitled to show any damages sustained by it by reason of the plaintiff's failure. The plaintiff could not recover more than the value of the services rendered to the city over and above all damages occasioned by plaintiff's failure. It may be that there would be great practical difficulty in showing the actual value to the city of the water furnished; if so, it is not the fault of the city, but of the plaintiff. The rights of the parties are defined by the contract, and the party which violates the contract, and fails to

comply with its provisions, must suffer rather than the innocent one." Inasmuch as the defendant corporation made the contract in question for the benefit of the inhabitants of the village, and suffered but slight injury in its corporate capacity, it would be a manifest injustice to compel the defendant to rely upon its claim for damages by way of recoupment and assume the burden of proving the reasonable value of the plaintiff's services. See also *Sykes* v. *St. Cloud*, 60 Minn. 442.

Again it is contended that the stipulation must in any event lose its character as a condition precedent by reason of the acceptance of the service and continued use of the water. But in view of the peculiarities which necessarily characterize the sale and delivery of water through a system of water works, it is manifest that the mere receipt and consumption of water under such a contract would not conclusively show an acceptance of the service as a performance of its contract. Considerable time might be required to determine whether or not the imperfect service was caused by the "unavoidable accidents" excepted in the contract, and under such circumstances a due regard for the necessities of the people would render a discontinuance of the use of the water unreasonable and impracticable.

Finally the plaintiff complains that the rule of damages given "allowed the jury to disregard the contract altogether and afforded no tangible basis for fixing the value of the services rendered." Upon this point, as has been noted, the final instruction was as follows:

"The contract was for $1,037.50 for every six months. That isn't controlling. It may be considered by you. There may have been elements of profit in the contract. It may have been advantageous to the plaintiff, or it may have been advantageous to the defendant. And whatever advantages they would get out of their contract, of course they are entitled to. The plaintiff here is entitled not to its contract price, or to any advantage which it might have by its contract, but is entitled to the reasonable worth of the service to the purchaser.

"So far as the potable water problem is concerned, as bearing upon the question, the rule applies to that feature also. You are

simply to answer, how much less the service was worth to the corporation for corporation purposes, by reason of any impurity in the water.

This, considered in connection with other parts of the charge, gave the jury to understand that in adopting a measure of value for the assessment of damages, the parties were to be considered as entitled to any advantages they would have derived from the contract as far as the element of profit was concerned; but in case of partial performance, the plaintiff was not entitled to the contract price, nor to any advantage from the contract in the maintenance of the suit; but it was entitled to recover the fair value of the service, having regard to the contract price, and "considering how much less the service was worth to the corporation" by reason of the plaintiff's breach of the contract.

It is the opinion of the court that the instructions as a whole as applied to the facts in this case, were substantially correct, and not prejudicial to the plaintiff.

Exceptions overruled.

ROSCOE H. THOMPSON *vs.* FREDERICK S. RICHMOND & Trustee.

Franklin. Opinion December 18, 1906.

Deeds. Covenants. Actions. Assignees. R. S., chapter 84, section 30.

When land conveyed with covenants of warranty has passed by subsequent conveyances, with like covenants of warranty, through the hands of various covenantees, the last covenantee or assignee in whose possession the land was when the covenant was broken can alone sue for the breach, and he has a right of action against any or all of the prior warrantors. No intermediate covenantee can sue his covenantor until he himself has been compelled to pay damages on his own covenant.

General covenants of warranty in a deed of land are prospective and run with the estate, and consequently vest in assignees and descend to heirs. But covenants of seizin and those against incumbrances are personal covenants in praesenti which do not run with the land and are not assignable by the general law.

In the case at bar, the defendant Richmond conveyed the premises in question to the plaintiff Thompson by warranty deed containing the usual covenant against incumbrances. At that time the premises were subject to a mortgage given by the defendant to one Crafts.

The plaintiff subsequently conveyed the premises by warranty deed to one Helen C. Thompson who in like manner by warranty deed conveyed to one Bean. The latter by warranty deed conveyed the premises to one Israel Bean who died intestate leaving two sons, to whom the title descended and who have now title and possession.

The mortgage constituting the incumbrance was foreclosed and by assignment came to one Whittemore, who afterward quitclaimed his interest in the premises to the plaintiff Thompson in consideration of $250.

The present owners have never been disturbed in their quiet possession of the premises by any one claiming any right or title thereto by virtue of the Crafts mortgage, and the plaintiff has never been sued on his covenants in his deed of the premises to said Helen C. Thompson, and was never threatened with any suit or claim on account of such covenants by any person except said Whittemore.

Prior to his purchase of the outstanding interest claimed by said Whittemore the plaintiff had suffered no damage and might never have sustained any. His voluntary act in purchasing the outstanding title without the request or the consent of the present owners of the estate, does not entitle him to recover in this suit the amount thus expended. But as there was

a breach of the covenant against incumbrances at the time the plaintiff received his deed from the defendant, he is entitled to recover nominal damages in this action.

On report on agreed statement of facts. Judgment for plaintiff for $1.00.

Action of covenant broken to recover damages for a breach of the covenant against incumbrances brought by the original covenantee against the original covenantor after conveyance of the land by the former. The land to which this action relates is situate in the town of Jay.

Plea, the general issue, and a brief statement alleging as follows:

"1. That the defendant has fulfilled, performed and kept all and singular the covenants, grants and agreements on his part to be fulfilled and performed.

"2. That the plaintiff has never been disturbed in the quiet enjoyment of the premises described in his said declaration; or in his right to use said premises according to the true intent and meaning of said grant.

"3. That at the time of the commencement of the plaintiff's said action he had no right, title or interest in and to the premises described in his said declaration."

This action came on for trial at the May term, 1906, of the Supreme Judicial Court, Franklin County. An agreed statement of facts was filed and the case was withdrawn from the jury and reported to the Law Court with the stipulation that the Law Court should "render judgment in accordance with the law and the facts of the case."

All the material facts are stated in the opinion.

E. E. Richards and R. H. Thompson, for plaintiff.

Joseph C. Holman, for defendant.

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

WHITEHOUSE, J. This is an action of covenant broken to recover damages for a breach of the covenant against incumbrances brought by the original covenantee against the original covenantor after conveyance of the land by the former.

Dec. 26, 1887, the defendant Richmond conveyed the premises in question to the plaintiff Thompson by warranty deed containing the usual covenant against incumbrances. At that time the premises were subject to a mortgage given by the defendant to Adeline B. Crafts dated May 20, 1882.

June 27, 1901, the plaintiff conveyed the premises by warranty deed to Helen C. Thompson who in like manner by warranty deed of Nov. 20, 1895, conveyed to Augusta N. Bean. The latter by warranty deed of June 21, 1897, conveyed the premises to Israel Bean who died intestate in May, 1905, leaving two sons George H. and Perley Bean, to whom the title descended and who now have title and possession. They had no notice of the incumbrance on the premises until after the commencement of this action.

The mortgage constituting the incumbrance was foreclosed and by assignment came to Herbert C. Whittemore July 28, 1898. Whittemore quitclaimed his interest in the premises to the plaintiff Thompson by deed dated December 1, 1904, for which it is claimed the plaintiff gave him a note for $250.

Dec. 26, 1887, the defendant Richmond conveyed to Alvin Record the real estate covered by the Crafts mortgage given by him excepting the lot in question which he had previously conveyed to the plaintiff Thompson. By this deed Richmond conveys the land to Record subject to the Crafts mortgage but in the language of the agreed statement "Richmond says that Record was to pay the Crafts mortgage as a part of the consideration of the deed to Record." The following statement also appears among the facts reported: "Roscoe H. Thompson says that he gave his note for $250 to Herbert C. Whittemore for the quitclaim deed of the premises at the time of the conveyance to him of Dec. 1, 1904."

The plaintiff Thompson has never been sued on his covenants in his deed of the premises to Helen C. Thompson nor was he ever threatened with suit or claim on account of such covenants by any person except Whittemore.

The plaintiff was first notified of the incumbrance in question on the real estate described in the writ, by H. C. Whittemore, a few weeks before the date of the writ and payment demanded. The

defendant refused to do anything to satisfy Whittemore before the plaintiff made the settlement with him. It is agreed that the sum paid is a fair and reasonable amount to free the real estate from the incumbrance named.

The case is reported to the Law Court upon an agreed statement of facts.

When land conveyed with covenants of warranty has passed by subsequent conveyances, with like covenants of warranty, through the hands of various covenantees, the last covenantee or assignee in whose possession the land was when the covenant was broken, can alone sue for the breach, and he has a right of action against any or all of the prior warrantors. No intermediate covenantee can sue his covenantor until he himself has been compelled to pay damages on his own covenant. 2 Chitty on Cont. 1388; *Crooker* v. *Jewell*, 29 Maine, 527.

General covenants of warranty in a deed of land are prospective and run with the estate, and consequently vest in assignees and descend to heirs. But covenants of seizin and those against incumbrances are personal covenants in praesenti which do not run with the land and are not assignable by the general law. *Allen* v. *Little*, 36 Maine, 170. The provisions of sect. 30 of chap. 84, R. S., only authorize the assignee of a grantee to maintain an action for the breach of such covenants, after eviction by an older and better title, and are therefore not applicable to the case at bar where there has been no eviction of the owners of the premises in question.

In the intermediate conveyances from the plaintiff to the Beans who are the present owners, the deeds have all contained covenants of warranty. If the present owners who are in possession of the estate had been evicted by the enforcement of Whittemore's mortgage claim, they could have availed themselves of the covenants in the deeds of the prior warrantors, and thus the defendant Richmond, the first covenantor, might ultimately have been vouched in to defend.

It appears, however, that the Beans, the present owners, have never been disturbed in their quiet possession of the premises by any one claiming any right or title thereto by virtue of the Crafts mortgage, and never knew there was such a mortgage until the com-

mencement of this suit. It further appears that the plaintiff has never been sued on his covenants in his deed of the premises to Helen C. Thompson, and was never threatened with any suit or claim on account of such covenants by any person except Whittemore.

According to the agreed statement of facts reported, the plaintiff Thompson "says" that he gave his note for $250 to Whittemore for the quitclaim deed of the premises in 1904.

If this statement ascribed to Thompson is presented for the consideration of the court as one of the "facts agreed" by the parties, it must be assumed that the plaintiff paid $250 to purchase the outstanding title from Whittemore. But prior to his conveyance of all his interest in the estate to Helen C. Thompson, by deed with covenants of warranty, the plaintiff had sustained no damage on account of the Crafts mortgage; and after a grantee of land has conveyed his estate, he can maintain no suit upon such covenants unless prior to his conveyance he had been damnified. *Allen* v. *Little*, 36 Maine, 170; *Griffin* v. *Fairbrother*, 10 Maine, 91. A covenantee who has conveyed his estate to a second grantee with warranty cannot maintain an action against his covenantor for a breach of the warranty subsequently occurring, unless he is compelled to pay damages upon his own covenant of warranty, so that the first covenantor may not be liable to be twice charged. *Wheeler* v. *Sohier*, 3 Cush. 219. Prior to his purchase of the outstanding interest claimed by Whittemore the plaintiff had not suffered any damage and might never have sustained any. His voluntary act in purchasing the outstanding title without the request or the consent of the present owners of the estate, does not entitle him to recover in this suit the amount thus expended. But as there was a breach of the covenant against incumbrances at the time the plaintiff received his deed from the defendant, he is entitled to recover nominal damages in this action.

Judgment for plaintiff for one dollar.

LAURA HAYFORD, Trustee,

vs.

MUNICIPAL OFFICERS OF THE CITY OF BANGOR.

Penobscot. Opinion January 24, 1907.

Certiorari. Eminent Domain. Public Exigency. Legislative Questions. Delegated Authority. Constitution of Maine, Article I, Section 21. R. S., chapter 4, section 89.

The writ of certiorari can only be issued to correct errors in law.

When the issue raised by the assignment of errors relates entirely to questions of fact to be determined by evidence outside of the record, such questions cannot be reached by a writ of certiorari.

The writ of certiorari is not a writ of right but one of discretion. If the record offered exhibits errors, it is within the discretion of the court to admit evidence aliunde the record to show that, even though erroneous, justice and equity do not require that it should be quashed. When such record and evidence have been produced it is within the discretion of the court to issue or refuse the writ.

The constitution of Maine, Article I, section 21, provides that "private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." Under this section, the first proposition arising with respect to the taking of private property by the right of eminent domain is whether the public exigency or necessity requires it. This is a legislative question and is not open to judicial revision.

The legislature by the enactment of section 89 of chapter 4 of the Revised Statutes in relation to the taking of "suitable lands for . . . . a public library building" by cities and towns, has not undertaken to say that any specific piece of land may be taken but has declared that the public exigency, requiring that some private property may be taken for "a public library building," exists and thus the exigency or necessity is established by the enactment of the statute authorizing the taking. In such a case, municipal officers do not pass upon the question of necessity as that has already been done by the legislature before the duties of the municipal officers under this section of the statute begin.

The legislature having the constitutional right of taking lands for a public purpose, also has the right to delegate such authority to municipal officers

and the act of municipal officers in the exercise of the authority conferred by R. S., chapter 4, section 89, to take land for a public library building is the exercise of a legislative function and is not reviewable by the court.

Not only is the question of exigency or necessity for the taking a matter for the legislature, or those to whom it delegates its authority, but also the extent to which property may be taken is also a matter for the legislature.

Petition for writ of certiorari. On report. Writ denied.

Petition for a writ of certiorari to quash a record of the municipal officers of the city of Bangor wherein are contained the proceedings of the city in taking certain real estate of the plaintiff, in said city, by right of eminent domain for a public library building, under the provisions of R. S., chapter 4, section 89.

Heard at the October term, 1906, of the Supreme Judicial Court, Penobscot County. At the conclusion of the evidence the case by agreement was reported to the Law Court "to be determined upon so much of the evidence as is legally admissible."

The case appears in the opinion.

Charles F. Woodard and Erastus C. Ryder, for plaintiff.

E. P. Murray, C. A. Bailey and T. D. Bailey, for defendant.

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

SPEAR, J. This case involves an application for a writ of certiorari to quash a record of the municipal officers of the city of Bangor, wherein are contained the proceedings of the city, in taking certain real estate of the plaintiff by right of eminent domain for a public library building in accordance with R. S., chapter 4, section 89, which reads: "Any city or town containing more than one thousand inhabitants, upon petition in writing signed by at least thirty of its taxpaying citizens, directed to the municipal officers, describing the land to be taken as hereinafter provided, and the names of the owners thereof so far as they are known, at a meeting of such town, or of the mayor, aldermen and council of such city may direct such municipal officers to take suitable lands for public parks, squares or a public

library building; and thereupon such officers may take such land for such purposes, but not without consent of the owner, if at the time of filing such petition, with such officers, or in the office of the clerk of such town or city, such land is occupied by a dwelling-house wherein the owner or his family reside."

The grounds upon which the plaintiff claims the writ should be issued are stated as follows :

1. It is claimed by the plaintiff that the whole premises are not necessary for a library lot; that the amount of land included in the premises is largely in excess of what is reasonably required for a public library building.

2. It is claimed that part of the premises is not adapted for use as a lot for a public library building, and therefore is not suitable for that purpose.

It does not appear to be alleged or claimed that any defect in the chain of proceedings required by law for a legal condemnation of the premises in question, is found in the record. In other words, the record discloses that all the proceedings in the taking of the land were regular. The contention of the plaintiff therefore, does not seek to assign any errors apparent upon the face of the record.

The issue which she raises in her assignment of errors relates entirely to questions of fact to be determined by evidence outside the record.

But such questions cannot be reached by a writ of certiorari. The writ can only be issued to correct errors in law. The petitioner can present no evidence de hors the record. It is not a writ of right but one of discretion. If the record offered exhibits errors, it is then within the discretion of the court to admit evidence aliunde the record to show that, even though erroneous, justice and equity do not require that it should be quashed. When such record and such evidence have been produced it is in the discretion of the court to issue or refuse the writ.

The authorities upon this branch of the case have so recently been considered in *Stevens* v. *County Commissioners*, 97 Maine, 121, that we need only to refer to this case as authority for the uniform practice in this State of issuing the writ of certiorari only upon evidence

presented by the record itself, and to correct errors in law. These conclusions are decisive of the plaintiff's case and require that the writ should be denied.

While the case may have been properly decided upon the production of the record only, yet, inasmuch as the plaintiff has presented and fully argued her contention upon the errors assigned, it is the opinion of the court that it may not be improper to briefly allude to the questions raised, waiving, arguendo, the fact that the case is concluded by the record.

The Constitution of Maine, Art. 1, sec. 21, provides that "private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." Under this section three propositions arise with respect to the taking of private property by the right of eminent domain. First, whether the public exigency or necessity requires it. Second, whether the taking is for a public use. Third, that just compensation must be made. The matter of compensation is not here raised. The first, so far as we are aware, is held to involve a legislative question and is not open to judicial revision. The second is a judicial question and may be reviewed by the court. Neither is this question raised in these proceedings.

In the case at bar, the plaintiff's first claim is "that the whole premises are not necessary for a library lot." The issue here raised by the plaintiff is clearly a subject for legislative action. Such action has been taken and promulgated in R. S., sec. 89, chap. 4, above quoted. The legislature has not undertaken to say, by its action, that any specific piece of land may be taken but has declared that the public exigency, requiring that some private property may be taken for a public library building, exists. And thus the exigency or necessity is established by the enactment of the statute authorizing the taking.

It will therefore be observed that the municipal officers do not pass upon the question of necessity. That has already been done by the legislature before their duties begin.

The exigency or necessity having been declared to exist, the act then prescribes the method of procedure for the condemnation of the

particular piece of property required to meet such exigency, and among other things delegates to the municipal officers authority to determine whether the land described in the petition of the "thirty tax paying citizens" is suitable, the mere exercise of legislative judgment by the tribunal appointed. Having determined that the land is suitable, a duty preliminary to the taking, the municipal officers are then directed and authorized to take the land described for a public library building. Now if the legislature, having the constitutional right of taking lands for a public purpose, if necessary, have also the right to delegate such authority to the municipal officers, as they have undertaken to do by the terms of the statute quoted, then, no doubt can be entertained that the act of the municipal officers in the exercise of the authority conferred to take the land, was the exercise of a legislative function and not reviewable by the court. That the legislature can delegate such authority seems to be well established. In *Riche* v. *Bar Harbor Water Company*, 75 Maine, 91, it is said: "There is nothing better settled than the power of the legislature to exercise the right of eminent domain, for purposes of public utility. This may be done through the agency of private corporations although for private property when the public is thereby to be benefited. It is upon this principle that private corporations have been authorized to take private property for the purpose of making public highways, railroads, canals, erecting wharves and basins, establishing ferries, etc. The use being public, the determination of the legislature that the necessity which requires private property to be taken, exists, is conclusive." If the legislature can delegate to a private corporation the authority to pass upon the necessity of taking private property for a public use, a fortiori can it delegate such authority to a quasi public corporation.

Judge Dillon in his work on Municipal Corporations, 4th Ed. section 600, states the principle as follows: "Of the necessity, or expediency of exercising the right of eminent domain, in the appropriation of private property to public uses, the opinion of the legislature, or the corporate body or tribunal upon which it has conferred the power to determine the question, is conclusive upon the courts, since such a question is essentially political in its nature and not judicial.

Judge Cooley in his constitutional limitations, 7th Ed. page 77, approves of the above rule and proceeds to say with respect to a work of improvement of local importance, that the legislature not only may, but generally does, refer the question of necessity "which must be determined by a view of the facts which the people of the vicinity may be supposed best to know," to some local tribunal. In *Lynch* v. *Forbes*, 161 Mass. 302, it is held that the body or individuals to whom the statute has delegated the authority to take by right of eminent domain "have the same power as the state acting through any regularly constituted authority would have."

It has also been held that not only the question of necessity and exigency for the taking are matters for the legislature, or those to whom it delegates its authority, but also the extent to which the property may be taken.

In *Shoemaker* v. *U. S.*, 147 U. S. 282, 289, it is held, "that the extent to which such property shall be taken, rests wholly in the legislative discretion subject only to the restraint that just compensation shall be made. To the same effect is *United States* v. *Gettysburg Electric Ry.*, 160 U. S. 668.

Thus it will be seen that courts have no power to re-examine the question of necessity or exigency, or the extent to which land may be taken for a public use, unless that power is expressly reserved to them.

The only limitation which, by the authorities, seems to have been placed upon the right of the legislature, or those to whom they have delegated the power, to exercise the function of taking property by right of eminent domain, is found in the manifest abuse of the power granted or bad faith in its exercise. A. & E. Ency. Law, 2d Ed. Vol. 10, page 1057; *Burnett* v. *Boston*, 173 Mass. 173; Old Colony Ry., Petr., 163 Mass. 356.

The second ground of complaint presented by the plaintiff is that "the premises is not adapted for use as a lot for a public library building, therefore is not suitable for that purpose."

This proposition has already been decided and need not be further discussed.

It seems to us to be well established that neither of the plaintiff's

assignments of error, if properly before us for decision, neither bad faith nor abuse of power being alleged, could be regarded as sufficient in law to defeat the proceedings of the respondents in taking the plaintiff's land for the location of a public library building.

Writ denied.

Petition dismissed with costs.

BIDDEFORD NATIONAL BANK *vs.* ETTA O. HILL et al.

York. Opinion January 24, 1907.

Promissory Notes. Forgery. Fraud. Deceit. Laches. Bona Fide Holder.

Where a person not intending to sign a promissory note but by fraud and deceit has been tricked into signing an instrument which afterwards proves to be a promissory note, such instrument is a forgery although the signature affixed thereto is genuine.

A forged paper without negligence imputed to the party affected by the forgery, is not a binding contract, whether the forgery was committed by alterations or substitution of the forged contract for the supposed genuine contract.

In the absence of negligence or laches on the part of a person not intending to sign a promissory note but who by fraud and deceit has been induced to sign an instrument which afterwards proves to be a promissory note, such note is not valid although in the hands of an innocent holder for value.

Whether or not a person not intending to sign a promissory note but who by fraud and deceit has been induced to sign an instrument which afterwards proves to be a promissory note, was guilty of negligence or laches in signing such instrument, is a question of fact to be submitted to the jury.

On motion by plaintiff. Overruled.

Assumpsit upon a promissory note of the following tenor:

"$344.44. July 5, 1905.

"Three months after date, we promise to pay to the order of—Biddeford National Bank—

—Three hundred forty-four 44-100 Dollars—at said Bank. Value received.

ETTA O. HILL.
D. O'CONNOR & CO."

Tried at the January term, 1906, of the Supreme Judicial Court, York County. Plea, on the part of the defendant, Etta O. Hill, the general issue together with a brief statement alleging as follows: "That if the name of Etta O. Hill, which appears upon the note declared upon in plaintiff's writ, was in fact placed there by the hand of Etta O. Hill, that the act of signing said name by her was procured by Dennis O'Connor, the other defendant in this suit, by fraud and false and fraudulent misrepresentation, and upon the statement upon his part and the reasonable belief upon the part of Etta O. Hill that she was signing a receipt in full for money just paid by O'Connor to said Hill, and that said Etta O. Hill never in fact executed or authorized to be executed the note in suit, but that if the same was ever executed as a promissory note, its execution was procured and completed by said O'Connor as above aforesaid by means of false and fraudulent misrepresentation and by fraud and deceit, and that said Dennis O'Connor forged and uttered as a forgery the instrument declared on by plaintiff. And that said note was without consideration." Verdict for defendants. The plaintiff then filed a general motion for a new trial.

Etta O. Hill was the only active defendant. The other defendant Dennis O'Connor who constituted D. O'Connor & Co., was not present at the trial and was not represented by counsel.

The case fully appears in the opinion.

Anthony Dwyer, for plaintiff.

B. F. Hamilton and Cleaves, Waterhouse & Emery, for defendant, Etta O. Hill.

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

SPEAR, J. This is an action of assumpsit upon a promissory note for $344.44 dated July 5th, 1905, purporting to be signed by Etta O. Hill and D. O'Connor & Co. The undisputed facts show that Etta O. Hill at some time previous to the date of the note, had sold and delivered to D. O'Connor & Co., a quantity of pressed hay, the consideration for which amounted to $344.44. Early in the morning of the date of the note, she called upon O'Connor & Co., meeting D. O'Connor himself, for the purpose of obtaining a settlement for the hay. When the object of her call was made known to Mr. O'Connor, he informed her that he desired to settle for the hay by giving her the promissory note of the company for the amount due. This she peremptorily declined upon the ground that being left in entire charge of her father's farm, it would be necessary for her to make use of money at once in harvesting the hay upon the farm. Thereupon Mr. O'Connor wrote her a check for $344.44, the delivery of which she took from him and started to leave his place of business, when he called her back requesting her to sign a receipt, for the money received for the hay. She returned to his desk where a receipt for $344.44, all written out, was lying for her signature. Mr. O'Connor stepped along, placed his finger upon the paper and directed her where to sign. She signed the receipt as requested. It proved, however, that instead of signing the receipt as she supposed she was doing, she was deceived and tricked by O'Connor into affixing her signature either to a blank with the note in question afterwards written upon it, or upon a blank already filled in with the contents of the note. It is evident from the history of this transaction that the contract manifested by the note in suit was not the contract of the defendant Etta O. Hill. This proposition is too obvious and too well settled to require citation. If the note was not her contract, was she so negligent in placing her name upon the paper upon which the note appears, when she thought she was signing a receipt, that she is estopped from denying her act under the just and well settled rule that of two innocent parties, he whose negligence has occasioned the loss must bear it.

No exceptions were taken either to the ruling or the charge of the presiding Justice in presenting the case to the jury, and it is therefore presumed that every element of law in the case was properly given. It therefore follows that the question of negligence imputable to Etta O. Hill in signing the note purporting to be a receipt was properly submitted to the jury as a question of fact, and their verdict shows that they found this issue in favor of the defendant. The verdict must stand. We are of opinion that it was not only not erroneous but fairly deducible from the undisputed facts.

This brings us to the proposition of law whether, in the absence of any negligence on the part of Etta O. Hill in affixing her signature to the note, she thereby became liable for its payment. The bank was undoubtedly an innocent holder of the note for value, but in view of the fact that Etta O. Hill was fraudulently induced to sign the note without laches on her part, makes the note, not only not her contract, but a forgery with respect to her signature.

It is contended, however, that the fact that her signature is genuine, relieves the note from the character of a forged paper, and instead renders it a paper obtained by fraud and deceit.

But that a paper, obtained like the note in question, partakes of the character of a forged instrument, has long been the doctrine of the law in this and many other states.

State v. *Shurtliff*, 18 Maine, 368, decided in 1841, is a case wherein the grantee agreed with the grantor to purchase an acre of his farm and prepared the draft of a deed correctly describing the land agreed to be conveyed and exhibited it to the grantor who examined it and found it to be correct, but the execution of it was delayed and the draft was retained by the grantee; the grantee afterwards fraudulently prepared the draft of another deed describing the grantors whole farm and presented it to the grantor for his signature as the deed before examined and it was executed and delivered, but the court held this to be a forgery. In the opinion the court say: "Forgery has been defined to be a false making, a making malo animo, of any written instrument for the purpose of fraud and deceit. 2 Russell, 317, and the authorities there cited. The evidence fully justifies the conclusion that the defendant falsely made and prepared the

instrument, set forth in the indictment, with the evil design of defrauding the party, whose deed it purports to be. It is not necessary, that the act should be done in whole or in part by the hand of the party charged. It is sufficient, if he cause or procure it to be done. The instrument was false . . . . If he had employed any other hand, he would have been responsible for the act. In truth the signature of that false instrument, in a merely logical point of view, is as much imputable to him, as if he had done it with his own hand . . . . and the opinion of the court is, that the crime of forgery has been committed."

It is our opinion that the case at bar falls precisely within the statement of facts and conclusions of law herein laid down. In the case decided, the signature of the grantor upon the deed was genuine, and procured by the fraud of the grantor. In like manner, the signature of Etta O. Hill upon the note was genuine and procured, without negligence on her part, by the fraud of D. O'Connor.

Commonwealth v. *Foster*, 114 Mass. 320, is similar in principle to *State* v. *Shurtliff*. In this case the court state the rule to be: "It matters not by whom the signature is attached, if it be not attached as his own. If the note is prepared for the purpose of being fraudulently used as the note of another person, it is falsely made. The question of forgery does not depend upon the presence upon the note itself of the indicia of falsity." In a subsequent paragraph it is further declared "to constitute forgery where there has been no subsequent alteration, the fraudulent intent must attend the making of the instrument. But it is not necessary that it should be in the mind of the one whose hand holds the pen in writing the signature. If that is done at the dictation or request of another, and for his purposes and use, and his designs are fraudulent so as to make it forgery if he had written it himself, then the instrument is a forged one." See also *Gregory* v. *State*, 26 Ohio State, 510; 20 Am. Rep. 774; 19 Cyc. 1374 D, and cased cited; 13 A. & E. Enc. 1087, 3, and cases cited.

It would appear from these citations to be well established that

the note in question, under the circumstances attending its execution, was a forgery.

But from the fact that, as between O'Connor and Etta O. Hill, the note was a forgery, it does not necessarily follow that she would be relieved from liability thereon. There are numerous cases in which a party may be held criminally guilty of committing forgery, when the parties sought to be charged by the forgery cannot avoid their liability, as made apparent upon the face of the forged instrument. *Abbott* v. *Rose*, 62 Maine, at page 202-3. But nearly all these cases involve the negligence of the parties sought to be charged by the forged instrument either by their own failure to properly examine it, or by leaving it with blanks to be filled in by the agency of some other person, or by some other neglect of duty. But we have already determined that the defendant Etta O. Hill was not negligent, therefore the only remaining question to be determined is, whether she is liable upon this forged paper to the making and uttering of which her negligence in no way contributed. The law is well established that she cannot be held. The note taken by the bank with her name upon it was not her contract. It is no more binding upon her than if O'Connor had written her name upon the note with his own hand. It has been held in numerous cases that a forged paper without negligence imputed to the party affected by the forgery, is not a binding contract, whether the forgery was committed by alterations or a substitution of the forged contract for the supposed or genuine contract.

In *Greenfield Savings Bank* v. *Stowell*, 123 Mass. 196, Gray, C. J., in an elaborate opinion, reviewing both the common and civil law upon this point, declares: "It is a general rule of our law, that a fraudulent and material alteration of a promissory note, without the consent of the party sought to be charged thereon, whether made before or after the delivery of the note, renders the contract wholly void as against him, even in the hands of one who takes it in good faith and without knowledge or reasonable notice of the alteration;" and specifically held that the alteration of a promissory note by one of the makers by increasing the amount for which it is made by the insertion of words and figures in blank spaces left in the printed

form on which it is written, avoids the note as to such makers who do not consent thereto, even in the hands of a bona fide holder for a valuable consideration. To the same effect is *Draper* v. *Wood*, 112 Mass. 315.

Waterman v. *Vose et als.*, 43 Maine, 504, is in perfect accord with the rule above laid down and holds that the alteration of a note by the maker, after it was endorsed, by adding the words "with interest" was material, and if made without the consent of the endorser relieved him of liability, though the alteration was made before delivery. The reason upon which this conclusion was based, is that "an alteration afterwards, which is material, without his consent, will make it a contract which he never executed, and which it is manifest he never intended to, and it is a new contract to which he can in no sense be charged as a party and he cannot be bound by it." See also *Abbott* v. *Rose*, 62 Maine, 194, and *Fay* v. *Smith*, 1 Allen, 477, which is precisely in point in fact and law.

The ground upon which these cases seem to be decided is that the forgery destroyed the identity of the defendant's contract and present a different or new contract which he never made.

Under these well established rules of law, applicable to the case at bar, our conclusion is that the note signed by Etta O. Hill upon which she is sought to be charged, was a forgery with respect to her signature, not her contract and not binding upon her.

Motion overruled.

NEWELL GOODWIN *vs.* CHARLES W. FALL.

York. Opinion January 25, 1907.

Deeds. Fraud. False Statements. Estoppel. Evidence.

The general rule that a party will be estopped to question his own deed does not apply where the deed has been procured by fraud, as the doctrine is now well established that a conveyance obtained by fraud will not operate by way of estoppel against the grantor.

A bond or deed procured by fraud will not operate as an estoppel upon the party defrauded; relief may be granted under the circumstances at law, not only when fraud enters into it and vitiates the execution of the instrument, but when it consists in the misrepresentation of the nature and value of the consideration.

If a person states to another person that which he knows to be false or recklessly states that which he does not know to be true concerning a material matter, and the person to whom such statement is made is justified by the circumstances connected with the matter concerning which such statement is made, in relying upon such statement without further investigation or inquiry, then such statement is characterized in law as a fraudulent representation. It is classified among the wrongs inflicted by one person upon another by means of deception, and in contemplation of law an intention to deceive is always involved.

A fraudulent purpose may be inferred from a wilfully false statement in relation to a material fact; and it is not always necessary to prove that the person making such statement knew that the facts stated by him were false. If he recklessly states as of his own knowledge material facts susceptible of knowledge which are false, it is in effect, a fraud upon the party who relies and acts upon the statement as true.

In the case at bar, the original plaintiff, Newell Goodwin, died after the commencement of the suit and before trial, and the action was prosecuted by his executor. Mr. Goodwin by deed had conveyed to the defendant a certain parcel of land, also "all the growth" standing on a certain other lot of land bounded on the north "by the above described lot this day deeded to said Charles W. Fall, running easterly to a certain spotted yellow birch tree standing by an elm." The defendant cut and removed certain growth standing on the last described land and Mr. Goodwin brought an action of trespass quare clausum against the defendant, claiming that the defendant had committed a trespass although the defendant had only operated within the limits of the last described land. At the trial, the plaintiff claimed that another yellow birch tree standing within

one or two rods from a "scraggy maple" about thirty rods westerly from the "spotted yellow birch by the elm," was the monument for the northeasterly corner of the last described land intended and agreed upon by the parties before the deed was executed, and that Mr. Goodwin was induced to assent to the bound described in the deed by means of the defendant's positive assurance that it was only "between one and two rods" from the "scraggy maple." The testimony of the magistrate who wrote the deed was offered in behalf of the plaintiff to show that the defendant made fraudulent representation to the grantor, Mr. Goodwin, respecting the location of the "spotted yellow birch near the elm," for the purpose, as it was claimed, of inducing Mr. Goodwin to accept that monument as the northeast corner to be mentioned in the deed, and that Mr. Goodwin was thereby induced to execute the deed as it was written with calls embracing the growth on six acres more than he intended to sell to the defendant. The plaintiff claimed that this evidence considered in connection with the other evidence, was sufficient to create an estoppel against the defendant and preclude him from claiming the growth on land embraced in the deed thus obtained by means of a false representation, and that the plaintiff was not estopped by a deed thus obtained by fraud. The presiding Justice excluded the evidence of the magistrate and ordered a verdict for the defendant.

Held: that the evidence of the magistrate respecting the representation made by the defendant to Mr. Goodwin, the grantor, should have been admitted and the case submitted to the jury upon the question of estoppel.

At the time of the commencement of the action in the case at bar, the right to cut and remove the growth from the disputed section had been fully exercised by the defendant and he had no further interest in that part of the permitted lot from which the growth had been removed, hence there was no necessity or occasion for a proceeding in equity to reform the deed.

On exceptions by plaintiff. Sustained.

Trespass quare clausum to recover damages for cutting wood and timber on land claimed by the original plaintiff, Newell Goodwin, who died after the action was commenced and before the trial thereof, and the action was prosecuted by his executor. Plea, the general issue with a brief statement alleging title in the defendant to all the growth cut by him, by virtue of a deed from said Newell Goodwin to the defendant.

Tried at the January term, 1906, of the Supreme Judicial Court, York County. During the trial the plaintiff offered certain evidence which was excluded by the presiding Justice. To this ruling the plaintiff excepted. At the conclusion of the evidence the presiding Justice "ruled, as a matter of law, that the evidence presented was

not sufficient to authorize a verdict in favor of the plaintiff and directed a verdict for the defendant," and the verdict was so rendered. To this ruling the plaintiff also excepted.

The case fully appears in the opinion.

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.

George F. & Leroy Haley, for plaintiff.

Mathews & Stevens, for defendant.

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

WHITEHOUSE, J. This is an action of trespass quare clausum to recover damages for cutting timber and wood on land claimed by the original plaintiff, Newell Goodwin. The plea is the general issue with a brief statement alleging title in the defendant to all the growth cut by him, by virtue of a deed from Newell Goodwin dated October 16, 1899.

Newell Goodwin deceased after the commencement of the suit and before trial, and the action is now prosecuted by his executor.

The defendant purchased of Goodwin a certain parcel of wood land and also "all the growth" standing on a certain other lot bounded on the north "by the above described lot this day deeded to said Charles W. Fall, running easterly to a certain spotted yellow birch tree standing by an elm." This action of trespass grows out of a controversy respecting the northeasterly corner of the lot thus located by the description in the deed at "a certain yellow birch tree standing by an elm."

The plaintiff claims that another yellow birch tree standing within one or two rods from a "scraggy maple" about thirty rods westerly from the "spotted yellow birch by the elm," was the monument for the northeasterly corner intended and agreed upon by the parties before the deed was executed, and that Mr. Goodwin was induced to assent to the bound described in the deed by means of the defendant's positive assurance that it was only "between one and two rods" from the "scraggy maple."

With respect to the alleged acts of trespass the case discloses the following stipulation: "It is agreed that if the line is from the place marked yellow birch up by the elm, if that is the corner, there has been no trespass; that if it is down where the maple is, or anywhere between them, it is admitted that there has been a trespass."

It appears from the testimony of a surveyor, and is not in controversy, that a large yellow birch tree, at least sixteen inches in diameter, spotted on three sides for a corner, was readily found by him, in making a survey after the commencement of this suit, near a large elm at the north end of the easterly line claimed by the defendants. But about thirty rods westerly from this spotted yellow birch, the stump of another yellow birch tree of about the same size, recently cut, was found at the northerly end of the line claimed by the plaintiff, within one rod and 22 links from the large "scraggy maple."

The testimony of J. S. Wentworth, the magistrate who wrote the deed in question from Newell Goodwin to the defendant, was offered in behalf of the plaintiff with the following statement respecting its purpose and tendency:

"Our position is, and the evidence that we offer will tend to prove, and I offer it for the purpose of proving, that, at the time the deed was prepared Mr. Goodwin gave Mr. Wentworth instructions, in the presence of Mr. Fall, to run the line opposite the maple tree marked upon the plan, and run across to the line of Orren B. Goodwin, or Goodwin's heirs, as afterwards stated in the deed; that, at that time, Mr. Fall stated to him that he did not think it was quite far enough to take in all of the old growth and said, "Why not run to the yellow birch that is near the elm, about a rod or two?" Mr. Goodwin states, "I don't remember any elm there but I do remember a yellow birch there," and Mr. Fall then states that there is an elm close to the yellow birch, and it is only between one and two rods from the maple. Mr. Goodwin says, "Then, if that is so, if it ain't any farther than that, a rod or two, it won't make any difference and it may go to that point," and that was the point we claim at which they intended to make the deed, and that Mr. Fall having

made that representation,—and, according to the testimony, he had walked that same forenoon over that same road,—that he is estopped claiming it in any different place. The rules of evidence in equity would be the same as in law, and I do not understand that there is any difference in regard to the effect of an estoppel if a man has, by his conduct or by his declaration, misled a party to that party's disadvantage, and he ought not to be allowed to take advantage of his own wrong, and if the testimony of this boy is true, that he had walked over that that forenoon by both trees, and the boy said he had, and had walked down there as the boy says he had that long distance, 25 rods and 62 links, he knew when he was making that statement that it was false, and he cannot be allowed to take advantage of it."

Upon objection by the defendant's counsel, the presiding Justice ruled that this evidence was not admissible and thereupon ordered a verdict for the defendant. The case comes to this court upon exceptions to these rulings.

The evidence of the magistrate excluded by the court does not appear to have been offered for the purpose of authorizing the jury to substitute the yellow birch tree near the "scraggy maple" for the spotted yellow birch by the elm which was clearly designated in the deed as a monument to mark the northeast corner. It was obviously inadmissible for that purpose. It had not been claimed or suggested that there was any ambiguity in the description of the bounds in the deed, or that any uncertainty in regard to them had been created by extrinsic evidence. The monument at the northeast corner was so clearly designated that it was at once definitely located on the surface of the earth by the surveyor, and the "clear and unambiguous calls of a deed cannot be set aside and different ones substituted in their place by parol evidence of the acts of the parties either before or after the deed is made." *Ames* v. *Hilton*, 70 Maine, 41, and cases cited.

The line run from the spotted yellow birch by the elm must therefore be deemed the true boundary line as disclosed in the deed, and in that event, as before seen, the parties agreed in the report that "there has been no trespass." It is not contended by the defendant,

however, that this stipulation was intended to be conclusive upon the question of the defendant's liability. It was designed simply as an agreed statement of fact that there had been no cutting beyond the line described in the deed. It was claimed at the trial and insisted in argument by the plaintiff's counsel, that the evidence of the magistrate was admissible to show that the defendant made fraudulent representation to Mr. Goodwin respecting the location of the "spotted yellow birch near the elm," for the purpose of inducing him to accept that monument as the northeast corner to be mentioned in the deed; that Mr. Goodwin was thereby induced to execute the deed as it was written with calls embracing the growth on six acres more than he intended to sell to the defendant.

It is contended by the plaintiff that this evidence considered in connection with the other evidence in the case, is sufficient to create an estoppel against the defendant and preclude him from claiming the growth on land embraced in a deed thus obtained by means of a false representation, and that the plaintiff is not estopped by a deed thus obtained from him by fraud.

It appears from the evidence offered and excluded that Mr. Goodwin gave the surveyor instructions, in the presence of the defendant, to run the line opposite the maple tree, which was afterwards designated on the plan as "scraggy maple," but in order to take in all "of the old growth," the defendant preferred to have the line run to "the yellow birch near the elm," and stated as a positive fact that it was "only between one and two rods" from the maple, whereas in truth and in fact as already noted it was more than thirty rods distant from it. It also appears from the testimony of the defendant's son that only a few hours before the deed was prepared, he and his father went over the lot, down past the "scraggy maple" to the yellow birch by the elm, and that his father then spotted the yellow birch before they went to the magistrate's office. It is claimed that the jury would have been warranted in finding that the defendant stated to Mr. Goodwin what he knew to be false, or recklessly stated what he did not know to be true, and that Mr. Goodwin, being aged and infirm and residing two miles distant from the lot, was justified in relying upon the defendant's statement without

further investigation or inquiry. Such a statement is characterized in law as a fraudulent representation. It is classified among the wrongs inflicted by one person upon another by means of deception, and in contemplation of law an intention to deceive is always involved; but a fraudulent purpose may be inferred from a wilfully false statement in relation to a material fact; and it is not always necessary to prove that the defendant knew that the facts stated by him were false. If he recklessly states, as of his own knowledge material facts susceptible of knowledge which are false, it is in effect a fraud upon the party who relies and acts upon the statement as true. *Braley* v. *Powers*, 92 Maine, 209; *Litchfield* v. *Hutchinson*, 117 Mass. 195.

Substantially the same rule prevails in regard to the doctrine of estoppel. It was expressly declared by this court in *Martin* v. *Maine Central Railroad Co.*, 83 Maine, 100, that "it is not necessary that the original conduct creating the estoppel should be characterized by an actual intention to mislead and deceive, and this was expressly affirmed in *Rogers* v. *Street Railway*, 100 Maine, 93. See also *Trenton Banking Co.* v. *Duncan*, 86. N. Y. 221.

The general rule that a party will be estopped to question his own deed does not apply where the deed has been procured by fraud. *Harding* v. *Randall*, 15 Maine, 332. The doctrine is now well established that a conveyance obtained by fraud will not operate by way of estoppel against the grantor. 11 Encyc. of Law, 394; Cyc. of Law & P. Vol. 16, p. 708. A bond or deed procured by fraud will not operate as an estoppel upon the party defrauded; relief may be granted under the circumstances at law, not only when fraud enters into it and vitiates the execution of the instrument, but when it consists in the misrepresentation of the nature and value of the consideration. Herman on Estoppel, sec. 587; Bigelow on Estoppel, 255; *Hazard* v. *Irvin*, 18 Pick. 95; *Phillips* v. *Potter*, 7 R. I. 289; *Hoitt* v. *Holcomb*, 23 N. H. 535.

It will be remembered that in this case the question does not arise respecting a conveyance of land in fee. It was a permit to cut and remove the growth standing on the land described. By the same deed the defendant took a conveyance of one lot of land in fee, and

the right to cut and remove the growth standing on the parcel in question. At the time of the commencement of this action, this right to cut and remove the growth from the disputed section had been fully exercised, and he had no further interest in that part of the permitted lot from which the growth had been removed. There was no necessity or occasion for a proceeding in equity to reform the deed. The defendant had no further right or interest in the land. If the plaintiff's contention is correct the true line to which the defendant had the right to cut should have been run from the yellow birch within two rods of the "scraggy maple," instead of the "spotted yellow birch by the elm" thirty rods farther east. The apparent right to cut between these two lines, the plaintiff says, was obtained by fraud. The growth standing between these two lines was on the plaintiff's land upon which the defendant had in truth no lawful right or authority to enter, his prima facie right having been vitiated by fraud. The line claimed by the plaintiff beyond which the defendant acquired no valid right to cut, is no more uncertain or indefinite in this action of trespass than it would be in an action on the case to recover damages for the defendant's fraudulent representations, and the assessment of damages would be no more difficult in the one case than in the other. There seems to be no reason in principle why the doctrine of equitable estoppel should not apply to such a case.

In *Stubbs* v. *Pratt*, 85 Maine, 429, the court say: "The doctrine of estoppel has been very much extended within the last half century and is now as freely applied in actions at law as in suits in equity; it is a doctrine so well calculated to suppress fraud and oppression that we do not wish to be understood as limiting its application in the slightest degree in proper cases."

It is accordingly the opinion of the court that in the case at bar the evidence of the magistrate respecting the representation made by the defendant to the grantor before the deed was executed should have been admitted and the case submitted to the jury upon the question of estoppel.

Exceptions sustained.

E. L. BENNETT *vs.* EDMUND W. DYER.

Knox. Opinion January 25, 1907.

Contract. Breach. Damages.

In an action to recover damages for breach of contract to purchase the plaintiff's steam laundry business in Camden, the plaintiff claimed as an element of damages that "after he had made a contract for the sale to the defendant of the laundry business he sold the house in which he lived in Camden for the sum of three hundred dollars or more less than it was fairly worth at the time of such sale, intending to move away from Camden because he believed it would be advantageous for the health of one member of his family," and offered to prove "that during the negotiation for the sale of the laundry business and prior to the completion of the contract he informed the defendant that his purpose in making the contract for the sale was so that he could move away from the town, which he desired to do for the reasons above stated, and that to do this he would be obliged to sell the house in which he was living, and gave these as the reasons why he should require the payment of five hundred dollars on account of the purchase before the contract was completed, which sum by agreement was afterwards reduced to two hundred and fifty dollars, and was paid by the defendant to the plaintiff, and that subsequently and after the contract was made, and before the alleged breach, he did sell the house and land for about three hundred dollars less than its fair market value."

The presiding Justice "ruled that notwithstanding the proof of the above facts, any loss sustained by the plaintiff under the circumstances in selling the house and lot, in no way connected with the laundry business, was not approximately caused by the defendant's breach of contract because such loss was not one that would have been contemplated by the defendant, even if informed of the facts as above stated.

Held: that the ruling was right, and that nothing appears in the evidence offered which naturally should have led the defendant to contemplate a loss to the plaintiff, in the contemplated sale of his house, the presumption being that the sale of the house would produce its market value.

On exceptions by plaintiff. Overruled.

Action of assumpsit to recover damages for an alleged breach of a contract to purchase the plaintiff's steam laundry business in Camden, and the property connected therewith.

Tried at the September term, 1906, of the Supreme Judicial Court, Knox County. Plea, the general issue. At the trial, the presiding Justice made a certain ruling in relation to the question of damages, to which ruling the plaintiff took exceptions and the case was sent directly to the Law Court without further proceedings at nisi prius.

The case appears in the opinion.

Arthur S. Littlefield, for plaintiff.

J. H. Montgomery, for defendant.

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

SAVAGE, J. Action to recover damages for breach of contract to purchase the plaintiff's steam laundry business in Camden, and the property connected therewith.

At the trial below, in opening, the plaintiff's counsel stated that one of the principal elements of damage which he claimed to recover was "that the plaintiff after he had made a contract for the sale to the defendant of the laundry business sold the house in which he lived in Camden for the sum of three hundred dollars or more less than it was fairly worth at the time of such sale, intending to move away from Camden because he believed it would be advantageous for the health of one member of his family." The presiding Justice then intimated that he did not think such a loss was one which naturally followed from the defendant's breach of the contract, if any, or one that the defendant did contemplate or should have contemplated, and consequently that this loss could not be recovered in this action. Thereupon the plaintiff offered to prove "that during the negotiations for the sale of the laundry business and prior to the completion of the contract he informed the defendant that his purpose in making the contract for the sale was so that he could move away from the town, which he desired to do for the reasons above

stated, and that to do this he would be obliged to sell the house in which he was then living, and gave these as the reasons why he should require the payment of five hundred dollars on account of the purchase before the contract was completed, — which sum by agreement was afterwards reduced to two hundred and fifty dollars, and was paid by the defendant to the plaintiff, — and that subsequently and after the contract was made, and before the alleged breach, he did sell the house and land for about three hundred dollars less than its fair market value." The counsel also stated that unless this alleged loss was an element of damage recoverable in this action he would not care to proceed to trial.

Thereupon the presiding Justice "ruled that notwithstanding the proof of the above facts, any loss sustained by the plaintiff under the circumstances in selling the house and lot, — in no way connected with the laundry business, — was not approximately caused by the defendant's breach of contract, because such loss was not one that would naturally be expected to follow from such alleged breach, nor would have been contemplated by the defendant, even if informed of the facts as above stated." To this ruling the plaintiff excepted, and the case was brought directly to the Law Court, without further proceeding below, both parties stipulating that if the ruling is sustained, this action, as well as another action by this defendant against this plaintiff to recover back the two hundred and fifty dollars paid on account of the purchase price of the laundry business shall both be entered "neither party, no further action for the same cause;" and that if the exceptions are sustained, both actions are to stand for trial.

We think the exceptions must be overruled. We do not need to inquire, and do not inquire, what would have been the effect if the seller, in connection with the trade, had informed the purchaser of his intention or purpose in consequence of the trade to do some act which might naturally result in a loss. It is clear that in the case as first stated by counsel there was no connection whatever between the laundry trade and the subsequent sale of the house. Neither the sale of the house nor any loss therefrom could have been contemplated by the defendant. Nor upon the legal theory advanced

by the plaintiff is he aided by the proof offered. What mattered it, if he did say that he would move away from town, to benefit the health of a member of his family, and that he would be obliged to sell his house, and that he gave these as reasons for requiring an advance payment? Nothing was said about the probability of incurring a loss on the sale, and nothing was reasonably to be inferred. The presumption would be that the sale would produce the market value of the house, for aught that appears here. The fact of the intended sale of the house was brought home to the defendant, but nothing which naturally should have led him to contemplate a loss to the plaintiff.

The defendant therefore is not liable for this loss, even if it should be admitted that there was such a connection between the laundry trade and the sale of the house, that he might have been held liable under some circumstances, which question we do not pass upon.

Exceptions overruled.

Action to be entered below,

"Neither party, no further action."

In Equity.

WILLIAM A. MOODY

vs.

PORT CLYDE DEVELOPMENT COMPANY.

Cumberland. Opinion February 5, 1907.

Courts. Jurisdiction. Insolvent Corporations. Receivers. United States Bankruptcy Act, 1898. Statute 1905, chapter 85, sections 1, 2, 3, 4. R. S., chapter 47, section 79.

The very foundation of judicial proceedings is jurisdiction, and the question of jurisdiction may be raised at any stage of the proceedings by any suggestion that will apprise the court of the want of jurisdiction.

In the case at bar, a bill in equity was filed against the defendant corporation by one of its stockholders as provided by chapter 85 of the Public Laws of 1905, and after hearing thereon a receiver was appointed for the defendant corporation under the provisions of the aforesaid chapter. At the time the aforesaid chapter was enacted, the present United States Bankruptcy Act of 1898 was in operation and also was in operation at the time the aforesaid bill in equity was filed and also when the aforesaid receiver was appointed. Previous to the filing of the aforesaid bill in equity and the appointment of a receiver as aforesaid, a creditor had brought suit against the defendant corporation and made a general attachment of all the defendant corporation's real estate. After the appointment of a receiver as aforesaid, the attaching creditor filed a petition praying that the proceedings appointing the receiver and the receiver-ship be dismissed and that the petitioner be allowed to prosecute its suit without any interference or objection on the part of the alleged receiver. The petitioner contended that the state court had no jurisdiction in the matter of appointing the receiver, for the following reasons: First. Because at the time of filing the bill in equity the defendant corporation was insolvent. Second. Because chapter 85, Public Laws, 1905, under which the receiver purported to have been appointed, was in effect an insolvent law. Third. Because when said receiver purported to have been appointed, the United States Bankruptcy Act of 1898 had been and was then in operation, and suspended and rendered inoperative the aforesaid chapter 85 of the Public

Laws of 1905, which in practical effect was an insolvent law, and deprived the state court of any jurisdiction in the matter of appointing a receiver by virtue of said chapter 85. Hearing was had on the petition and the prayer of the petition was denied.

Held: 1. That at the time the bill in equity was filed, the defendant corporation was insolvent.

2. That chapter 85, Public Laws, 1905, under which the receiver purported to have been appointed was in effect an insolvent law.

3. That the United States Bankruptcy Act of 1898 being in operation when said chapter 85 was enacted, said chapter 85 never went into operation.

4. That under said chapter 85 the state court had no jurisdiction in the matter of appointing a receiver by virtue of said chapter.

On exceptions by Georges National Bank, Petitioner to dismiss proceedings appointing receiver, etc. Sustained.

The Port Clyde Development Company is a corporation organized in 1902, under the laws of Maine, and located at Portland.

On February 14, 1904, the Georges National Bank of Thomaston, Knox County, commenced an action at law against the defendant corporation. The declaration in the writ is as follows:

"In a plea of the case, for that the said defendant, at said Thomaston on the tenth day of February in the year of our Lord one thousand nine hundred and four by its note of that date, by it duly signed, for value received, promised said bank to pay it or its order, the sum of four thousand dollars in thirty days after the date thereof and said plaintiff says that said thirty days have long since elapsed, whereby an action hath accrued to the plaintiff to have and recover the same with interest of said defendant. Yet the said defendant, though requested has not paid the same, but neglects so to do; to the damage of the said plaintiff (as it says), the sum of six thousand dollars which shall then and there be made to appear, with other due damages."

This writ was returnable at the April term, 1906, of the Supreme Judicial Court, Knox County. A general attachment of the defendant corporation's real estate was made on this writ on the day of its date. February 28th, 1906, service of this writ was made on W. A. Moody, president of the defendant corporation.

On the 13th day of March, 1906, William A. Moody, the said president of the defendant corporation, and one of its stockholders

under the provisions of chapter 85, Public Laws, 1905, filed in the Supreme Judicial Court, Cumberland County, a bill in equity against the defendant corporation, which said bill, omitting formal parts, is as follows:

"William A. Moody of St. George, County of Knox, State of Maine, complains against the Port Clyde Development Company located at Portland, Cumberland County Maine, and says:—

"1. That said William A. Moody is a stockholder and creditor of said Port Clyde Development Company:

"2. That said Port Clyde Development Company is a corporation organized and existing by virtue of the laws of the State of Maine; that said corporation by its vote, is located at Portland aforesaid:

"3. That said Port Clyde Development Company has held all, including its last stockholders' meeting, in said Portland; that its property is situate in the town of St. George, County of Knox, State of Maine:

"4. Said William A. Moody is informed and believes, and therefore alleges upon information and belief, that said corporation is in imminent danger of insolvency:

"5 Said William A. Moody is informed and believes, and therefore alleges upon information and belief, that the estate and effects of said Port Clyde Development Company, through attachment and litigation, and other proceedings hostile to the interests of said Moody and other unsecured creditors and stockholders, are in danger of being wasted or lost:

"Wherefore, inasmuch as said plaintiff is remediless except in equity, he prays that full, true and certain answers may be given to all the premises and paragraphs herein set forth, but not under oath, that said Honorable Court, if it finds that sufficient cause exists, will issue an injunction, both temporary and permanent, restraining said corporation, its officers and agents, from receiving any moneys, paying any debts, selling or transferring any assets of the corporation, or exercising any of its privileges or franchises until further order of the Court.

"And that said Court may also appoint one or more receivers to

wind up the affairs of the Company, and also that said Court may make all decrees and orders that may be proper and necessary under the provisions of chapter 85 of the Public Laws of the State of Maine for 1905, or under any other law relating to the subject matter of this bill of complaint.

"May it please your Honors to grant unto your orator, this plaintiff, most gracious writ of subpoena in the form provided by law, directed to said Port Clyde Development Company.

"And as in duty bound your orator will ever pray."

To this bill the defendant corporation filed its answer which, omitting formal parts, is as follows:

"And now the said Port Clyde Development Company, answering to the bill of complaint of William A. Moody against said company dated March 8th, 1906, says:

"1. The truth of the allegation contained in paragraph one of said bill of complaint is admitted:

"2. The truth of the allegation contained in paragraph two of said bill of complaint is admitted:

"3. The truth of the allegations contained in paragraph three of said bill of complaint is admitted.

"4. The truth of the allegation contained in paragraph four of said bill of complaint is admitted:

"5. The truth of the allegations contained in paragraph five of said bill of complaint is admitted:

"And said corporation prays that in this proceeding right and justice may be done all parties interested, and that said corporation may be fully protected."

Hearing was had on bill and answer on the 16th day of March, 1906, and after hearing the presiding Justice made a decree which, omitting formal parts and parts not material to this case, is as follows:

"This cause came on for hearing on bill and answer, by agreement, this sixteenth day of March, 1906, the parties being represented by counsel, and all the allegations of the bill are admitted by the answer; and upon consideration thereof, it is ordered, adjudged and decreed that the allegations in said bill that said corporation is in

imminent danger of insolvency and that the estate and effects of said Port Clyde Development Company, through attachment and litigation, and other proceedings hostile to the interests of said complainant Moody and other unsecured creditors and the stockholders, are in danger of being wasted or lost, and also each and every allegation in said bill of complaint are sustained and that a receiver should be appointed, and by agreement of parties, Chester W. Teel of St. George in the County of Knox, Maine, a suitable person, is hereby appointed such receiver of said defendant corporation, to wind up the affairs of said corporation, with power to institute or defend suits at law or in equity in his own name as receiver, to demand, collect and receive all property, books, papers and assets of said corporation, to sell, transfer or otherwise convert the same into cash; and to conduct and carry on the business of said corporation as ordered by this court, and to hold and use the assets of this corporation subject to and under the further order of this court.

"Also that pending the proceedings in this cause said defendant corporation, its officers and agents, be and they hereby are restrained from receiving any moneys, paying any debts, selling or transferring any assets of said corporation or exercising any of its privileges or franchises until the further order of this court."

At the April term, 1906, of the Supreme Judicial Court, Knox County, the return term of the writ in the aforesaid action at law, the defendant corporation filed an answer to said action at law setting forth the aforesaid equity proceedings and the decree appointing a receiver and praying "that as said decree is in full force a sufficient suggestion hereof may be spread upon the docket and records of this court, and that this plaintiff may be directed and allowed to proceed according to the decree, a copy of which is hereto attached, as aforesaid, and that as this said plaintiff has an attachment dated Feb. 14, 1906, at four o'clock in the afternoon, and none other, the date of said attachment being less than thirty days prior to the filing of said bill in equity in said court at Portland, Cumberland County, and no farther proceedings be had or allowed, by said court in Knox County, touching the matter and that this cause may be dismissed on account of the equity proceedings herein set forth." The action at law was then continued.

On the 11th day of August, 1906, the Georges National Bank, the plaintiff in the aforesaid action at law, filed in the Supreme Judicial Court, Cumberland County, a petition directed to the Justice who made the decree in the aforesaid equity proceeding, which said petition, omitting formal parts is as follows:

"The Georges National Bank of Thomaston Maine respectfully represents that it is a creditor of the Port Clyde Development Co., of St. George Knox Co. Maine, to the extent of $4,000 money loaned. That on Feb. 14, 1906, said bank brought a suit against said Development Co. and William H. Moody, a signer of said note, made an attachment of the real estate of said Development Co. On March 2, Isaac E. Archibald having a judgment against said company attempted to sell said real estate on an execution, but as said bank claims, illegally and that said sale and levy are invalid. Subsequently said Development Co. was placed in the hands of a receiver on the petition of William A. Moody, its general manager.

"Said action of said bank is pending in the Supreme Judicial Court for Knox County, and will be in order for trial at the September term, when it claims that it should have judgment and protect its lien.

"Said Development Co. files a defence claiming that it is in the hands of a receiver and that the attachment of said bank is dissolved, and that the company is insolvent, and that the receiver who was appointed should sell the property and pay to the creditors a pro-rata percentage distributing the assets among the creditors in the nature of a dividend in insolvency proceedings. Your petitioner says that said proceedings are illegal and the acts of the receiver would be in violation of the National Bankruptcy Law; that the proceedings under which the said receiver acts and the statute under which the proceedings were instituted in which he is appointed receiver is in the nature of an insolvent law which cannot exist during the existence of the National Bankruptcy Act.

"Wherefore the Georges National Bank respectfully moves that the proceedings appointing said receiver and said receiver-ship be dismissed and said bank be allowed to prosecute its suit without any interference or objection on the part of the alleged receiver."

After notice given to the receiver, a hearing was had on the petition before the Justice to whom the petition was directed who denied the prayer of the petition. Thereupon the petitioner, the Georges National Bank, took exceptions.

George E. Grant, for plaintiff, William A. Moody.

James O. Bradbury, for defendant.

Joseph E. Moore, for petitioner, Georges National Bank.

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

SPEAR, J. The Port Clyde Development Company is a corporation established under the laws of Maine in 1902. The purposes of the corporation were very broad including the right to carry on a general grocery business; and general ship building and ship repairing business; to own and operate saw mills; to carry on a general fish and canning business; to carry on a general ice business; to carry on a general real estate business; to carry on a general teaming, transportation, express and forwarding business; and to do all things that may be incidental to the accomplishment of the foregoing objects.

On the 14th day of February, 1906, the Georges National Bank of Thomaston attached the real estate of said company and on the 28th day of February, made service of a writ upon W. A. Moody, its president.

On the 13th day of March, 1906, William A. Moody, who is identical with W. A. Moody, upon whom the writ was served, filed a bill in equity under the provisions of chapter 85 of the Public Laws of 1905, alleging among other things, that he was a stockholder and creditor of the company; that he was informed and believed, and therefore alleged, that the corporation was in imminent danger of insolvency, and that the estate and effects of the company, through attachments and litigation, and through proceedings hostile to the interests of said Moody and other unsecured creditors and stockholders, were in danger of being wasted or lost. The bill in its prayer among other things, asked for an injunction, both temporary and permanent, restraining the corporation, its officers and agents,

from transacting any business until the further order of the court and also for the appointment of one or more receivers to wind up the affairs of the company, and that the court would make all decrees and orders that might be proper and necessary under the provisions of chapter 85 of the Public Laws of 1905, or under any other law relating to the subject matter of the bill of complaint.

On the 12th day of March, 1906, the company appeared by attorney, admitted the truth of every allegation in the bill and on the 16th day of March, 1906, a decree of the court was filed stating that the case come on for hearing and on bill and answer by agreement, the parties being represented by counsel, and that all the allegations of the bill were admitted in the answer. Whereupon it was "ordered, adjudged and decreed that the allegations in said bill, that said corporation is in imminent danger of insolvency and that the estate and effects of said Port Clyde Development Company through attachment and litigation, and through proceedings hostile to the interests of said complainant Moody and other unsecured creditors and the stockholders are in danger of being wasted or lost, and also each and every allegation in said bill of complaint, are sustained, and that a receiver should be appointed . . . . to wind up the affairs of said corporation with power to institute or defend suits at law in equity or in his own name as receiver, to demand, collect and receive all property, books, papers and assets of said corporation, to sell, transfer or otherwise convert the same into cash; and to conduct and carry on the business of said corporation as ordered by this court, and to hold and use the assets of this corporation subject to and under the further order of this court."

On the 11th day of August, 1906, the Georges National Bank, plaintiff in the above mentioned suit, filed a petition in the nature of a bill in equity in the Supreme Judicial Court, directed to the Justice thereof who made the above decree, alleging that it was a creditor of said bank to the extent of $4000 for money loaned; that on Feb. 14, 1906, it brought a suit against said company and William A. Moody signer of the note, and made an attachment on the real estate of said company; that subsequently the company was placed in the hands of a receiver on the petition of said Moody;

that said action of said bank was pending in the Supreme Judicial Court for Knox County and would be in order for trial at the September term; that said company filed a defense claiming that it was in the hands of a receiver and that the attachment of said bank was dissolved; that the company was insolvent and that the receiver should collect and distribute the assets of the company and pay the creditors a pro rate percentage in the nature of a dividend in insolvency proceedings.

The petitioner further alleged that the proceedings were illegal, and that the acts of the receiver would be in violation of the National Bankruptcy Law; that the proceedings under which the receiver was acting and the statute under which the proceedings were instituted, in which he was appointed receiver, were in the nature of an insolvent law which could not operate during the existence of the National Bankruptcy Act, and moved that the proceedings of appointing said receiver and said receiver-ship, be dismissed; that said bank be allowed to prosecute its suit without any interference or objection on the part of the alleged receiver.

Notice was ordered upon this petition and a hearing had on the 11th day of September, 1906, and the prayer of the petitioner denied. To this decree, denying the petition, the petitioner excepted and his exceptions were allowed.

The petitioner contends that upon this state of facts, and a proper interpretation of the statute under which the receiver was appointed the court had no jurisdiction in the matter of appointing the receiver.

I. Because at the time of filing of the petition for the receiver, the Development Company was insolvent.

II. Because the Act of 1905 under which the receiver purported to have been appointed, was in effect an insolvent law.

III. Because when said receiver purported to have been appointed, the National Bankruptcy Law had been, and then was, in operation, and suspended and rendered inoperative the statute of 1905, which in practical effect was an insolvent law, and deprived the state court of any jurisdiction in the matter of appointing a receiver by virtue of such statute.

In the future discussion of this case the petitioning bank will be

called the plaintiff, and the Port Clyde Development Company, the defendant.

The first contention of the plaintiff, that the defendant, at the time of its petition for a receiver, was insolvent, appears to be well established, not only by the facts, but admitted by the allegations in the defendant's bill. Item 4 alleges imminent danger of insolvency. Item 5 goes further and avers that the estate and effects of the defendant company, through attachments and litigation and other proceedings, are in danger of being wasted or lost. Item 4 does not technically allege insolvency, and while item 5 does not use the word "insolvency" to express the condition of the company, it nevertheless employs, to express that condition, the language which defines the legal meaning of the word "insolvency." In other words, the defendant instead of using the term, uses the definition. But the language of the bill used to express this condition so nearly comports with the phraseology employed in *Morey* v. *Milliken*, 86 Maine, 464, to define insolvency, that a reasonable inference might suggest it to have been intended to follow that opinion. This case declares that insolvency exists in its application to persons engaged in commercial pursuits "when they can no longer continue in the ordinary course, securing to the existing creditors an equal division of the assets before they shall be wasted and frittered away in a hopeless struggle under conditions which compel disaster in the end."

The analogy between this definition of insolvency and the language of the bill describing the condition of the defendant, will readily be seen by comparison. The bill says, that the assets "are in danger of being wasted or lost." The case says, that insolvency exists when the assets are in danger of being "wasted and frittered away." The phrases quoted are indentical in meaning. The facts also clearly bring the defendant within the other definition found in this case that insolvency exists when a party is unable "to pay his debts as they become due in the ordinary course of business." It will also be observed that the answer of the defendant does not traverse the allegation of insolvency averred in the plaintiff's petition, but by its silence confesses the truth thereof and seeks to avoid its effect by averring the appointment of a receiver under the Act of 1905.

That the defendant was insolvent, may be regarded as established, not only by the facts but by the pleadings.

The insolvency of the defendant having been established, we have occasion to examine the second contention of the plaintiff, that the Act of 1905, under which the receiver for the defendant purported to have been appointed, was in effect an insolvent law for the settlement of the estate of the corporation, for which a receiver might be appointed under the act.

Section 1 clearly sets forth the purpose for which the chapter was enacted. It provides: "Whenever any corporation shall become insolvent, or be in imminent danger of insolvency, or whenever through fraud, including the gross mismanagement of its affairs, or through attachment, litigation or otherwise, its estates and effects are in danger of being wasted or lost . . . . upon application of any creditor or stockholder by a bill in equity filed in the Supreme Judicial Court . . . . the court may issue both temporary and permanent injunction restraining the corporation from doing the business of collecting and disbursing funds, "and may at any time make a decree dissolving such corporation."

We have no occasion at this time to consider the clauses of the Act which apply to a corporation whose charter has expired or been forfeited. We are considering only the clauses above recited. Whenever, therefore, a corporation falls within that proviso of the Act when its estate is in danger of being wasted or lost, it then becomes insolvent. The phraseology of the Act, as well as that of the bill, is practically identical with the language of the opinion, in *Morey* v. *Milliken*, supra, employed to define the meaning of the word "insolvency." The Act of 1905 was clearly intended, in the language of the opinion, "for the liquidation of business interests when they can no longer continue in the ordinary course." The scheme of the Act was to accomplish this end. Its purpose could not have been more plainly stated. The law can be invoked when, in the language of the Act, "its estates and effects are in danger of being wasted or lost." It is perfectly obvious that the clauses of the section now under consideration, were intended to operate upon those corporations that had arrived at that state of financial decay which the law defines as "insolvent."

Section 2 provides that the court may appoint one or more receivers "to wind up the affairs of the company" and that all attachments made within thirty days before the filing of the bill in equity wherein a receiver is to be appointed, shall thereupon be dissolved. The first provision which authorizes the receiver to wind up the affairs of the company, confers upon him as an officer of the court authority to take possession of the estate of the defendant, collect all of its debts and distribute all its assets thereby obliging the creditors to either accept the dividend in full, discharge their claim, or lose it. As a natural corollary of the first proviso, and having the form and analogy of the bankrupt law, the second proviso follows which vacates all attachments made within thirty days.

Section 3 invests the receiver with plenary power over all the assets of the company and he is required to report to the court from time to time, and to distribute the assets as provided in sec. 79, chapter 47. The allusion to this section has the effect of adopting it as a part of section 3, mutatis mutandis. This section clearly applies to the settlement of an insolvent estate.

Section 4 is, in terms, an insolvent provision. We quote it in full. "Whenever a receiver is appointed as above, the court shall limit a time, not less than four months, of which decree notice shall be given, within which all claims against said corporation shall be presented, and make such order for the manner of hearing and proving same as may be just and proper, and all claims not so presented shall be forever barred."

The chief difference between the provision of this section and that of the United States Bankruptcy Law is, that the latter gives a year and the former only four months, as the time within which all claims against the corporation shall be presented, and that all claims not so presented shall be forever barred.

While chapter 85 of the laws of 1905 is not an insolvent law in title or express terms, it yet operates as such in all the essential features of taking charge of the property; bringing suits in law or equity; discharging the liabilities; barring all claims not presented; and distributing the assets of the corporation coming into the hands of the officer appointed by the court under its provisions.

Having analyzed the several sections of the Act for the purpose of determining their analogy to, and effect in comparison with, the provisions of the bankrupt law, we will now refer to the decisions of the different courts, state and federal, pertinent to the proposition under discussion.

It may be well at this point to further observe that the decision of the case at bar applies only to the operation of those statutes, or parts of statutes, which are calculated to perform the functions of an insolvent law. Whether receivers may be appointed to wind up the affairs of a corporation, or a debtor may make an assignment for the benefit of his creditors, under any other provisions of law, statute or common, we do not pretend to decide.

The principle of law applicable to the case under consideration is clear and succinctly stated in 5 Cyc. 240, D. Note 16; "So far as the state law administers upon the estate of the insolvent as a proceeding in the courts, the proceeding deriving its potency and force from the law itself and not from the voluntary act of the debtor, and where the estate is wound up judicially and the debtor discharged, the state law is undoubtedly suspended by a national bankruptcy act, ex proprio vigore, as to all persons affected by the terms of the latter." It will be seen, however, that it is not an essential element of an insolvency law that the debtor be discharged.

Lyman v. *Bond*, 130 Mass. 291, is a case in which the defendant, owing the plaintiff the sum of $1000 in the form of a note, made an assignment under a New Hampshire statute for the benefit of all his creditors. The assignment was in due form. The plaintiff did not join the assignment but proved his claim under the statute and received his dividend, a pro rata share of the estate from the assignee. The defendant contended that the plaintiff was barred by his action in receiving the dividends, upon his claim.

The opinion of the court in full was: "The plaintiff was not barred of his action by any agreement of his own; because he has made no agreement to that effect. He is not barred by the proceedings under the statute of New Hampshire; because if such should be the effect of proceedings under that statute, which we need not

now decide, it is an insolvent law, the operation of which was suspended during the existence of the bankrupt act of the United States." The application of this opinion is that if the plaintiff had been barred by the statute of New Hampshire, then the statute would have been an insolvent law. The Act of 1905, chapter 85, does expressly bar all claims not presented in accordance with section 4. It is therefore in effect under this opinion, an insolvent law. The New Hampshire act, however, did not pretend to be an insolvent law, but simply a provision regulating an assignment for the benefit of creditors.

Mauran et als. v. *Crown Carpet Lining Co.*, 23 R. I. 324, is a case exactly in point. The act for the appointment of a receiver for the corporation, the essential features of which are quoted in the opinion, are practically identical with the Act of 1905. Upon representation "that the estate and effects of said corporation are being misapplied and are in danger of being wasted and lost and praying that said corporation might be dissolved" a receiver was appointed.

This is practically the language of section one of our own statute. It will be observed also that the petitioners for the appointment of a receiver in this case were also stockholders and creditors. The court held that this proceeding in the state court resulting in the appointment of a receiver was practically an insolvency proceeding. Its object was to collect and distribute its property in the estate, at least among its creditors. It was commenced by stockholders and creditors because its estate was being misapplied and was in danger of being wasted. The decree appointing a receiver was assented to by the corporation and while the petition does not in form allege insolvency, yet the cause alleged, the action taken, and the fact that in proceedings in voluntary bankruptcy filed twelve days after the preferring of the petition in the state court for a receiver, it was declared bankrupt by the U. S. Bankruptcy Court, all show that the corporation was insolvent and that the proceeding in the state court was but an attempt to forestall action in the U. S. Bankruptcy Court, and for some reason not known to the court, to have its affairs settled by the state tribunal.

It is unnecessary to give any analysis to show the precise analogy, in law and fact, of this case with the case at bar.

In re *Storck Lumber Company*, 114 Fed. Rep. 360, is a case involving a petition for the appointment of a receiver under a Maryland statute which provided for the dissolution of a corporation, and the appointment of a receiver of its estate and effects, who should be trustee for the benefit of the creditors and stockholders and who should act under the direction of the court. The corporation filed its answer admitting the truth of the allegations in the bill and consented to the appointment of a receiver; and on the same day the court entered its decree appointing receivers who were authorized to take possession of all the assets, collect the outstanding debts and convert all its property into cash and bring the same into court for distribution to the creditors and stockholders according to their legal rights. The court held that the statute authorizing this transaction was in effect a state insolvent law and superceded by the Bankrupt Act of 1898. This case is also practically identical with the case at bar.

The contention might here be raised that a statute, in order to be regarded as an insolvent law, must provide for the discharge of the debtor, and that, inasmuch as the law of 1905 does not so provide, it lacks an essential feature of such a law. But such is not the interpretation given by the courts.

In re *Merchants Insurance Company*, 17 Fed. Cases No. 9441, is in point. The company was subject to state control under the insurance laws. The state statute did not provide for the discharge of debts and the court held that to be no defense as the winding up of the corporation discharged the debts, and that the statute was to all intents and purposes an insolvent law, although it may not authorize a discharge of the debtors from further liability on its debts.

Harbaugh, Assignee, v. *Costello et al.*, 184 Ill. 110, is a case involving an Illinois assignment act. The court hold that this was an insolvent law, and go on to say; "It is true, that an insolvent law is a law for the relief of creditors by an equal distribution among them of the assets of the debtor, but does not necessarily involve the discharge of the debtor; while a bankruptcy law secures the relief of the insolvent debtor by his discharge.

In re *Salmon & Salmon*, 143 Feb. Rep. 395, decided in 1906, involved the winding up of a bank under the state laws of Missouri,

and the direct issue was whether it was an insolvent law. The creditors contended that the Missouri statute under which the proceeding was instituted in the state court was not an insolvency law but an act under what is known as the reserve power or police power of the state for the purpose of exercising visitorial supervision of the banking institutions of the State for the welfare of its citizens. But the court held that it was in legal effect an insolvent law, and, in regard to the necessity for a provision for the discharge of the debtor, said "to render a state insolvency law inoperative because in contravention of the federal bankrupt act, it is not essential that the state act shall contain a provision for discharge of the debtor." See authorities cited.

It is here proper to observe that the last three cases apply, not only to the general proposition that the state law, whatever its name, authorizing a court to appoint an officer to take charge of the estate of a corporation and collect and distribute its assets, and that bars the debts which are not filed within the time ordered by the court, *is* an insolvent law, but also, that it is not necessary for the act, in order to operate as such a law, to provide for the discharge of the debtor. The Act of 1905 makes no provision for the discharge of the corporation from its debts and therefore comes within the doctrine of these cases.

While there are numerous cases, state and federal, in harmony with the opinions in the above citations and none, so far as we have been able to discover, opposed to them, we deem it unnecessary to further cite authorities in confirmation of the plaintiff's second contention, and regard it as a well settled rule of law, that a state statute which authorizes the court to appoint an officer, whatever his title, to take charge of an insolvent estate with full power to bring suits in law or in equity, discharge the liabilities and distribute the assets either in full or upon a percentage of the claims proved, and which also bars all claims not proven within the time specified by the statute, or by the order of the court, is in effect and practical operation, an insolvent law.

Such we determine to be the Act of 1905 under consideration. Having determined that this Act is in the nature of an insolvent law,

we now come to the defendant's third proposition, that, when the receiver purported to have been appointed, the National Bankruptcy Law had been, and then was, in force, and suspended and rendered inoperative, the statute of 1905, which in practical effect was an insolvent law, and deprived the state court of any jurisdiction in the matter of appointing a receiver by virtue of such statute. This contention it is evident, raises the question of procedure as to whether jurisdiction of the state court can be attacked collaterally without invoking the aid of the United States Bankruptcy Law. This question seems to be settled in the affirmative by several very recent decisions in our own State, and by many decisions of other state and federal courts.

The effect of the National Bankruptcy Act in its operation of suspending the state insolvency law and ousting the jurisdiction of the state court by virtue of such law, involves but a single proposition, as the question of suspension of the state law also embraces the question of jurisdiction.

National Bank v. *Ware*, 95 Maine, 388, decided in 1901, is a case where the defendant went into voluntary insolvency under our state law. Composition papers were then prepared and having been signed by the number and amount of creditors required by the insolvency law, the debtor was granted a certificate of discharge according to the provisions thereof. Subsequent to these proceedings the plaintiff brought action upon two promissory notes. The defendant contended as a defense to this action that he was effectually discharged from these notes by the decree of discharge dated Nov. 27, 1898, in the insolvency proceedings. But the court held that the insolvency proceedings were taken July 8, 1898, at the time when the insolvency court had been deprived of all power and jurisdiction in the matter by the United States Bankruptcy Act enacted and put in force July 1, 1898.

Littlefield, Assignee, in Insolvency v. *Gay*, 96 Maine, 422, decided in 1902, is a case in which the issue with respect to the operation of the United States Bankruptcy Act to suspend the state insolvency law, and oust the jurisdiction of the court, was sharply raised and contested.

Blackington, the insolvent debtor, owing less than $1000, was petitioned into insolvency in 1899 by his creditors, while the U. S. Bankruptcy Law was in force. The State Insolvency Court took jurisdiction, decreed him insolvent and appointed the plaintiff assignee. This action is to set aside a conveyance by Blackington as a preference under the state law. This case holds that under the bankrupt law, Blackington could have gone into bankruptcy voluntarily but could not be forced by his creditors under involuntary proceedings. He was asked to go in and refused. Under this state of the law and facts, it was contended that the insolvency law might be invoked. But the court held that the test of jurisdiction under the state law did not rest upon the volition of the debtor, but that "if his person or property are or *may* be subject to the bankruptcy law, then as to him and his possessions, the state insolvency law is in abeyance and powerless. . . . . That where a person falls within the purview of the bankrupt act, whether by voluntary or involuntary proceedings, the state insolvent law must be silent." And finally the court say, "It follows that the insolvent court was without jurisdiction in the case, and the appointment of plaintiff as assignee was unauthorized and void. He therefore has no standing in court."

It should be here observed that neither of these Maine cases involve contests between officers appointed under the state and United States laws, but are both brought by parties who attacked the jurisdiction of the state court on the ground that the state law was suspended and superceded.

Wescott v. *Berry et al.*, 69 N. H. 505, is another case precisely in point, and almost identical in its facts with the case at bar. It involved a bill in equity, alleging that the plaintiffs are a corporation and organized under the laws of the State, that they were decreed to be insolvent debtors upon a creditor's petition, filed in the Probate Court for the county, October 20, 1898, under the provisions of the state law, that the defendant Berry was appointed messenger and as such claimed the plaintiff's property, and that the proceedings in the Probate Court were void. The court held that the Act of Congress approved July

1, 1898, entitled an act to establish a uniform system of bankruptcy so far superceded the insolvency laws of the state from the time of its passage as to deprive the Probate Court of jurisdiction to entertain petitions filed after that date. See also *Parmenter Mfg. Co.* v. *Hamilton*, 172 Mass. 178.

The discussion of this case up to this point has proceeded upon the assumption that the defendant corporation came within the Bankruptcy Act with respect to the institution of involuntary proceedings, section 4, which provides that "any corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits owing debts to the amount of $1000 or over may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provision and entitled to the benefits of this act." That the defendant corporation comes within the scope of this provision amply appears from the statement of facts in the first part of this opinion, and also, by the allegations of the plaintiff's bill and the admissions by the defendant's answers.

But notwithstanding this fact, the proposition might be plausibly suggested that a corporation which cannot become a voluntary bankrupt should be permitted to take advantage of a state law giving it authority, of its own motion, to wind up its affairs, by dissolution, collection of debts and distribution of assets. But the proposition is not tenable. That the defendant is denied the right to become a voluntary bankrupt is held to be immaterial in this class of cases: *Mauran et als.* v. *Crown Carpet Lining Co.*, 23 R. I., *Harbaugh, Assignee*, v. *Costello et als.*, 184 Ill. already cited, were each cases involving the appointment of receivers for corporations.

It has been declared in the recent case, in re *Watts* v. *Sachs*, 190 U. S. 1, that "the operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under state statutes."

Upon the proposition that the insolvency law should take jurisdiction where voluntary proceedings cannot be instituted under the bankrupt act, the point being expressly raised, our own court, in *Littlefield* v. *Gay*, 96 Maine, supra, have held that the jurisdiction of the

state court did not rest upon the volition of the debtor. It would seem therefore to be immaterial whether the debtor would not, as in the case cited, or could not, take advantage of the bankrupt act. But a complete answer to this proposition in the case at bar is found in the fact that the creditors of the defendant, if they deem it necessary to protect their interest, may institute involuntary proceedings.

Our conclusion is that chapter 95 of the laws of 1905, with respect to the clauses herein considered is in effect an insolvent law and is suspended and superceded by the National Bankrupt Act of 1898, as to all insolvent corporations, whose property may be subject, by either voluntary or involuntary proceedings, to the authority and jurisdiction of said act.

The only remaining question to be considered is the mode of procedure adopted by the plaintiff in its attack upon the jurisdiction of the state court. But no difficulty in this respect seems to be apparent. The very foundation of judicial proceedings is jurisdiction. The question of jurisdiction may therefore be raised at any stage of the proceedings by any suggestion that will apprise the court of the want thereof.

Our court have said in *Powers* v. *Mitchell*, 75 Maine, 364, "When it appears to the court, that they have no jurisdiction of the case before them, they will not proceed in the suit but will stay all further proceedings, though the objection is not taken by plea to the jurisdiction. *Lawrence* v. *Smith*, 5 Mass. 362. The objection to want of jurisdiction may be taken advantage of at any stage of the proceedings."

That the creditor is a proper party to raise the question of jurisdiction, see in re *Reynolds*, 20 Fed. Cases, No. 11723. This case arose under the Rhode Island statute hereinbefore referred to. The creditor appeared to oppose Reynold's petition for the benefit of the insolvent laws of the state and filed a motion to dismiss the petition upon the ground that the jurisdiction of the court had been suspended by the bankruptcy act. The motion was granted and the method of procedure not questioned.

Day v. *Bardwell et al.*, 97 Mass. 246, is a case involving precisely the same mode of procedure as that pursued in the case at bar.

We are unable to discover how the creditor in the case before us could enforce a consideration of his rights in any other way.

We deem it unnecessary to discuss the possible suggestion that the Act of 1905 was passed after and while the National Bankruptcy Act was in force and that, consequently, it could not technically be suspended or superceded; but the answer to this is, that it was still-born, never had any life and never went into operation.

Our opinion is that the court should have sustained the plaintiff's petition, dismissed the receiver and discontinued the proceedings begun and prosecuted under chapter 85 of the laws of 1905.

Exceptions sustained.

STATE OF MAINE

vs.

INTOXICATING LIQUORS, TARBOX EXPRESS COMPANY Claimant & Appellant.

Androscoggin. Opinion February 7, 1907.

Exceptions. Intoxicating Liquors. Seizure. United States Supreme Court Decisions. Interstate Commerce. Common Carriers. Shipments. Delivery to Consignee. Fictitious Consignee. "Wilson Act."

1. When a case is heard by a presiding Justice, without a jury, exceptions are not allowable, unless they have been expressly reserved. But in the absence of anything in the bill of exceptions to show the contrary, the certificate of the presiding Justice that the exceptions are "allowed" is conclusive as to their being rightfully allowed in this respect.
2. The decisions of the Supreme Court of the United States relating to the interpretation of the federal constitution and federal statutes are conclusive upon state courts.
3. By the decisions of the Federal Supreme Court, it is settled that intoxicating liquors are articles of commerce, and as such, while being transported from state to state, are within the protection of that clause in the

constitution of the United States which gives to Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," and thus are subject to the exclusive jurisdiction of Congress.

4. The act of Congress of August 8, 1890, called the Wilson Act, was a regulation of interstate commerce as related to the transportation of intoxicating liquors.

5. This court has heretofore *held*, under its own construction of the federal constitution and the Wilson Act, that when actual transportation of intoxicating liquors had been entirely completed, and when the liquors had not only arrived at the place of their destination, but had been moved by the carrier from the car to its freight house, there to await the order of the shipper, they had arrived in the State within the meaning of the Wilson Act, so as to be subject to the laws of this State.

6. But the Federal Supreme Court in its decision in the case of *Heymann* v. *Southern Railway Co.*, 203 U. S. 270, announced December 3, 1906, has authoritatively settled the following doctrines:

(a) Prior to the Wilson Act, in case of interstate shipment of intoxicating liquors, delivery and sale in the original package was necessary to terminate interstate commerce, so far as the police regulations of the states were concerned.

(b) The Wilson Act did not delegate to the states the right to forbid the transportation of merchandise from one state to another, but "it merely provided in the case of intoxicating liquors that such merchandise, when transported from one state to another, should lose its character as interstate commerce upon completion of delivery under the contract of interstate shipment, and before sale in the original package."

(c) The state statute must permit the delivery of the liquors to the party to whom they were consigned within the state, but after such delivery, the state has power to prevent the sale of the liquors, even in the original package.

(d) The question of whether the liability of the carrier, as such, has ceased, under the state laws, and has become that of a warehouseman, is immaterial.

(e) But the court reserved its opinion upon the question whether if the consignee, after notice and full opportunity to receive the liquors, designedly leaves them in the hands of the carrier for an unreasonable time, they should not be held to have come under the provisions of the Wilson Act, because constructively delivered.

7. Under the authority of the decision of the Federal Supreme Court in the Heymann case, this court is compelled to overrule its decision in *State* v. *Intoxicating Liquors*, 95 Maine, 140, and now to hold that intoxicating liquors, transported from another state to this by a common carrier, are not subject to seizure by virtue of the provisions of the prohibitory liquor statute of this State, until there has been a delivery to the consignee.

8. Whether they may be so seized, as constructively delivered, in case the consignee, after notice, designedly leaves them in the hands of the carrier for an unreasonable time, is not considered, as the facts in these cases do not present that question.

9. The rule is the same whether the consignee was known to the carrier or not, and whether the name of the consignee was fictitious or not.

State v. *Intoxicating Liquors*, 95 Maine, 140, overruled.

On exceptions by-claimant. Sustained.

Three cases of search and seizure under the provisions of Revised Statutes, chapter 29, section 49, originating in the Lewiston Municipal Court, Androscoggin County. In each of these cases, certain intoxicating liquors were seized and taken from the possession of the Tarbox Express Company, a common carrier, while alleged to be still in transit. The liquors seized had been transported by the Tarbox Express Company by continuous shipment from Boston Mass., to Lewiston, Maine. Under the provisions of section 48 of the aforesaid chapter, the seizures were made by the officer before the making of the complaints and the issuing of the warrants.

In the first case as numbered on the docket, the complaint and warrant are as follows:

"STATE OF MAINE.

"Androscoggin, ss. To the acting Clerk of our Municipal Court for the City of Lewiston, in the County of Androscoggin:

"A. B. Howard of Auburn in said County, and competent to be a witness in civil suits, on the Twenty-fourth day of August in the year of our Lord one thousand nine hundred and six in behalf of said State, on oath, complains that he believes that on the twenty-fourth day of August in said year, at said Lewiston, in said County, intoxicating liquors were unlawfully kept and deposited by some person to your complainant unknown, at the freight depot of the Tarbox Express Company situated on the east side of Park Street, in said Lewiston, said person to your complainant unknown, not being then and there authorized by law to sell liquors within said City of Lewiston, and that said liquors then and there were intended for sale by some person to your complainant unknown, in this State in violation of law, against the peace of said State, and contrary to the forms of the statute in such cases made and provided.

"And the said A. B. Howard on oath, further complains, that he, the said A. B. Howard on the Twenty-fourth day of August A. D. 1906 being then and there an officer, to wit: a Deputy Enforcement Commissioner for said State, duly qualified and authorized by law to seize intoxicating liquors kept and deposited for unlawful sale, and the vessels containing them, by virtue of a warrant therefor, issued in conformity with the provisions of law, did find upon the above described premises twelve bottles each containing one quart of whiskey marked M. Supowitz, 274 Main St., Lewiston, Me. intoxicating liquors as aforesaid, and vessels containing the same then and there kept, deposited and intended for unlawful sale as aforesaid, within this State, by some person to your complainant unknown, and did then and there by virtue of his authority as a Deputy Enforcement Commissioner for said State, as aforesaid, seize the above described intoxicating liquors and the vessels containing the same, to be kept in some safe place for a reasonable time, and hath since kept, and does still keep, the said intoxicating liquors and vessels to procure a warrant to seize the same.

"He therefore prays that due process be issued to seize said intoxicating liquors and vessels, and them safely keep until final action and decision be had thereon.

"A. B. HOWARD."

"Androscoggin, ss. On the twenty-fourth day of August aforesaid, the said A. B. Howard made oath that the above complaint signed by him is true.

"Before me,

"A. K. P. KNOWLTON, Acting Clerk."

"STATE OF MAINE.

"Androscoggin, ss. To the Sheriff of our said County of Androscoggin, or either of his Deputies, or the Constables of either of the Towns or Cities within said County, or to any or either of them, or to any Deputy Enforcement Commissioner for said State, Greeting:

"In the name of the State of Maine, you are commanded to seize the intoxicating liquors and vessels in which they are contained,

named in the foregoing complaint, of said A. B. Howard and now in his custody, as set forth in said complaint, which is expressly referred to as a part of this warrant, and safely keep the same until final action and decision be had thereon.

"Witness, ADELBERT D. CORNISH, Esquire, Judge of our said Court, at Lewiston aforesaid, this twenty-fourth day of August in the year of our Lord one thousand nine hundred and six.

"A. K. P. KNOWLTON, Acting Clerk."

The complaints and warrants in the other two cases were of the same general tenor with the necessary changes in names and dates, etc.

In each case the liquors were properly libelled as provided by R. S., chapter 29, section 50, and on the return days of the libels the said Tarbox Express Company appeared before the Lewiston Municipal Court and claimed the liquors. In each case its claim was denied and the liquors in each case were adjudged forfeited as provided by R. S., chapter 29, section 51. The claimant, in each case, then appealed to the Supreme Judicial Court as provided by said section 51.

After the hearing in the Supreme Judicial Court, the presiding Justice ruled in each case as a matter of law that the liquors should be forfeited. To these rulings the claimant took exceptions.

The case fully appears in the opinion.

Ralph W. Crockett, County Attorney, for the State.

McGillicuddy & Morey, for claimant.

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

SAVAGE, J. These are three cases of claims by a common carrier for intoxicating liquors seized and taken from its possession, while alleged still to be in transit, and within the protection of the inter-state commerce provision of the Constitution of the United States. The liquors seized were properly libelled. The claimant appeared before the Municipal Court. Its claims were denied, the liquors in each case adjudged forfeited, and the claimant appealed to the

Supreme Judicial Court. After a hearing in that court the presiding Justice ruled in each case as a matter of law that the liquors should be forfeited, and the claimant alleged exceptions which were regularly allowed.

At the outset, the attorney for the State claims that the exceptions were not allowable, should not have been allowed, and should now be dismissed, because, as he says, the cases were heard by the presiding Justice without the intervention of a jury, and that the right of exceptions was not expressly reserved. It is true that in such cases exceptions are not properly allowable, and if allowed, should be dismissed when the fact properly appears. *Reed* v. *Reed*, 70 Maine, 504; *Frank* v. *Mallett*, 92 Maine, 77. The trouble in this case, however, is that the fact is not shown to be as claimed by the State's attorney. We cannot travel out of the bill of exceptions, and this bill is silent upon the matter. The attorney argues that it must appear affirmatively from the bill that the right of exception was expressly reserved before the hearing. We do not think so. We hold that in the absence of anything in the bill to show the contrary, the certificate of the presiding Justice that the exceptions are "allowed" is conclusive as to their being rightfully allowed in this respect. *Dunn* v. *Auburn Electric Motor Company*, 92 Maine, 165 These bills of exceptions, therefore, are properly open to consideration.

The presiding Justice made no specific findings of fact, but his ruling as a matter of law necessarily involved certain findings of fact, which must be deemed, upon exceptions, to be true. He must have found that the liquors seized were intoxicating, and that they were intended for sale in violation of law in this State. But the undisputed testimony, which is made a part of the bill of exceptions, shows certain other facts, which, in considering the exceptions, we must deem were true, and that they were so found by the Justice, because his ruling was essentially based upon their truth.

In the first place, it appears that the claimant is a common carrier of merchandise, and that each of the packages seized was transported by the claimant by continuous shipment from Boston, Massachusetts, to Lewiston, in this State.

I. In the first case, as numbered on the docket, the package was a C. O. D. shipment, marked "M. Supovitz, No. 274 Main Street, Lewiston, Maine." Max Supovitz testified that he lived at 274 Main Street, Lewiston, and was the only one of the name living there; that he had not ordered the liquors and did not know to whom they belonged. The liquors were brought by the claimant over the Maine Central Railroad line to Lewiston, and were taken by it from the railroad freight shed to its office on Park Street, where they were shortly after seized by the officer.

II. In the next case, the liquors were marked "H. E. Perkins, Lewiston, Maine." From the evidence, we think it may be assumed that the name was fictitious. The evidence shows that the package was never in the claimant's office, but was seized and taken from the claimant's delivery wagon, apparently either while going out to make delivery or returning from an unsuccessful attempt to make delivery. And as we shall see later it is immaterial which. Whether the driver knew who was the real consignee does not appear, but that we think is also immaterial in this case.

III. The third case is that of a C. O. D. shipment. The package was marked "J. P. Sutton, Auburn, Maine," and was seized from the claimant's wagon while being taken to its office. The evidence strongly tends to show that Mr. Sutton did not order the liquors, but that they were ordered by another person in his name, without his knowledge.

It is well settled that intoxicating liquors are articles of commerce, and as such, while being transported from state to state, are within the protection of that clause in the constitution of the United States which gives to Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," and thus are subject to the exclusive jurisdiction of Congress. *Bowman* v. *Chicago & Northwestern Ry. Co.*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100; *State* v. *Burns*, 82 Maine, 558; *State* v. *Intoxicating Liquors*, 83 Maine, 158. And although a state may constitutionally prohibit the sale of intoxicating liquor within its borders, *Mugler* v. *Kansas*, 123 U. S. 623, such prohibi-

tion could not, prior to the Wilson Act, so called, hereafter referred to, constitutionally extend to a sale of them by the importer while in the original package. *Leisy* v. *Hardin*, 135 U. S. 100; *State* v. *Burns*, 82 Maine, 558; *State* v. *Intoxicating Liquors*, 83 Maine, 158.

At this stage of the decisions, the act of Congress of August 8, 1890, called the Wilson Act, was passed, which provided that all intoxicating liquors "transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Since the enactment of the Wilson Act, the questions as to what its effect was, and at what point of time there is an "arrival" of intoxicating liquors in a state, within the meaning of that Act, so as to subject them to the police powers of a state, have several times been considered by the Federal Supreme Court, as well as by this court. In re *Rahrer*, 140 U. S. 545, the Wilson Act was held to be constitutional, and it was held that after its passage, intoxicating liquors introduced into a state from another state, whether in the original package or otherwise, were subject to the police powers of the State. In *Rhodes* v. *Iowa*, 170 U. S. 412, (1897) an interstate shipment of intoxicating liquors had reached the point of destination and had been unloaded from the railroad car to the platform. A station agent of the railroad company, removed the liquors from the platform to the freight warehouse of the railroad company, a few feet away. For this act he was prosecuted under the Iowa statute which made it unlawful for any person in the employ of a common carrier, or for any other person, to "transport or convey between points, or from one place to another within this State for any other person or persons or corporation, any intoxicating liquors," without first having the certificate which the statute provided for. The Federal Supreme Court held, on writ of error, that the removal of such liquors from the platform to the freight warehouse was a part of the interstate

commerce transportation, and overruled the contention of the State of Iowa that the liquors became subject to its police powers by virtue of the Wilson Act, as soon as they came within its geographical limits. In the opinion the court said passim, "The sole question presented for consideration is whether the statute of the State of Iowa can be held to apply to the box in question whilst it was in transit from its point of shipment, Dallas, Illinois, to its delivery to the consignee at the point to which it was consigned. . . . . Did the act of Congress referred to (the Wilson Act) operate to attach the legislation of the State of Iowa to the goods in question the moment they reached the state line, and before the completion of the act of transportation, by arriving at the point of consignment and the delivery there to the consignee is then the pivotal question. . . . . We think that interpreting the statute by the light of all its provisions, it was not intended to and did not cause the power of the State to attach to an interstate commerce shipment whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee."

In *State* v. *Intoxicating Liquors*, 95 Maine, 140, (1901) this court was called upon to interpret the Wilson Act. In that case there was an interstate shipment of intoxicating liquors over connecting railroads, consigned to the shippers. They arrived at the point of destination on the morning of one day, were transferred to the railroad company's freight house, where they were seized by the officers on the afternoon of the next day. There had been no delivery of the liquors and no notice given to any one of their arrival. The railroad company filed a claim for the liquors, on the ground that they were within the protection of the interstate commerce provision of the federal constitution, when seized, and that it was entitled to their possession until delivery. The claimant relied upon *Rhodes* v. *Iowa*, supra, as settling the question involved, favorably to its contention.

But this court after examination of the facts reported in the Rhodes case, and of the general line of reasoning adopted in the opinion of the Federal Supreme Court, were of opinion that the question whether the liquors were so protected *until delivery at the*

point of destination to the consignee, was not necessarily involved in the Federal Court's decision. We said:—"If the act of moving the package from the platform to the freight house was a part of the interstate commerce transportation, as the court held it was, and the transportation was not consummated until the package had been moved to and deposited within the freight house, so that the liquors had not arrived within the State, until that act had been performed, then the Iowa statute could not apply to any part of such transportation, and it was unnecessary to a decision of the point involved to hold that such transportation was not completed until delivery to the consignee." And we held in the case then before us that when the actual transportation had been entirely completed, and when the liquors had not only arrived at the place of their destination, but had been moved by the carrier from the car to its freight house, there to await the order of the shipper, they had arrived in the State within the meaning of the Wilson Act, so as to be subject to our laws.

And we took occasion in that case to say: "We fully recognize that the question whether a state statute is in contravention of any provision of the federal constitution is for the final determination of the Federal Supreme Court, and that its decision, when the question is presented, is conclusive. But we do not consider it obligatory upon this court to hold, against our own judgment, that a statute of our State is in violation of that constitution, until it has been so decided, even if it may be possible, judging, from certain remarks in that court's opinion, that our judgment may be overruled by that tribunal."

But since the cases at bar were heard at nisi prius, the Federal Supreme Court has announced an authoritative decision upon the precise point involved. In the case of *Heymann* v. *Southern Railway Co.*, 203 U. S. 270, announced December 3, 1906, intoxicating liquors were shipped over the defendant's railroad from Augusta, Georgia, to Charleston, South Carolina, where they were unloaded by the railroad company from the car into its warehouse, ready for delivery. Shortly after the liquors were so placed, they were seized and taken from its possession by constables asserting their right to do

so under the authority of what is known as the dispensary law of South Carolina. The State Court held as we held in 95 Maine, 140, supra, that the interstate transportation of the goods ended when they were placed in the warehouse, and that then the goods ceased to be under the shelter of the interstate commerce clause of the constitution. The decision was based upon the conclusion that goods warehoused under the circumstances stated must be considered as having arrived within the meaning of the Wilson Act. The Georgia Court also stated that they deemed that the expressions to the contrary effect in *Rhodes* v. *Iowa* "were not binding, as they were merely obiter." But the Federal Supreme Court reversed the judgment of the State Court, and held, for reasons stated, that the Rhodes case "necessarily involved deciding the meaning of the word arrival in the Wilson Act, and that this required an ascertainment of when goods shipped from one state to another, generally speaking, ceased to be controlled by the interstate commerce clause of the constitution." And the conclusion reached and stated by the Federal Supreme Court in *Heymann* v. *Southern Railway Co.*, supra, may be summarized as follows:

1. The elementary and long settled doctrine is reiterated that, prior to the Wilson Act, in case of interstate shipments, "delivery and sale in the original package was necessary to terminate interstate commerce, so far as the police regulations of the states were concerned."

2. That the Wilson Act manifested no attempt on the part of Congress to delegate to the states the right to forbid the transportation of merchandise from one state to another, "since it merely provided, in the case of intoxicating liquors, that such merchandise, when transported from one state to another, should lose its character as interstate commerce upon completion of delivery under the contract of interstate shipment, and before sale in the original package."

3. That the State statute must permit the delivery of the liquors to the party to whom they were consigned within the State, but that, after such delivery, the State has power to prevent the sale of the liquors, even in the original package.

4. That the question whether the liability of the carrier, as such, has ceased, under the state laws, and has become that of a ware-

houseman, is immaterial. *Heymann* v. *Southern Railway Co.*, supra; In re *Rahrer*, 140 U. S. 545; *Vance* v. *W. A. Vandercook Co. No. 1*, 170 U. S. 438; *American Express Company* v. *Iowa*, 196 U. S. 133; *Foppiano* v. *Speed*, 199 U. S. 501.

5. But in stating these principles, the court in the Heymann case reserved its opinion upon one point in the following words:—"Of course we are not called upon in this case, and do not decide, if goods of the character referred to in the Wilson Act, moving in interstate commerce, arrive at the point of destination, and, after notice and full opportunity to receive them, are designedly left in the hands of the carrier for an unreasonable time, that such conduct on the part of the consignee might not justify, if affirmatively alleged and proven, the holding that goods so dealt with have come under the operation of the Wilson Act, because constructively delivered. We say we are not called upon to consider this question, for the reason that no facts are shown by the record justifying passing on such a proposition." But the point thus suggested by the Federal Court, if tenable, is unimportant in the cases at bar, since the facts in these cases do not bring them within such a rule.

This decision of the Federal Supreme Court, upon this question of the interpretation and application of the interstate commerce clause of the Federal Constitution, and of the Act of Congress, called the Wilson Act, is conclusive and binding upon this Court. *State* v. *Burns*, 82 Maine, 558; *State* v. *Intoxicating Liquors*, 95 Maine, 140. Under the authority of this decision, we are bound to say that though interstate transportation may end before delivery, interstate commerce does not end before delivery to the consignee, either actual, or at least constructive within the principle left undecided by the Federal Court. And we cannot see that it makes any difference in principle whether the consignee was known to the carrier or not, or even if the name of the consignee was fictitious.

There was no delivery of liquors either actual or constructive, to consignee in any of the cases at bar. Hence these liquors had not become liable to seizure and forfeiture under our statute.

It may be that in part, if not in all of these cases, it would have been our duty to rule favorably to its claimant, on the ground that

at time of seizure, actual transit was not ended. *State* v. *Intoxicating Liquors*, 101 Maine, 430; *State* v. *Intoxicating Liquors*, 102 Maine, 206. But we have thought it expedient, in view of the decision in the Heymann case, to place our decision upon the ground which must hereafter control in all similar cases.

Exceptions in each case sustained.

ANDERS PERSSON *vs.* CITY OF BANGOR.

Penobscot. Opinion February 8, 1907.

Ways. Application for assessment of damages. Same must be addressed to municipal officers. Mayor and aldermen are "municipal officers" of cities. R. S., chapter 1, section 6, paragraph 25; chapter 23, section 68.

To sustain a complaint to the Supreme Judicial Court to assess damages for the raising or lowering of a street or way under Revised Statutes, chapter 23, section 68, a previous application in writing for the assessment of such damages must have been made to the municipal officers.

The mayor and aldermen constitute the municipal officers of cities.

Such an application addressed to the mayor and city council, comprising not only the mayor and aldermen but also all the members of the common council, is not sufficient to authorize such complaint to the Supreme Judicial Court.

On report. Complaint dismissed.

Complaint under Revised Statutes, chapter 23, section 68, to have the damages determined alleged to have been caused by the raising of Hellier Street adjoining the complainant's land in the City of Bangor. Heard at the January term, 1906, of the Supreme Judicial Court, Penobscot County. At the conclusion of the testimony the case was reported to the Law Court "for determination upon so much of the evidence as is legally admissible."

The case appears in the opinion.

A. H. Harding, for plaintiff.

E. P. Murray, for defendant.

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

POWERS, J. On report. This is a complaint under R. S., chapter 23, section 68, to have the damages determined caused by the raising of Hellier Street adjoining the complainant's land in Bangor. The case shows that on October 13, 1903, and again on May 10, 1904, the Bangor Stone Ware Company of which the plaintiff was the proprietor applied in writing to the mayor and city council of Bangor, reciting the raising of said street thereby causing a strain and pressure to the wall of its factory and asking the city council to examine the premises and cause repairs to be made, or a new wall to be built. On each application the city council on Nov. 10, 1903, and on August 9, 1904, respectively gave the petitioner leave to withdraw, and thereupon this complaint was entered at the January term, 1905 of this court in Penobscot.

Several objections are made to these proceedings. By said section it is provided: "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."

It will be noted that only those can complain to the court who are aggrieved by the action of the municipal officers on such written application to them to assess the damages. Without determining whether the application in this case is in other respects sufficient, it was addressed to the mayor and city council and not to the municipal officers as required by the statute. The two are not the same. The mayor and aldermen constitute the municipal officers of cities, R. S., chapter 1, section 6, paragraph 25; while in Bangor the city council includes not only these but also the twenty-one members of the common council. This proceeding by complaint to the Supreme Judicial Court is authorized only after written application to the municipal officers. Upon them alone, and not upon another body of

which they form a part, the statute has conferred the power to act in such cases; and their action must be separate. *Atwood* v. *Biddeford*, 99 Maine, 78. The complainant never invoked their action but directed his application to another tribunal. This objection being fatal, it is unnecessary to look for others.

Complaint dismissed.

STATE OF MAINE *vs.* EDWARD A. WINSLOW et al.

Lincoln. Opinion February 8, 1907.

Testimony, objections thereto. Exceptions. Practice.

Objections to testimony, to be available upon exceptions, must be specific. Where a bill of exceptions states that "the charge is to be referred to as to what was said by the presiding Justice instead of the paragraphs quoted in the exceptions," and no part of the charge is printed or presented to the Law Court, the exceptions to the charge cannot be sustained.

On exceptions by defendants. Overruled.

The defendants after conviction and sentence in a trial justice court on search and seizure process, appealed to the Supreme Judicial Court where they were again convicted. They then filed the following bill of exceptions:

"The State offered evidence to show the defendants' guilt that upon the premises searched was a bar and empty glasses which evidence was objected to by defendant but allowed by the court.

"The defendants also except to the following in the Judge's charge to the jury: 'If you see a man with a scythe upon his shoulder going into a field in the middle of July you would assume that he was going to mow. When you find two barrels of empty beer bottles upon the premises searched what is the presumption?'

"The evidence, writ, charge of the Judge to be made a part of these exceptions, the charge to be referred to as to what was said by the presiding Justice instead of the paragraphs quoted in the exceptions."

The evidence in the case and the charge of the presiding Justice were neither printed nor furnished to the Law Court.

Weston M. Hilton, County Attorney, for the State.

L. M. Staples, for defendants.

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

POWERS, J. This is a bill of exceptions.

The first matter stated in the exceptions is that at the trial of the defendants on a search and seizure process evidence was admitted, against the defendants' objection, that upon the premises searched was a bar and empty glasses. Objections to testimony, to be available upon exceptions, should be specific. *Harriman* v. *Sanger,* 67 Maine, 442. Indeed the counsel for the defendants seems to have had this rule in mind, as he does not state in his exceptions that he excepts to the ruling of the presiding Justice admitting the evidence nor ask that any exception be allowed thereto. It may however be a satisfaction to the defendants to know that the evidence was clearly admissible for the purpose of showing the intent with which the liquors seized were kept by them. *State* v. *Burroughs,* 72 Maine, 480.

The rest of the exceptions relate to what is there alleged to be a part of the charge of the presiding Justice. It is stated in the exceptions that the evidence and charge are made a part of the exceptions, "the charge to be referred to as to what was said by the presiding Justice instead of the paragraphs quoted in the exceptions." Neither the evidence nor the charge is printed. Exceptions have never been allowed to the alleged part of the charge contained in the bill of exceptions. That part of the charge to which exceptions were allowed the defendants have not presented to the court. Under such circumstances there is nothing before the court for its consideration.

Exceptions overruled.

ALBERT J. TAYLOR

vs.

INHABITANTS OF THE TOWN OF CARIBOU.

Aroostook. Opinion February 8, 1907.

Taxation. Money at Interest. Debts. Statutory Construction. Punctuation. Statute 1845, chapter 159, section 4. R. S., chapter 9, sections 5, 79, 80, 81.

In the assessment of personal property for taxation under Revised Statutes, chapter 9, section 5, the amount which the person to be taxed is owing is to be deducted from the money which he has at interest and the debts due him.

The statute makes no distinction between money at interest and debts due the person to be taxed as to his right to have the same reduced in the assessment by the amount of debts which he is owing.

It is a principle of statutory construction that, when the meaning of a statute is in doubt, it is well to resort to the original statute and there search for the legislative will as first expressed.

While punctuation is subordinate to the text and can never control its plain meaning, yet in cases of doubt it may aid in its construction.

Whatever may have been the case formerly in England, when statutes were enrolled upon parchment and enacted without punctuation, in this State, where such a practice has never obtained, there is no reason why punctuation, which is intended to and does assist in making clear and plain the meaning of all things else in the English language, should be rejected in the interpretation of statutes.

On report. Judgment for plaintiff.

Appeal to the Supreme Judicial Court, under Revised Statutes, chapter 9, sections 79, 80 and 81, from the decision of the assessors of the town of Caribou refusing to make an abatement of the plaintiff's taxes.

The "petition for appeal," omitting formal parts, is as follows:

"Respectfully represents Albert J. Taylor, of Caribou, in said County of Aroostook, that on a certain day, to wit, the 15th day of April, 1905, in accordance with the notification by the assessors of taxes of the town of Caribou, aforesaid, for the year 1905, he season-

ably made, subscribed and presented to said assessors a true and perfect list of his polls and of his estate, real and personal, not by law exempt from taxation, of which he was possessed on the first day of April, 1905, and then and there offered to make oath to the truth of the same.

"Yet the said assessors in making the assessment for the year 1905, wholly disregarded and ignored the list aforesaid, and assessed your petitioner for money at interest, assessing on said money at interest a tax of Twenty-three Dollars and ten cents ($23.10); whereas in truth and in fact your petitioner owed debts on said first day of April, 1905, in excess of all money said petitioner had at interest and all debts due him on that day.

"And said petitioner further avers that afterwards, to wit, on the twenty-third day of December, 1905, he made written application to said assessors for an abatement of said tax of Twenty-three Dollars and ten cents ($23.10), being the amount of tax assessed against said petitioner for the year 1905, for money at interest. And in said application your petitioner stated the grounds on which he asked for this abatement; to wit, that he owed debts on said first day of April, 1905, in excess of all money he had at interest, and all debts due him, the said petitioner.

"And the said assessors declined to make any abatement as requested by your petitioner, and on the thirtieth day of December, 1905, gave your petitioner written notice to this effect.

"And your petitioner further avers that afterwards, to wit, on the sixteenth day of February, 1906, your petitioner in order to prevent distress of his property, paid under protest to Charles F. Ross, tax collector of the town of Caribou aforesaid, the said tax of twenty-three dollars and ten cents. ($23.10.)

"Wherefore, your petitioner appeals from said decision of said assessors, and prays that he may be relieved by the court from said tax, and that he may be reimbursed out of the town treasury the amount of this abatement, and that judgment for the amount of this abatement shall be rendered against the town of Caribou aforesaid, and for the costs of suit, and that execution may be issued therefor."

The matter came on for hearing at the September term, 1906,

Supreme Judicial Court, Aroostook County, at which time an "agreed statement" of the following tenor was filed:

"In the above entitled case, the parties thereto agree to submit the same to the Law Court upon an agreed statement of facts, which agreed statement of facts is as follows:—

"That on the first day of April, A. D. 1905, the day on which the petitioner was assessed for taxes, the plaintiff was a resident of the town of Caribou; that the assessors of said town of Caribou were legally chosen and qualified; that all due and legal proceedings were had by the said assessors in relation to giving notice in writing to the Inhabitants of said town of Caribou, to make and bring in to them, true and perfect lists of their polls and all their estates, real and personal, not by law exempt from taxation, of which they were possessed on the first day of April of that year; that the plaintiff seasonably and in accordance with the notification by the assessors of taxes for the year 1905, made, subscribed and presented to said assessors a list of his polls and estate of which he claimed he was possessed on the first day of April, A. D. 1905, and then and there offered to make oath to the truth of the same.

"That the said assessors of the town of Caribou, duly assessed the plaintiff for money at interest, as set forth in the petition for appeal, which may be copied and referred to by either party; that the plaintiff on the first day of April, A. D. 1905, and at the time of the said assessment, had, and was possessed of, the amount of money at interest for which he was taxed; that on the same day the plaintiff owed debts which amounted to as much, or more than he had money at interest upon which the tax was laid.

"It is further agreed that the plaintiff seasonably took an appeal after the assessors of said town of Caribou declined to make any abatement and gave due and proper notice of his appeal; that the plaintiff thereafterwards, to wit, on February 16th, A. D. 1906, in order to prevent distress of his property paid, under protest, to the collector of the town of Caribou, the said tax assessed by said assessors upon money at interest, which tax amounted to twenty-three dollars and ten cents ($23.10); and this suit is for the recovery of that sum, being the amount of tax so assessed against this plaintiff.

"The parties agree to limit the issue in this case to the question as to whether on the above agreed statement of facts the plaintiff could be legally assessed for money at interest within the meaning of chapter 9, section 5, and other tax laws of the Revised Statutes. If the plaintiff could be legally taxed under the above statement of facts, the town of Caribou is to prevail in this suit; but if the petitioner could not be legally taxed for money at interest under the above statement of facts, then the plaintiff is to prevail."

The case was then reported to the Law Court as agreed.

Albert B. Donworth and Charles Carroll, for plaintiff.

Foster & Foster and Eugene A. Holmes, for defendants.

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

POWERS, J. Appeal to the Supreme Judicial Court, under R. S., chapter nine, sections 79, 80 and 81, from the decision of the assessors of Caribou refusing to make an abatement of the appellant's taxes. The case comes before the Law Court on report and presents a single question for determination. The appellant seasonably made, subscribed and presented to the assessors a list of the estate of which he claimed he was possessed on April 1, 1905, and offered to make oath to the same. He had one thousand dollars money at interest and owed debts which amounted to as much or more than that sum. The assessors assessed him for the amount of money which he had at interest, without making any deduction from the same on account of the debts which he owed, and on application refused to make any abatement of this tax.

Personal estate for purposes of taxation is defined by R. S., chapter nine, section five, to include, among other things, "all obligations for money or other property; money at interest, and debts due the persons to be taxed more than they are owing." The defendants claim that in this statute the words "more than they are owing" relate to debts alone; the plaintiff contends that they modify and relate to money at interest as well as to debts.

As the statute now reads the legislative intention does not appear

clear. The punctuation, the comma after "interest," seems to favor the defendants' interpretation. On the other hand the two subjects of taxation are intimately related. Money at interest is included in debts, and whether all debts which bear interest would be money at interest might sometimes be questioned. The rest of the clause, "due the person to be taxed" relates to money at interest as well as to debts. The legislature evidently intended to include in this description, "money at interest and debts due the persons to be taxed," all debts whether bearing interest or not; and there would seem to be no reason in justice why it should apply a different rule of taxation to one than to the other. If the defendants are right in their interpretation the man who has one thousand dollars at interest and is paying interest on many times that amount, must be taxed for the one thousand dollars. On the same hypothesis if A and B should for their mutual accommodation swap their notes for one thousand dollars each on interest, two thousand dollars of taxable property have been thereby created, although neither man is worth a cent more than he was before the transaction.

This court has frequently declared that, when the meaning of a statute is in doubt, it is well to resort to the original statute and there search for the legislative will as first expressed. *Cummings* v. *Everett*, 82 Maine, 260; *French* v. *Co. Coms.* 64 Maine, 583. The statute under consideration is a part of section four, chapter 159, Public Laws of 1845, which reads as follows: "Personal estate shall, for the purpose of taxation, be construed to include all goods and chattels, moneys and effects, wheresoever they may be — all ships and vessels,— whether at home or abroad — all obligations for money or other property; money at interest and debts due the persons to be taxed, more than they are owing — all public stocks and securities — all shares in moneyed corporations, whether within or without the state — all annuities payable to the person to be taxed when the capital of such annuity is not taxed in this state — and all other property, included in the last preceding state valuation for the purposes of taxation." The words are precisely the same as in R. S., chapter nine, section three, but the punctuation is materially different. In the original act there is no comma after the word "interest," and there

is one after the word "taxed," thus making it at once clear that the clause "more than they are owing" relates to and modifies both money at interest and debts due the persons to be taxed. For twelve years the statute remained as originally enacted until the revision of 1857 which retained the grammar but changed the punctuation; and in the same form it appears in all the revisions since. A change in phraseology in the re-enactment of a statute in a general revision does not change its effect unless there is an evident legislative intention to work such a change. *Hughes* v. *Farrar*, 45 Maine, 72; *Cummings* v. *Everett*, supra. The reason for the rule applies with equal force to changes in punctuation.

We are aware that it has been repeatedly asserted by courts and jurists that punctuation is no part of a statute, and that it ought not to be regarded in construction. This rule in its origin was founded upon common sense, for in England until 1849 statutes were enrolled upon parchment and enacted without punctuation. No punctuation appearing upon the rolls of Parliament, such as was found in the printed statutes simply expressed the understanding of the printer. Such a rule is not applicable to conditions where, as in this State, a bill is printed and is on the desk of every member of the legislature, punctuation and all, before its final passage. There is no reason why punctuation, which is intended to and does assist in making clear and plain the meaning of all things else in the English language, should be rejected in the case of the interpretation of statutes. Cessante ratione legis cessat ipsa lex. Accordingly we find that it has been said that in interpreting a statute punctuation may be resorted to when other means fail; *Ewing* v. *Burnet*, 11 Pet. 41; that it may aid in its construction; *Albright* v. *Payne*, 43 Ohio St. 8; that by it the meaning may often be determined; Endlich Int. of Statutes, section 61; that it is one of the means of discovering the legislative intent; *Howard Savings Inst.* v. *Newark*, 63 N. J. L. 547; that it may be of material assistance in determining the legislative intention. *Coms. of Highways* v. *Ellwood*, 193 Ill. 304. "The punctuation however is subordinate to the text and is never allowed to control its plain meaning, but when the meaning is not plain, resort may be had to the marks, which for centuries have

been in common use to divide writings into sentences, and sentences into paragraphs and clauses, in order to make the author's meaning clear." *Tynell* v. *The Mayor*, 159 N. Y. 239.

In the case at bar looking at the statute in the light of the original act of 1845 as it was then punctuated and remained unchanged until the revision of 1857, it is clear that, as the appellant had no money at interest due him more than he was owing, he should not have been assessed for money at interest. The amount of the tax was $23.10 and he is entitled to an abatement to that extent. It is alleged in the application and admitted in the report that he has paid this tax to the collector of the town. He is therefore entitled to judgment for that amount against the town. R. S., chapter 9, section 81.

Judgment for the appellant against the town of Caribou for $23.10 and taxable costs.

FRANK C. BARKER *vs.* LESTER S. FRENCH.

Penobscot. Opinion February 15, 1907.

Waters and Water Courses. "Mill Act." Dams. Rights and duties of dam owner. Overflowing land below dam. Damnum Absque Injuria.

The case at bar was an action on the case in which the plaintiff sought to recover compensation for the loss and damage sustained by him, because, as he alleged, the defendant opened the gates of his mill dam across Kenduskeag Stream, and wrongfully discharged upon the plaintiff's meadow below, an unnatural and largely increased body of water which he had collected in his mill pond by means of the dam and flush boards. The plaintiff excepted to all the rulings made by the presiding Justice in his charge to the jury.

There was no averment in the plaintiff's declaration and no suggestion of evidence tending to prove that the defendant's mill dam and mills were not adapted in magnitude to the size and capacity of the stream and the quantity of water usually flowing in it. The instructions to the jury must therefore be presumed to have been given upon the assumption that the defendant's works were adapted in size to the usual flow of the stream.

With reference to the issue raised by the pleadings, the instruction was, that the defendant "could only maintain a head of water for the use of his mill, only let it out at such times and in such quantities as were proper and reasonable for the use of his mill. He could not hold water back when he had no use for it and there was no need of it . . . . and if he had occasion to use his mill, he could not turn out more water than was reasonably necessary and proper for the reasonable use of his mill. He must so far have regard for the rights and interest of those below him but within his right to operate his mill, he could exercise his rights and if those below were injured that was their misfortune in owning land below the mill." *Held:* that there was no error in the instructions.

The mill act of Maine does not authorize a complaint for flowing lands below a dam, and hence in an action at common law to recover damages alleged to have been caused by a defendant wrongfully increasing the volume of a stream so as to overflow a plaintiff's land below a dam, the question whether or not there was an unreasonable exercise of such defendant's rights is a question of fact for the determination of a jury under proper instructions.

On exceptions by plaintiff. Overruled.

Action on the case in which the plaintiff sought to recover for loss and damage sustained by him and alleged to have been caused by the defendant opening the gates of his mill dam across the Kenduskeag Stream and wrongfully discharging upon the plaintiff's meadow below the dam an unnatural and largely increased volume of water which the defendant had collected in his mill pond by means of the dam and flush boards.

Tried at the January term, 1906, of the Supreme Judicial Court, Penobscot County. It is assumed that the verdict was for the defendant although the case as sent to the Law Court is silent on that point. The plaintiff excepted to all the rulings made by the presiding Justice in his charge to the jury.

The case appears in the opinion.

Thomas W. Vose, for plaintiff.

P. A. Smith, for defendant.

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

WHITEHOUSE, J. This is an action on the case in which the plaintiff seeks to recover compensation for the loss and damage sustained by him, because, as he alleges, the defendant opened the gates

of his mill dam across Kenduskeag Stream, and wrongfully discharged upon the plaintiff's meadow below, an unnatural and largely increased body of water which he had collected in his mill pond by means of the dam and flush boards.

There was evidence tending to prove that the owners of the mill and dam prior to the occupation of this defendant, annually, on or before the twentieth day of May removed the flush boards on the dam and suspended the operation of the mill until the grass on the plaintiff's meadow was cut and housed.

There was, also, evidence tending to prove that at times during the months alleged in the declaration the water from the defendant's mill, while in use by him for the purpose for which it was built, so increased the flow of water in the stream that it overflowed its banks and flooded the plaintiff's meadow, thereby greatly reducing the quality and quantity of grass thereon, and so softened the soil of the meadow that it became very difficult and in some places impossible, to secure whatever crop of grass did grow there. There was also evidence to the contrary.

The presiding Justice instructed the jury as follows:

"The defendant is the owner of a dam and mill on the Kenduskeag Stream in Exeter. By the law of this State, he has a right to maintain on that stream a dam on his own land and with that dam raise a head of water for operating his mill on that dam. The plaintiff is the owner of a meadow on that same stream, below that dam one-half or three quarters of a mile, I think. The plaintiff has a right to have the water of that stream flow by his meadow according to its natural course and natural amount, except so far as modified by the right of the defendant in his mill above. The State has the power to give the defendant, Mr. French, certain rights which are superior, perhaps, to the rights of the plaintiff. Now Mr. French, the owner of the mill, by the law of this State had a right, in the prosecution of his business, to maintain a dam to raise a head of water sufficient to propel the machinery of his mill. He had a right to let that water out at such times in the year, at such times in the day, and in such quantities, as would be reasonably necessary for the proper and efficient working of his mill to transact his business as a manu-

facturer in that mill ; and the owner of lands below own their lands and enjoy them subject to that right of the mill owner above. So if, in the prosecution of his own rights, the mill owner lets water down at various times and various seasons and in various quantities, within his rights, and, by reason of the time of letting down or the quantity of letting down, the property of the riparian owner below is injured, then the latter must bear it. That is the law of this State. The defendant, Mr. French, therefore, could maintain his dam, and he could maintain flush boards, if reasonably necessary to raise a head of water for the proper working of his mill ; and by "proper" I mean the efficient working of his mill. Having raised his head of water, he could then use it in the prosecution of his business, and at such times, winter or summer, spring or autumn, freshet or drought, as would be reasonably necessary for the proper transaction of his business. He was entitled by law to carry on his mill business and to manufacture as the material came to him to manufacture. But he could only maintain a head of water for the use of his mill, only let out at such times and in such quantities as were proper and reasonable for the use of his mill. He could not hold water back when he had no use for it and there was no need of it. He could not turn it out at his whim when he had no occasion to use his head of water ; he could not turn it out wantonly. He could not turn it out simply to get rid of it, in such quantities as to be injurious ; and, indeed if he had occasion to use his mill, he could not turn out more water than was reasonably necessary and proper for the reasonable use of his mill. He must so far have regard for the rights and interest of those below him, but within his rights to operate his mill, he could exercise his rights, and if those below were injured, that was their misfortune in owning land below the mill. Whoever owns land upon the bank of a river or stream does so subject to the rights of men building mills above."

"To all of which rulings, the plaintiff excepts and prays that his exceptions may be allowed."

It will be seen that the bill of exceptions upon which this case comes to the Law Court fails to distinguish in any manner whatever the several propositions of law stated in the charge. It is therefore

clearly amenable to the disapproval visited upon this method of taking exceptions in the opinion of this court in *McKown* v. *Powers*, 86 Maine, 291. Under the rule of practice "authoritively declared" in that case, the court would not be required to consider exceptions presented in this objectionable manner, but inasmuch as the bill appears to have been allowed by the presiding Justice without objection or qualification the case has been carefully examined in the light of the arguments of counsel and the attention of the court has not been called to the statement of any proposition of law in the charge respecting the rights of riparian owners under the circumstances disclosed, which is not in harmony with the established principles of the common law, as modified by legislative enactments in regard to the erection and maintenance of mills and mill dams. The rule there given to the jury has been approved by a substantially uniform current of authority in all jurisdictions having statutes similar to our mill act, and no case has been cited by counsel in which an essentially different rule has been adopted. The same doctrine has been repeatedly announced by the court in Massachusetts, and in several analogous cases in our own State.

It should be noticed in limine that there is no averment in the plaintiff's declaration and no suggestion of evidence tending to prove that the defendant's mill dam and mills were not adapted in magnitude to the size and capacity of the stream and the quantity of water usually flowing in it. The instructions to the jury must therefore be presumed to have been given upon the assumption that the defendant's works were adapted in size to the usual flow of the stream; and with reference to the issue raised by the pleadings, the instruction was, that the defendant "could only maintain a head of water for the use of his mill, only let it out at such times and in such quantities as were proper and reasonable for the use of his mill. He could not hold water back when he had no use for it and there was no need of it; . . . and if he had occasion to use his mill, he could not turn out more water than was reasonably necessary and proper for the reasonable use of his mill. He must so far have regard for the rights and interest of those below him but within his right to operate his mill, he could exercise his rights and if those

below were injured that was their misfortune in owning land below the mill."

This was undoubtedly correct. In *Gould* v. *Boston Duck Company*, 13 Gray, 442, Shaw, C. J., says: "By the rule that all proprietors of land through which a water course passes have an equal right to the use of the power of the stream for mill purposes, it is not to be understood that each or any one has a right to the natural flow of the stream in the manner in which it ran originally, or as it would run if no mill were erected on it, or to be worked by it; in its mere natural flow, it affords no power. Dams must be made to raise it, and canals and sluices to conduct, apply and discharge it. The right to erect these works, and to change the natural mode of the flow of the current, is incident to the right of applying it to the working of mills, and this right therefore is common to every riparian proprietor. Each therefore must exercise his own reasonable right with a just regard to the like reasonable use by all others. The mere erection of a dam and the use of the water in driving wheels, must necessarily derange its steady and constant natural flow, and substitute a different manner, as to the time and mode of holding it up and letting it down. So far as such mode is reasonably incidental to the use of the stream for mill purposes, it is the right of the proprietor, and constitutes, in part, the mill privilege which the law gives him." See also *Drake* v. *Hamilton Woolen Co.*, 99 Mass. 574.

In *Brooks* v. *Cedar Brook Improvement Co.*, 82 Maine, 17, it was held that where a dam, erected in accordance with legislative authority upon a non-tidal public stream to facilitate the driving of logs, caused an increased flow of water at times in the channel below, thereby widening and deepening the channel and wearing away more or less, the soil of a lower riparian owner, it is not such a taking of property as entitled the owner to compensation, but a case of damnum absque injuria.

In *Durham* v. *Fibre Co.*, 100 Maine, 238, it appears that the dam in question was reasonably and properly located and rightfully constructed by the defendant company on its own land in accordance with the express authority of the statute for the purpose of propel-

ling a mill, and the question presented for the decision of the court was whether the plaintiffs were entitled to compensation for an injury to the highway below the dam resulting at freshet seasons from an increase in the volume, momentum and velocity of the water, and in the incidental pressure against the Durham shore, occasioned by the defendants' works. It was there held also that the damage sustained by the plaintiffs was a loss in fact without a wrong in law, the damnum absque injuria of the common law. See also A. & E. Encyc. of Law, Vol. 30, p. 378, and Farnham on Waters and Water Rights, Vol. 1, p. 1615, and Vol. 3, p. 2150.

It must be remembered that the case at bar is not a complaint for flowage under the statute. The mill act of this State, unlike that of Massachusetts, does not authorize a complaint for flowing lands below the dam. *Wilson* v. *Campbell*, 76 Maine, 94. The case at bar is an action at common law to recover damages for wrongfully increasing the volume of the stream so as to overflow its banks and the plaintiff's meadow. Whether or not there was an unreasonable exercise of the defendant's rights under all the circumstances of the case, was a question of fact for the determination of the jury under proper instructions. Whether the verdict was for the plaintiff or the defendant is not expressly stated, but from the fact that the exceptions are taken and presented by the plaintiff, it may be inferred that the verdict was in favor of the defendant. If so, the jury must have found that the defendant's manner of discharging the water through the gates of his dam was not an unreasonable exercise of his rights under the facts and circumstances disclosed, and the instructions given. Whether or not this conclusion was warranted by the evidence is a question not presented for the consideration of the court. The case is before the Law Court on exceptions and not upon a motion to set aside the verdict. The evidence is not before us. There was no error in the instruction, and the entry must be,

Exceptions overruled.

JOHN W. BAKER *vs.* JOHN P. WEBBER et al.

Washington. Opinion February 18, 1907.

Taxation. Assessment. Tax Sales. Forfeitures. Tax Title. Amendment of Records. Revised Statutes, chapter 4, section 10; chapter 9, section 87.

When a forfeiture of land is sought for non-payment of taxes assessed thereon, it must appear that there has been strict compliance with the essential provisions of the statute upon which the alleged tax title is founded. "To prevent forfeiture strict constructions are not unreasonable."

When a forfeiture of land is claimed for non-payment of taxes assessed thereon it must appear that the assessors made a proper record of the assessment of the tax or committed to the collector a list of assessments comprising an assessment of a tax upon the land.

Without statutory authority one who was formerly a town clerk, but who is no longer in office, cannot amend a town record made by him when clerk.

Revised Statutes, chapter 4, section 10, providing that "when omissions or errors exist in the records or tax lists of a town or school district, or in returns of warrants for meetings thereof, they shall be amended, on oath, according to the fact, while in or after he ceases to be in office, by the officer whose duty it was to make them correctly," is limited to amendments made under the sanction of an oath.

It is indispensible to the validity of a sale of real estate made by a tax collector for non-payment of taxes, that the collector be shown to have been legally elected and qualified to act in that capacity.

The case at bar was a real action to recover part of a township of land to which the plaintiff claimed title by virtue of a quitclaim deed from one who acquired his interest by deed from the inhabitants of the plantation, in which the land is situate, to whom the land was sold for non-payment of taxes assessed for the year 1897. *Held:* (1) that there was no legal evidence to show that any person was legally elected to the office of collector by the inhabitants or appointed thereto by the assessors of the plantation for the year 1897 or that any person was duly qualified to act as collector of taxes for that year; (2) that it does not appear that the assessors made any proper record of the assessment or that they committed to the collector any such list of assessments comprising the tax in question.

On report. Judgment for defendants.

Real action to recover possession of certain real estate situate in the plantation of Grand Lake Stream, otherwise known as Hinckley township, Washington County. The plaintiff's alleged title to the premises in dispute was based upon a quitclaim deed given to him by Dexter A. Hall who acquired his supposed interest in the premises by a deed given to him by the inhabitants of said plantation, to whom the premises were sold for non-payment of taxes by Arthur Fleming who acted as collector of taxes in said plantation for the year 1897.

Tried at the April term, 1905, of the Supreme Judicial Court, Washington County. At the conclusion of the evidence, it was agreed that the case should be reported to the Law Court for determination, "that Court to draw such inferences from the evidence as a jury might do, and render such decision as the law and evidence requires."

The case appears in the opinion.

Curran & Curran, for plaintiff.

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

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

WHITEHOUSE, J. This is a writ of entry to recover possession of certain real estate situated in the plantation of Grand Lake Stream, otherwise known as Hinckley township, in the County of Washington. The premises demanded comprise the whole of the plantation, but the defendants claimed to be seized in fee of only a part of it and disclaimed as to the residue.

The plaintiff claimed title by virtue of a quitclaim deed from Dexter A. Hall who acquired his interest by deed from the inhabitants of the plantation above named, to whom the land was sold for non-payment of taxes by Arthur Fleming who acted as collector of taxes in the plantation for the year 1897.

It is admitted that when this action was commenced, the defendants held and still hold title to the premises in dispute, unless it has devolved upon the plaintiff by virtue of the proceedings upon which the tax deed was based and subsequent conveyances. The defend-

ants' claim that the proceedings for the assessment and collection of the tax and for the sale of the land, are fatally defective in several particulars and that the evidence reported to the court fails to show that the requisite legal steps were taken to obtain a forfeiture of the lands for non-payment of taxes. They contend in the first place that no person was legally elected collector of taxes in that plantation for the year 1897, the year of the attempted assessment of the tax in question.

The only action taken by the inhabitants that year with reference to the choice of collector of taxes was at their annual March meeting, and so much of the record of this meeting as relates to the election and qualification of collector is as follows:

"Voted that the collection of taxes be given to lowest bidder if he gives the required bond, otherwise to be given to the next lowest bidder.

List of bids as follows:

	cts.	mills.
Geo. G. Elsemore,	4	4
A. J. Fleming,	4	
Chas. Fleming,	3	6
Wm. Elsemore,	3	5

After which all of the officers elected appeared before me and were duly sworn.

After which the meeting was duly adjourned.

A true statement of proceedings.

March 31st, 1897. Attest C. C. Hoar, Clerk."

This record purports to have been subsequently amended by C. C. Hoar, who acted as clerk in 1897; but it is admitted that he was not clerk at the time of the alleged amendment, and had ceased to hold the office long before that time, and was then residing in the State of Virginia. The amendment bears date June 28, 1897, but was in fact made in Virginia in February, 1905. It is as follows:

"June 28th, 1897.

This is to certify that Chas. Fleming & Wm. Elsemore, two lowest bidders for collection of taxes failed to give the required bond

and that A. J. Fleming, the next lowest bidder, has qualified by giving required bond and has been duly sworn by me.

Attest C. C. Hoar, Clerk."

It is admitted that Arthur Fleming is the same person as A. J. Fleming whose name appears in the list of bidders.

Whether the inhabitants at that meeting understood that by operation of the vote above recorded, the lowest bidder would be legally elected tax collector, or whether they intended that the assessors should make an appointment of collector under the instructions and limitations imposed by their vote respecting the lowest bidder, is not made entirely clear by the terms of the vote. But inasmuch as no action appears to have been taken by the assessors in regard to the matter, except to issue their warrant to Arthur J. Fleming as a collector of taxes already chosen, it is manifest that they intended and expected to make a final choice of tax collector by force of the vote passed at that meeting.

It appears, however, from the original record that Arthur Fleming who acted as collector for that year was not the lowest bidder, and without further evidence he would not appear to have been elected by operation of the vote at the March meeting. There is no other evidence bearing upon this question except the alleged amendment of the record made by Hoar in a distant State nearly nine years after he had ceased to be clerk. It is obviously no part of the record of the doings of the annual meeting of March 31, 1897, because it purports to relate to transactions occurring June 28 of that year; and unless it can be accepted as a legitimate record of matters which it was the duty of a town clerk to record, it is not competent evidence of the facts to which it relates, but only a certificate of one who might have been required to testify in relation to such facts as a witness under oath, subject to cross examination.

It is undoubtedly an established rule in New England respecting the amendment of the records of a city or town, that the clerk who has made an erroneous or incomplete record, may while in office or after a re-election to the same office, amend or complete such record according to the truth, being liable like a sheriff who amends his

return, for any abuse of the right. *Bangor* v. *Orneville*, 90 Maine, 217, and cases cited. But without statutory authority one who was formerly a town clerk, but is no longer in office, cannot amend a town record made by him when clerk. "There is an obvious distinction between the two cases" says Shaw, C. J., in *Hartwell* v. *Littleton*, 13 Pick. 229. In the former case the clerk "still enjoys the confidence of the town, is by their vote entrusted with the custody of their records and is held responsible for their purity and correctness under the sanction of an official oath."

It is true that section 10, chap. 4, R. S., provides that when errors and omissions exist in such records "they shall be amended on oath according to the fact while in or after he ceases to be in office by the officer whose duty it was to make them correctly." But the certificate of the former clerk made in February, 1905, in the case at bar, was not made under the sanction of an oath, and cannot be deemed an amendment of the record under the provisions of this statute. There is therefore no legitimate evidence in the case to show a compliance with the condition imposed by the vote of the inhabitants respecting the choice of a collector of taxes for the year 1897, and no legal evidence to show that any person was legally elected to that office by the inhabitants or appointed thereto by the assessors of the plantation for that year.

Nor is there any legal evidence of the qualification of Arthur J. Fleming as tax collector. The record of the annual meeting of March 31, only shows that the officers who had then been elected were "duly sworn." The certificate of C. C. Hoar, made nearly nine years later does purport to recite that A. J. Fleming was sworn June 28, 1897, but it has been seen that this certificate is not a part of the record and not legitimate evidence of the fact.

In *Payson* v. *Hall*, 30 Maine, 319, it was held to be indispensable to the validity of a sale of real estate made by a collector for non-payment of taxes, that the collector be shown to have been legally qualified to act in that capacity. "The party is required" said the court, "to produce the collector's deed, not the deed of a person assuming without right to act in that capacity. The tax payer is entitled to have his interest protected in the sale of his property by the obligations

imposed by the official oath." See also *Gould* v. *Monroe*, 61 Maine, 544.

But there is another fundamental defect in the proceedings reported which must be deemed fatal to the validity of the plaintiff's tax deed; for when a forfeiture of land is sought for non-payment of taxes assessed thereon, it must appear that there has been strict compliance with the essential provisions of the statute upon which the alleged tax title is founded. "To prevent forfeitures strict constructions are not unreasonable." *Cressey* v. *Parks*, 76 Maine, 532.

Here the report fails to show any proper record of an assessment of the tax in question. The statute (sect. 87, ch. 9, R. S.) provides that the assessors shall make a record of their assessment and of the invoice and valuation from which it was made" etc. In this case at the close of the assessors' record there is a certificate that the "foregoing pages contain a list and valuation of polls and estates, real and personal, liable to be taxed" etc. But there is nowhere in the record a positive statement that they have assessed on the polls and estates of resident proprietors and on the estates of non-resident proprietors the amount voted and raised by the plantation. It would be a reasonable inference from the certificate signed by them, that the "list" therein referred to, which comprised the defendants' lands, was the inventory or valuation from which the assessment was to be made, but which, so far as the record shows, never was made. It is true that in actions to recover taxes, not involving a forfeiture of the entire estate upon which the tax is assessed, it has been held that in the absence of such a record of the assessment signed by the assessors, the warrant committed to the collector, being an original paper, complete in itself, may be sufficient proof of the assessment. *Bath* v. *Whitmore*, 79 Maine, 182. But if it be conceded that this rule could properly be extended to cases involving a forfeiture of the property for non-payment of the tax upon it, the record here fails to show that the papers committed to the collector signed by the assessors, were accompanied by any list comprising an assessment of a tax upon the defendants' land. If any list of assessments was in fact committed to the collector, there is nothing in the record signed by the assessors showing what the list comprised.

Several other irregularities are apparent in the proceedings upon which the plaintiff's claim is based, but in view of the conclusion reached respecting the defects above considered, it is unnecessary to pursue an inquiry into any further irregularities.

It is the opinion of the court that the entry must be,

Judgment for the defendants.

EMMA M. DONNELL, Petitioner for Review,

vs.

E. Y. HODSDON.

Androscoggin. Opinion February 19, 1907.

Review. Same will be granted, when. What petition must allege. Negligence of Attorney. R. S., chapter 91, section 1; same, clause VII.

1. A petition for a review of a civil action is a statutory remedy to be granted only "in the special cases" named in the statute, R. S., chapter 91, section 1.
2. Under clause VII of the statute, the petition must allege and prove to the satisfaction of the court at nisi prius three propositions, (1) that justice has not been done; (2) that the consequent injustice was through fraud, accident, mistake or misfortune; and (3) that a further hearing would be just and equitable.
3. A ruling that the negligence of his attorney entitles the petitioner to a review is erroneous. It ignores the other requisites of the statute.

On exceptions by defendant. Sustained.

Petition for review entered and heard at the September term, 1906, of the Supreme Judicial Court, Androscoggin County. The bill of exceptions states the case as follows:

"This is a petition for review in which the petitioner prays to have a review of a certain civil action commenced against her in the Municipal Court for the City of Auburn in said County by E. Y. Hodsdon, and entered at the May term, 1906, in said court, in which action the petitioner was defaulted on the 28th day of May, A. D. 1906.

The presiding Justice after hearing the evidence, found as a matter of fact that the writ in the original action was properly served; that the petitioner herein procured the services of an attorney, and that such attorney properly entered his appearance in court; that the action was properly assigned for trial, and the attorney for the petitioner had actual notice of the date set for such trial. The presiding Justice also found as a matter of fact that a default in said case was entered after notice to said attorney and with his knowledge, and that the failure to defend occurred through the negligence and fault of the attorney for the petitioner, and ruled that failure of the attorney for said petitioner to do his duty was not negligence on the part of the petitioner, but was such accident, mistake or misfortune on her part as would entitle her to a review." To all these rulings the defendant excepted.

Arthur L. Bennett, for plaintiff.

S. Merritt Farnum, Jr., for defendant.

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

EMERY, C. J. A petition for a review of a civil action is a statutory remedy to be granted only "in the special cases" named in the statute. R. S., ch. 91, sec. 1. The only "special case" invoked in this petition is that stated in clause No. VII of the statute, which clause provides that "a review may be granted in any case where it appears that through fraud, accident, mistake or misfortune justice has not been done, and that a further hearing would be just and equitable." At the hearing upon this petition the presiding Justice found as a fact that the petitioner's attorney, who had appeared for her in the action sought to be reviewed, failed through negligence to notify her of the day set for the trial of the action, and hence she did not appear for trial and so was defaulted. The presiding Justice ruled that this negligence of her attorney "was such accident, mistake or misfortune on her part as would entitle her to a review." No other facts appear to have been shown as cause for a review, and hence the ruling was practically that nothing else was

necessary to be shown, as that fact was enough to entitle the petitioner to a review.

We think the ruling was wrong. It ignored other statutory requisites to the granting of a review on this petition. Under clause VII upon which this petition is based, the petitioner is not entitled to a review unless he proves to the satisfaction of the court at nisi prius three propositions; (1) that justice has not been done; (2) that the consequent injustice was through fraud, accident, mistake or misfortune; and (3) that a further hearing would be just and equitable. If the presiding Justice is satisfied of all these and grants the petition or is not satisfied of some one of them and denies the petition, his decision is final and not subject to review upon exceptions. Where, however, as here, the presiding Justice rules in effect that it is enough to show the negligent omission of the attorney to notify the client of the day set for trial, and that he, the presiding Justice, need not be satisfied of anything else, such ruling is subject to exception and for the reasons above stated is erroneous. It grants a review although there may not be any defense to the action, and although a further hearing would not be just nor equitable. It was declared in *Stillman* v. *Donovan*, 170 Mass. 360, that such negligence was not sufficient cause for a review.

Exceptions sustained.

SARAH E. MUNSEY *vs.* WILLIAM A. D. HANLY.

Lincoln. Opinion February 21, 1907.

Trespass Quare Clausum. Dower. Rights before assignment. Title to maintain. Evidence. Admissions and Declarations. Harmless error.

The gist of the action of trespass quare clausum is the disturbance of the possession.

Until dower has been lawfully assigned the right thereto is a mere chose in action, and confers no title to or seizin of the land itself.

A widow entitled to dower in land cannot maintain trespass quare clausum for an injury done to the land when her dower has not been lawfully assigned to her.

Admissions and declarations in disparagment of title are limited to those cases where the subject matter is capable of parol proof.

When admissions and declarations do not relate to the declarant's possession, which is provable by parol, but to his legal title, which such evidence is not competent to defeat, then such admissions and declarations are not admissible.

When in an action of trespass quare clausum testimony which has no bearing except upon the question of damages, is offered by the plaintiff and excluded such exclusion is not error unless the plaintiff shows a right to maintain such action.

On exceptions by plaintiff. Overruled.

Trespass quare clausum to recover damages alleged to have been committed in July and September, 1905, on land to which the plaintiff's husband held title in fee at the time of his death in 1899.

Tried at the October term, 1906, of the Supreme Judicial Court, Lincoln County. During the trial the plaintiff offered certain testimony which was excluded. To this ruling the plaintiff excepted. At the conclusion of the plaintiff's evidence, the presiding Justice ordered a nonsuit. To this ruling the plaintiff also excepted.

The case appears in the opinion.

Wm. H. Hilton, for plaintiff.

L. M. Staples, for defendant.

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

PEABODY, J. This was an action of trespass quare clausum brought by the plaintiff to recover damages of the defendant, for trespasses committed by him July 23 and September 1, 1905, on land to which Merrill Munsey, the husband of the plaintiff, held title in fee during coverture and until his death in the year 1889.

The plaintiff, the widow, with the five minor children of Merrill Munsey, continued to reside on the land in controversy. Under the statute in force at her husband's death she was entitled to dower, but it had not been assigned at the time of the alleged trespass.

The only evidence which the record presents consists of the plaintiff's testimony. It sufficiently proves her husband's ownership of the land, her continued occupancy with his children and the wrongful destruction by the defendant of trees growing on the land. She offered testimony to show how the defendant's acts and language at the time of the trespass affected her nervous system and as bearing upon her claim for exemplary damages. The presiding Justice excluded the testimony as to the effect upon her health of the acts done by the defendant in aggravation of the trespass, and ruled that the action could not be maintained upon the evidence, and ordered a nonsuit.

The case is before the Law Court on the plaintiff's exceptions to this exclusion of testimony, ruling and order of nonsuit.

The excluded testimony has no bearing except upon the question of damages, and is therefor immaterial unless the plaintiff has shown a right of action in this form. *Ames* v. *Hilton*, 70 Maine, 36; 12 Eng. & Am. Enc., 19; 28 Eng. & Am. Enc., 610.

The gist of the action of trespass quare clausum is the disturbance of the possession. *Brown* v. *Manter*, 22 N. H. 468; 4 Kent Com. 120; 3 Bl. Com. 210; Cooley on Torts, 379.

There is authority for holding that a widow continuing to reside in the house of her husband after his death has such possession by virtue of her right of dower, even before it is assigned as entitles her to maintain trespass quare clausum against a wrong doer or even against the heir. *Stevens* v. *Stevens*, 96 Ga. 374; *Frisbee* v.

Marshall, 122 N. Car. 760. But these cases and those of similar import will be found to be departures, under statutory provisions, from the rule established by the weight of English and American authority, that until dower has been lawfully assigned the right thereto is a mere chose in action, and confers no title to or seizin of the land itself. *Johnson* v. *Shields*, 32 Maine, 424; *Clarke* v. *Hilton*, 75 Maine, 426; *Hildreth* v. *Thompson*, 16 Mass. 191; 1 Wash. R. E. 222, 253: 4 Kent Com. 61.

The plaintiff's possession in this case was only a continuance of the occupation which she had during the life of her husband, and at the expiration of her ninety days quarantine as his widow it was subservient to the possessory rights which descent conferred upon the heirs, who were at the time of the alleged trespass in actual possession. Her right to remain was permissive and not inconsistent with their legal right of possession.

But it is claimed by the plaintiff that her possession was not that of doweress merely, but had been given her by the heirs. The evidence does not prove that she held possession by their consent. She relies upon the effect of their declarations and her testimony in support of this claim is, that as the children grew up they said to her repeatedly, "Mother the place is yours," "Mother you have brought us up and this place is yours." These declarations besides being indefinite do not come within the rule of admissibility. Admissions and declarations in disparagement of title are limited to those cases where the subject matter is capable of parol proof. These do not relate to the declarants' possession which is provable by parol but to their legal title which such evidence is not competent to defeat. 3 Phillips on Evidence C. & H. notes, 266: Wharton on Evidence, sec. 1165: *Keener* v. *Kauffman*, 16 Md. 296; *Dorsey* v. *Dorsey*, 3 H. & J. 426; *Phillips* v. *Laughlin*, 99 Maine, 26, and cases cited. In *Jackson* v. *Cary*, 16 Johnson (N. Y.) 302, Spencer, C. J., says: "Parol proof has never yet been admitted to destroy or take away title."

The evidence fails to prove the plaintiff's right to maintain this action, and a nonsuit was properly ordered. She was not prejudiced by the exclusion of the evidence offered on the question of damages

Exceptions overruled.

JOHN PELKEY *vs.* FANNIE A. HODGDON.

Androscoggin. Opinion February 22, 1907.

Collateral Evidence. Same open to explanation, when. Implied Admissions of Liability. Intention.

In an action brought by the plaintiff to recover for services alleged to have been rendered on the defendant's farm at her request and for her benefit, the defendant admitted on cross examination that after the plaintiff's claim had been made known to her, she mortgaged the farm for $900 for the purpose of taking up a mortgage given by her husband on property belonging to him, but on re-direct examination, the inquiry whether in giving this mortgage she had any purpose to defeat the collection of the plaintiff's claim, was excluded by the court.

Held: (1) That if the testimony be called purely collateral, it was not for the plaintiff to call out collateral facts which might prejudice and then object to an explanation of them.

(2) That the testimony that the defendant had given the mortgage under such circumstances might operate as an implied admission of liability on her part and was therefore material and not purely collateral evidence.

(3) That it was the legal right of the defendant to state distinctly on re-direct examination that in giving the mortgage she had no motive or design to hinder the collection of any claim which the plaintiff might have against her, and that she was not precluded from testifying in regard to her own intention by the fact that she was a party to the suit or otherwise, and that the exclusion of the testimony offered was therefore erroneous.

On exceptions by defendant. Sustained.

Assumpsit brought by the plaintiff against the defendant who is his daughter, to recover the sum of $2932 for the services of himself and his team alleged to have been rendered to the defendant at her request and for her benefit on a certain farm in Poland of which she had a bond for a deed. Plea, the general issue with a brief statement interposing the statute of limitations as a special matter of defense.

Tried at the September term, 1906, of the Supreme Judicial Court, Androscoggin County. Verdict for plaintiff for $406.

The defendant took exceptions to certain rulings made by the presiding Justice during the trial, and the case was sent to the Law Court on these exceptions.

The case sufficiently appears in the opinion.

Jesse M. Libby, for plaintiff.

Oakes, Pulsifer & Ludden and W. H. Judkins, for defendant.

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

WHITEHOUSE, J. This is an action of assumpsit brought by the plaintiff to recover compensation for services alleged to have been rendered at the request of the defendant and for her benefit, on a farm of which she had a bond for a deed in the town of Poland. It was not in controversy that the plaintiff lived on the premises with his wife and son and carried on the farm, from the spring of 1899 until June, 1905, but the relation of father and daughter existed between the parties, and the defendant says that solely for the purpose of providing a more comfortable home for her parents, she invited them to leave their lonely cabin in New Brunswick and come to her farm in Poland, Maine, and that the plaintiff's labor was accordingly performed chiefly for his own benefit, without any intention on his part of claiming payment therefor other than the produce from the farm which he received from year to year, and without any expectation on her part of making any further payments. The verdict was for the plaintiff for $406, and the case comes to this court on exceptions.

According to the facts recited in the bill of exceptions, there was evidence at the trial tending to show that the purchase price of the farm was $1400 and that at the time the plaintiff entered into possession of it, the defendant had paid only $200 of this amount, but had received a bond for a deed upon the payment of the remaining $1200; that she paid all the taxes assessed on the place, but by arrangement with her father, she received the apples raised on the premises each year; that out of her earnings in the Bates Street Laundry in Lewiston, and the proceeds of the apple crop, she paid the original indebtedness of $1200, and together with the

stumpage of $250 for lumber standing on the place, extinguished a subsequent mortgage of $800 placed on the property for the purpose of raising money to repair the buildings; "that afterwards she put another mortgage of $900 on the farm, and used the money to affect through a trustee, the purchase of a certain other mortgage of $800 given by her husband upon a certain legacy, not then available, owned by her husband on his mother's estate of the value of between two and three thousand dollars, in order to stop large interest accruing upon the mortgage and to save the legacy from being lost by the mortgage."

Concerning this last named mortgage for $900, the bill of exceptions contains the following statements:

"The defendant, Fannie Hodgdon, was inquired of, on re-direct, touching the nine hundred dollar mortgage, the last one put on the farm by her. Counsel for plaintiff claimed by insinuation during the trial and by argument to the jury, that this mortgage and the manner in which she effected the purchase of her husband's mortgage on his legacy, showed a purpose on her part to do something to hinder and delay the collection of her father's claim in suit."

Touching this point, the defendant was asked the following question:

"Whether or not at the time when you put that mortgage, the last mortgage, on your farm, you had any purpose of mind whatever in putting on the mortgage on the farm to defeat the collection of any claim your father might have against you in this court."

This was objected to and excluded and an exception allowed to the defendant.

It is not expressly stated in the exceptions, but it may fairly be inferred from the recitals above quoted that this mortgage was given after the plaintiff's claim for compensation had been asserted and made known to the defendant, and that the facts in regard to it were specifically drawn out on cross examination; for it appears that the "plaintiff claimed by insinuation during the trial," that the mortgage was given to hinder the collection of the plaintiff's claim, and that the defendant's inquiry under consideration was made on "re-direct examination." As observed by this court in *Williams* v.

Gilman, 71 Maine, 21, "If the testimony be called purely collateral, it was not for the plaintiff to call out collateral facts, which might prejudice, and then object to an explanation of them. The rule that testimony collateral to the issue, cannot be contradicted, does not apply to testimony introduced by the opposite party, but is confined to testimony introduced by cross examination of an opponent's witness, or otherwise, by the party which proposes to contradict it."

But such a piece of testimony cannot be treated as purely collateral. The fact that the defendant had given a mortgage on the property for such a large amount, for no purpose of her own, if not satisfactorily explained, might indicate a consciousness on her part that she could not successfully resist the plaintiff's claim, and thus operate as an implied admission on her part that there was an existing indebtedness from her to her father. With reference to "conduct as evidence of consciousness of a weak cause" Mr. Wigmore says: "The conveyance of property during litigation or just prior to it, may be evidence of the transferor's consciousness that he ought to lose." Wigmore on Ev. Vol. 1, sect. 282. In the Encyc. of Evidence, Vol. 1, p. 366, under the caption of "Admissions by Conduct" is cited *Heneky* v. *Smith*, 10 Or. 349. This was an action to recover damages for maliciously shooting the plaintiff. At the trial the court admitted in evidence a deed of 400 acres of land executed by the defendant fourteen days after the shooting, for the expressed consideration of $1200. On appeal it was held that the deed was properly admitted. In the opinion the court say:" "The jury might reasonably infer from this act of the appellant, in view of all its surroundings, that it was prompted by a consciousness on his part, that the shooting of the respondent was unjustifiable and that he was legally liable for the damages occasioned by it. In this view, it would operate like an admission of liability, and be equally competent. Admissions may be by acts, as well as by words."

It is true that the defendant appears to have testified affirmatively that this mortgage was given to stop the large interest accruing on the husband's mortgage, and to prevent the sacrifice of the legacy under that mortgage. But upon this state of the evidence the jury might not have been satisfied that these were the sole considerations

that induced her to give this mortgage. They might still have inferred that another and perhaps the principal purpose was to defeat the collection of the claim set up against her by the plaintiff. It was the legal right of the defendant to state distinctly on re-direct examination that she had no such motive or design in giving this mortgage. It was a material fact and not a matter resting wholly in the discretion of the presiding Judge. And it is well settled that the defendant was not precluded from testifying in regard to her own intention by the fact that she was a party to the suit or otherwise. *Edwards* v. *Currier*, 43 Maine, 474. See also Wigmore on Evidence, Vol. 1, section 581, where the objections to the rule are thus answered by the author: "The argument is (so far as any has been vouchsafed) that such testimony may be falsified without the possibility of detection, and that therefore it is dangerous to permit an interested person to allege, in effect, whatever he pleases as to his own state of mind. The answers to this argument are various and sufficient. In the first place, there is no precedent for it in the inherited common law; it is an attempt to create a rule without an analogy in the accepted doctrines of the judicial rulings. In the next place, it assumes that there is no counter-evidence available, and yet asks that the only evidence which it assumes to be available shall be excluded,— in other words, asks that a concededly proper issue be submitted to the jury with no evidence at all. In the third place, its assumption is incorrect in fact, namely, that there is no other available and sufficient evidence of intent or motive by which the person's own testimony can be tested and checked; for the evidence from conduct and circumstances and from others' testimony is not only a permissible but a potent source of belief and is amply sufficient to guard against falsification."

It is accordingly the opinion of the court that the evidence offered should have been admitted. This conclusion renders it unnecessary to consider the other exceptions presented.

Exceptions sustained.

JOHN P. CHASE

vs.

WM. A. COCHRAN, JAMES R. BRAGG, THOMAS CUNNINGHAM and GEORGE HUFF.

Lincoln. Opinion April 1, 1907.

Ways. Location. Trespass. Estoppel. "Official Acts." Authorizing a Tort. Liability. Speculative Damages. R. S., chapter 6, section 91; chapter 23, section 75.

No public way can be located across flats without authority therefor being first obtained from the legislature.

The owner of flats has in them an estate in fee, subject only to the public rights of fishing, fowling and passing over them in boats, and may maintain trespass quare clausum for any injury done to his possession of the same.

Petitioners for the laying out of a way are not thereby estopped to deny the legality of its subsequent location.

A grantee is not estopped by any act or declaration, of which he has no notice, of a grantor in possession at the time of the conveyance.

Statements not acted upon afford no ground for estoppel.

All acts of officials are not official acts, but only such as are done under some authority derived from the law, or in pursuance of prescribed duties.

One who directs or authorizes a trespass is equally and jointly liable with him who commits it.

Damages which are purely theoretic and speculative are too indefinite and uncertain to be recovered.

On report. Judgment for plaintiff.

Trespass quare clausum brought to recover damages alleged to have been sustained by the plaintiff by reason of the building of a bridge across a tide water and navigable cove in the town of Edgecomb, Lincoln County, which cove is dry at low water. This bridge was constructed by the defendant, George Huff, under a contract

made by the selectmen of said Edgecomb in their official capacity and on behalf of said town under one of certain votes of said town passed previous to the making of said contract and the construction of said bridge. This bridge made a part of the town road previously located by the selectmen of said town and accepted by said town which location covered the flats across which said bridge was built. The three selectmen representing said town in the making of said contract with said Huff for the construction of said bridge are the other three defendants.

Tried at the October term, 1905, of the Supreme Judicial Court, Lincoln County. Plea, the general issue with the following brief statement:

"That whatever was done on the premises of the plaintiff was done under and by virtue of the public right to build and construct a road which had been there legally laid out by the proper officials of the town of Edgecomb and authorized by lawful authority, and any entry upon the land of the plaintiff was under such right and laying out.

"That the said Wm. A. Cochran, James R. Bragg and Thomas Cunningham were at the time alleged in said writ public officers of the town of Edgecomb, and are not responsible to this plaintiff for their acts as such, or for their acts in laying out said road; nor for the acts of those they were obliged to employ in building the same; nor for the contractor with said town who did the work and acts which were done on the plaintiff's premises; that whatever they did thereon or in relation thereto, they did as such public officers and as agents of said town, and are not themselves personally responsible therefor.

"That this plaintiff, by his acts and words, and by the acts and words of his grantors, Norris & Gay, is estopped from making any complaint on account of the matters complained of in his said writ.

"And the defendants further say that they are not responsible or liable for the maintenance of any matter or thing which the plaintiff complains in his said writ infringes his rights."

At the conclusion of the evidence, the case was reported to the Law Court for decision upon so much of the evidence as is legally admissible, with the stipulation that "if the action is maintainable

against any of the defendants, judgment is to be given against such defendant or defendants and the court is to assess damages, otherwise judgment for the defendants."

The case fully appears in the opinion.

Wm. H. Hilton, for plaintiff.

Arthur S. Littlefield, for defendants.

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

POWERS, J. Trespass quare clausum, on report. Writ dated January 2, 1905. Aside from the testimony, which related principally to the questions of estoppel and damages, the facts appear in the following agreed statement:

"This is an action to recover damages on account of the building of a bridge across a tide water and navigable cove in the town of Edgecomb which cove is dry at low water, and the flats of which, with the adjoining upland on the east side of the cove, and what the plaintiff claims is a mill site and a dam some fifty feet south of the bridge, are owned by and was conveyed to the plaintiff May 16, 1903. This bridge was constructed by the defendant, George Huff, under a contract dated June, 1904, made by the selectmen of the town in their official capacity and on behalf of the town under one of the following votes at a town meeting held May 5, 1903, which was that the selectmen receive bids for building the whole or sections of the road, and allowed to accept or reject any or all bids; and at a meeting of said town held March, 1904, under an article in the warrant reading 'to see what kind of a bridge the town will vote to build across the cove near John P. Chase's ice pond,' it was voted 'to build a bridge. Voted to leave the matter of bridge with the selectmen, and commissioners.' The selectmen, representing the town in the making of this contract, are the other three defendants. The bridge was built in July, 1904. This bridge made a part of the town road located by the selectmen of Edgecomb May 4, 1903, and accepted by the town May 13, 1903, which location covered the flats across which the bridge was built, and the sufficiency or regularity of the location is

only questioned in so far as it is across the tide and navigable waters of said cove."

The location and plans for the bridge were approved by the Secretary of War Feby. 17, 1904. Defendants in their plea justified what was done on the premises of the plaintiff "by virtue of the public right to build and construct a road, which had been there legally laid out by the town of Edgecomb and authorized by lawful authority, and any entry upon the land of the plaintiff was under such right and laying out."

A part of the bridge was built over flats owned by the plaintiff. There was no special act of the legislature authorizing its erection, and no consent of the legislature is shown to the laying out of the way across tide water at the spot where the bridge was built. The plaintiff's flats at low water are entirely dry, and the defendants claim that the way was legally located although the bridge is a public nuisance, that the municipal officers had a perfect right to locate the road across such flats and to construct so much of it as did not interfere with or obstruct the navigation of the creek when the flats were covered with the tide. We cannot however conceive of a town way laid out by the municipal officers which the public can only use or have a right to use at certain times in the day, which times themselves vary each day with the ebb and flow of the tide. Nor can we conceive of the necessity for holding that the municipal officers have power under the statute to locate and contruct such anomalous and indeterminate ways, when by obtaining the legislative consent and in case a bridge, dam, dike or causeway is desired, the approval of the location and plans by the Chief of Engineers and the Secretary of War of the national government, a public way may be built in which the rights of the public are known and clearly defined. The question cannot be regarded as an open one. In *Kean* v. *Stetson*, 5 Pick. 492, the selectmen of Mansfield attempted to lay out a town way along flats between high and low water mark, that is upon flats which at low water were not covered by the tide, precisely what the defendants claim was done in the case at bar, except that here the attempted location extends clear across the cove from high water mark to high water mark. The court

speaking through Chief Justice Parker said, "We do not believe there is any authority given by the statute to appropriate the shores or flats of a navigable river to the use of the inhabitants of a town in the form of a way or road. It cannot be wanted for any of the common purposes of a road, and cannot be constructed so as to be used as such without interrupting more or less the public right of passage up and down the river. The whole river included within high water mark on each side is a public highway. . . . .

A public highway cannot be laid out across a navigable stream, except by a license from the legislature. Why? Because it will destroy an existing highway, the river itself, in which all the citizens have an interest. A town, then, cannot lay a way on the shore between high and low water mark, for though it may not entirely, it will essentially impair the public right."

It was held in *Cape Elizabeth* v. *Co. Coms.*, 64 Maine, 456 that a way across tide waters can only be located by authority of the legislature. In a more recent case speaking of a similar attempted location, this court said: "It was exclusively within the province of the legislature to determine whether public convenience and necessity required the extension of Exchange Street to low water mark." *Bangor* v. *Railroad Co.*, 97 Maine, 151. The location of the way being illegal and void the plaintiff had the same title to his flats as if it had never been attempted. He had in them an estate in fee, subject only to the public rights of fishing, fowling and passing over them in boats, and might maintain trespass quare clausum for any injury done to his lawful possession of said flats. *Moore* v. *Griffin*, 22 Maine, 350, *Com.* v. *Alger*, 7 Cush, 53; *King* v. *Young*, 76 Maine, 76.

It is claimed that the plaintiff is estopped to deny the legality of the way. He and his predecessor in title who then owned the premises joined in the petition for its location. The petition contained no representation of fact which is relied upon to create the estoppel. At most it could only be regarded as a representation on his part that the municipal officers had authority to make the location. This was a question of law about which the municipal officers are presumed at least to know as much as the petitioners. There is no

evidence that they were misled by it. The petitioners presumably were asking for a legal location, and they had a right to rely that before basing any action upon the petition the consent of the legislature would be obtained. The petitioners are not estopped to deny the legality of the subsequent location. In re *Sharp*, 56 N. Y. 357.

The plaintiff's grantors before conveying to him, wrote to the selectmen "to lay out the road now contemplated just as you think advisable." Without discussing or deciding the adequacy of this statement to create an estoppel against the grantors, it is sufficient that there is no evidence that the plaintiff ever heard of this statement before purchasing. The plaintiff cannot be estopped by any act, conduct or declaration of his grantors of which he had no notice. His grantors were in possession at the time of the conveyance to him; neither road nor bridge had been built; and their naked declarations cannot have a greater effect than would a prior unrecorded deed of which he had no notice. *Hodges* v. *Eddy*, 41 Vt. 485.

There is evidence that at a hearing before a United States engineer in regard to the plans for the bridge the plaintiff, on being asked if a twenty foot movable portion of the bridge would satisfy him, expressed himself as satisfied with an opening in the bridge. This falls far short of assenting to the building of the bridge. The plaintiff's attitude throughout shows that he was opposed to a way or bridge at the point where it was built; and the reasonable inference from his conduct and statement is that the opening proposed would be satisfactory if the bridge had to be built there. Moreover there is no evidence that the statement was heard or acted upon by any of the defendants and it affords no ground of estoppel in this case.

The way was not legally located; the attempted justification of the defendants fails; and the liability of defendant Huff, who unlawfully entered upon the plaintiff's land and there built the bridge, is established. The agreed statement recites that the other defendants, the selectmen, "in their official capacity and in behalf of the town" made a written contract with Huff to build the bridge. It is claimed that they were acting as town officers, that this was an official act, and that they are exempt from liability by virtue of R. S., chapter 6, section 91, which says that such officers by reason of such acts

shall not be liable in damages. Contracting with Huff to enter upon the plaintiff's land and build the bridge was not an official act within the meaning of that section, because it was not an act which it was a part of their official duty to perform. They did not undertake to make the contract with Huff because as selectmen they had authority to make it, but under a vote of the town that the selectmen eo nomine receive, accept or reject bids for building the whole or any part of the road. The town could have bestowed the same authority on John Doe or any other private person. "Towns may authorize their road commissioners or other persons to make contracts for opening or repairing their ways." R. S., chapter 23, section 75. The town authorized the selectmen to accept bids for building the bridge, but, as the way had never been legally located, there was no authority in the town to open it or build the bridge. The town could clothe the selectmen with no authority to employ Huff for that purpose. He acted under the contract by their authority and direction. It is well settled that one who directs or authorizes a trespass is equally and jointly liable with him who commits it; and the selectmen cannot escape liability in this case because they undertook to act in behalf of a municipality which itself had no legal power to authorize the entry upon the plaintiff's land.

The plaintiff is entitled to recover nominal damages for the unlawful entry upon his land and such actual damages as he has sustained, if any, by the erection of the bridge. Plaintiff had a dam, mill privilege and pond some fifty feet south of the bridge, and the only claim made of actual damage is that the bridge has obstructed the plaintiff's right of passage to and from this dam and mill privilege. The cove over which the bridge was built was a public highway. Its navigation was obstructed by the bridge which thereby became a public nuisance. An action on the case is the appropriate remedy to recover consequential damages such as are claimed by the plaintiff. Without resting our decision on that ground however, or here discussing or deciding whether, as claimed by the defendants, in order for an individual to recover damages arising from a public nuisance he must show that he has sustained an injury differing in kind as well as in degree from that suffered by the general public, it is suffi-

cient to say that the plaintiff has suffered no actual damage either direct or consequential. The damages claimed by him are theoretic and speculative, such as cannot afford ground for recovery. He had no mill on his mill privilege, and there had not been one there for more than thirty years before the bridge was built. He had been "considering an idea" he had for an invention, and was considering putting in a shop and using the privilege for "power to manufacture the invention." He had no definite plans however about building, and never made any attempt to build the shop or use the dam or privilege. That his plans never matured, that his idea never ripened into action, that no shop was built and no invention manufactured therein is, to say the least, as likely to have been a financial benefit as injury to him. He has never actually attempted to go by boat up the Sheepscot River to his mill privilege, has never had any occasion to carry anything up to the dam, and has never as matter of fact in any way been obstructed by the bridge in his use of the river as a highway. Here is no special damage of any kind or of any degree, and in fact no damage at all, except the nominal damage which the law gives for the unlawful entry upon the plaintiff's land.

Judgment for the plaintiff for one dollar.

In Equity.

UNION WATER POWER COMPANY et als.,

vs.

LIBBEY & DINGLEY COMPANY et als.

LIBBEY & DINGLEY COMPANY et als.,

vs.

UNION WATER POWER COMPANY et als.

Androscoggin. Opinion April 3, 1907.

Deeds. Reservation. Same Construed. Waiver.

In the case at bar in which equity proceedings were instituted for the purpose of obtaining a determination, among other things, of the number of hours in each day during which the Libbey & Dingley Company as owners of the Lincoln Mill, so-called, is authorized to use the amount of water to which it was found to be entitled, the following facts appear: The Libbey & Dingley Company acquired its rights in question by virtue of a reservation in a deed from the Franklin Company to the Union Water Power Company dated December 5, 1878. In this deed the description of the granted premises is separated and arranged under fifteen different captions comprising the several dams, canals, gate house lots and other items constituting the water power conveyed. The paragraphs containing the reservation are found under the sixth head entitled "Gate House Lot," the material parts of which are as follows:

"This conveyance is made subject to all the rights which the said City of Lewiston possesses in the street or passageway aforesaid from its said lot

to Main Street," (and several other rights therein enumerated.) "Excepting and reserving to said Franklin Company, its successors and assigns, the right forever to take from said Great Androscoggin River, where it now takes water for the Lincoln Mill, so-called, so much water as is necessary to furnish power for the machinery at present in said Lincoln Mill; said reservation being subject to all prior grants of water power made by the Lewiston Water Power Company or the Franklin Company to any corporations or persons.

"Subject also to all the conditions, obligations, limitations and provisions, applicable, contained in a certain indenture of lease from said Franklin Company to the Hill Manufacturing Company, dated December 30, A. D., 1865, and recorded in the Androscoggin Registry of Deeds; to which said indenture and its record reference is hereby made for a particular enumeration of said conditions, obligations, limitations and provisions."

Also in the aforesaid deed from the Franklin Company to the Hill Manufacturing Company it is provided that the latter "shall have the right to use and draw the amount of water hereby conveyed during the whole of the twenty-four hours of each and every day or any portion thereof, more than fourteen hours, provided such use and drawing more than fourteen hours per day shall not injure or interfere with any other use which the party of the first part, their successors and assigns, may desire to make of said water during the fourteen hours of each day" together with the further proviso that the said Hill Manufacturing Company should cease to use the water more than fourteen hours a day whenever the said Franklin Company should determine that such use is injurious to it the said Franklin Company and give written notice thereof to the said Hill Manufacturing Company. In accordance with the last aforesaid proviso, the Union Water Power Company, by written notice dated February 16, 1904, notified the Libbey & Dingley Company to cease using water for more than fourteen hours per day.

Held: 1. That the construction given by the presiding Justice to the deed of December 5, 1878 from the Franklin Company to the Union Water Power Company was correct, and that the reservation therein in favor of the Lincoln Mill, and not the conveyance itself, was made "subject to all conditions, obligations, limitations and provisions applicable" contained in the Hill indenture.

2. That the reservation in question must be held subject to the conditions, limitations and provisions of the Hill indenture as far as applicable, precisely the same as it would have been if all of such conditions, limitations and provisions had been copied verbatim into the reservation.

3. That upon the findings of the presiding Justice that the use of the water by the Libbey & Dingley Company in excess of fourteen hours a day was not shown to be injurious to the Union Water Power Company prior to the aforesaid notification, the latter cannot be deemed to have waived any rights by acquiescence in such excessive use prior to that time.

4. That while this conclusion that the Lincoln Mill became subject to the provision of paragraph sixth of the Hill indenture, providing for a day run and a night run and prescribing the manner in which the right is to be exercised, is based upon a legal construction of the reservation to the Franklin Company in favor of the Lincoln Mill, it is also manifestly in general accord with all of the grants made by the Lewiston Water Power Company prior to 1878, as well as all of the indenture of the Union Water Power Company after that date, and in harmony with the entire history of the development of this water power as well as the general policy indicated by its management and control for a quarter of a century.

In equity. On exceptions by Libbey & Dingley Company. Overruled.

Bill in equity brought by the Union Water Power Company and seven other corporations located at Lewiston, and a cross bill brought by the Libbey & Dingley Company also located at Lewiston. These equity proceedings were instituted for the purpose of obtaining a judicial determination of the respective rights of all the parties in the water power created by the dams, canals and head gates on the Androscoggin River at Lewiston.

These two causes were fully heard upon the bills, answers and proofs by the Justice of the first instance and his findings of fact, rulings and decrees cover eighty printed pages.

Exceptions were taken by the Libbey & Dingley Company to certain rulings made by the Justice of the first instance as the basis of his decree respecting the number of hours in each day during which the Libbey & Dingley Company, as owners of the Lincoln Mill, is authorized to use the amount of water to which it is found to be entitled.

The case appears in the opinion.

White & Carter, for Union Water Power Company.

John A. Morrill, for Libbey & Dingley Company.

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

WHITEHOUSE, J. The original bill brought by the Union Water Power Co. and seven other corporations located at Lewiston, and a cross bill filed by the Libbey & Dingley Co. also located at

Lewiston, were instituted for the purpose of obtaining a judicial determination of the respective rights of all the parties in the water power created by the dams, canals and head gates on the Androscoggin River at that place. The two causes were fully heard upon the bills, answer and proofs by a single Justice who made elaborate and exhaustive findings of fact and numerous rulings in matters of law. In accordance with these findings and rulings, decrees were filed comprising definite adjudications upon all of the questions involved respecting the rights of the parties in this water power. The single question presented to the Law Court arises upon exceptions taken by the Libbey & Dingley Co. to certain rulings made by the sitting Justice as the basis of his decree respecting the number of hours in each day during which the Libbey & Dingley Co. as owners of the Lincoln Mill, is authorized to use the amount of water to which it is found to be entitled.

According to the statement of facts a corporation known as the Lewiston Water Power Company appears to have been the original or parent company that acquired control of the land on both sides of the river at Lewiston prior to 1857 and owned all the water power which had then been developed at that point, excepting a small interest known as the Columbia mill power. In March, 1857, the Franklin Company, as successor to the rights of the parent company, acquired title to all the unsold and unused water power developed by the works of its predecessor, and December 5, 1878, in pursuance of a comprehensive scheme devised for the further development and more efficient management of this water power, conveyed to the Union Water Power Company organized for that purpose, all its right and title to this power, excepting and reserving the Lincoln mill power. But it held a controlling interest in the new company until long after the Libbey & Dingley Company had acquired title to the Lincoln Mill in 1893, through mesne conveyances from the Franklin Company.

The rulings of the presiding Justice to which these exceptions were taken, involve a construction of the reservation in this deed of December 5, 1878, from the Franklin Company to the Union Water Power Company. In this deed the description of the granted

premises appear to have been separated and arranged under fifteen different captions comprising the several dams, canals, gate house lots and other items constituting the water power conveyed, and the paragraphs containing the reservation in question are found under the sixth head entitled "Gate house lot" and are as follows:

"This conveyance is made subject to all the right which said City of Lewiston possesses in the street or passageway aforesaid from its said lot to Main Street, and also to all rights which said City of Lewiston possesses to lay pipes across the Upper or Main Canal and said above described parcel of land; and to enter upon the same at all reasonable and proper times for the purpose of repairs and all matters incidental to the carrying out of the purpose and objects for which the conveyance from said Franklin Company to said City of Lewiston was made; and also subject to the right of said City of Lewiston to build, construct, and maintain such gates, racks, and other works as may be needed to properly take the water from the River above said "dam No. 4," and to discharge the waste water into the River from the lower level, so called; and for all other purposes for which said last mentioned conveyance was made, reference being made to said conveyance for a particular description of the same. Excepting and reserving to said Franklin Company, its successors and assigns the right forever to take from said Great Androscoggin River, where it now takes water for the Lincoln Mill, so-called, so much water as is necessary to furnish power for the machinery at present in said Lincoln Mill; said reservation being subject to all prior grants of water power made by the Lewiston Water Power Company or the Franklin Company to any corporations or persons.

"Subject also to all the conditions, obligations, limitations and provisions, applicable, contained in a certain indenture of lease from said Franklin Company to The Hill Manufacturing Company, dated December 30, A. D. 1865, and recorded in the Androscoggin Registry of Deeds; to which said indenture and its record reference is hereby made for a particular enumeration of said conditions, obligations, limitations and provisions."

Among the provisions following the habendum of this deed of December 30, 1865, from the Franklin Company to the Hill Manu-

facturing Company, is the following found in paragraph VI, as follows:

"The Party of the second part, their successors and assigns, shall have the right to use and draw the amount of water hereby conveyed during the whole of the twenty-four hours of each and every day or any portion thereof, more than fourteen hours, provided such use and drawing more than fourteen hours per day shall not injure or interfere with any other use which the Party of the first part, their successors and assigns, may desire to make of said water during the fourteen hours of each day, and provided that said Party of the second part shall stop and put an end to said use and drawing of the water for more than fourteen hours per day, whenever said Party of the first part, their successors and assigns, owning said dam, water power, and canals, as aforesaid, or their Superintendent or Agent, shall determine that such use is, or if continued, would be injurious to said Party of the first part, their successors and assigns, and give written notice thereof to said Party of the second part, their successors and assigns, and if, upon such notice being given, such use by said Party of the second part, their successors and assigns, for more than fourteen hours per day is not discontinued, then and in that case, the Party of the first part, their successors and assigns, may enter upon the premises of the Party of the second part, their successors and assigns, and shut their gates, and take any other measures and do any other acts proper and necessary to prevent the continued use of said water for more than fourteen hours per day, so long as the same shall be injurious to said Party of the first part, their successors and assigns."

For the purpose of explaining the references by number made in the findings and rulings of the presiding Justice to the prior grants from the Lewiston Water Power Company and the Franklin Company, and of indicating the degree of uniformity with which restrictions are therein imposed respecting the number of hours during which the water might be used by each of the several grantees, a tabulation of such prior grants may here be appropriately made in the order of their respective dates, as follows:

1.	Bates Manufacturing Company,	Nov. 5, 1856.	For	14	hours.
2.	Hill Manufacturing Company,	Nov. 6, 1856.	"	14	"
3.	Androscoggin Mills,	Nov. 15, 1862.	"	14	"
4.	Lewiston Bagging Company,	Apr. 13, 1863.	"	14	"
5.	Lewiston Mills,	Jan. 1, 1865.	"	14	"
6.	Hill Manufacturing Company,	Dec. 30, 1865.	"	14	"
7.	Continental Mills,	Feb. 10, 1866.	"	12	"
8.	Lewiston Falls Man'f'g. Co.	May 29, 1869.	"	12	"

(From a mill pond supplied through the water ways of Lincoln Mill.)

9.	J. L. H. Cobb,	Mar. 30, 1874.	For	11	hours.
10.	City of Lewiston,	Nov. 5, 1877.	"	12	" (Special.)
11.	Same,	Same.	"	12	" (Special.)
12.	D. Cowan & Co.	Nov. 6, 1877.	"	14	"

13. Union Water Power Company, Dec. 5, 1878, in question.

The Lincoln Mill property was conveyed by the Franklin Company to the Lincoln Mills in 1881; by the Lincoln Mills to Libbey & Dingley in 1893, and by Libbey & Dingley to the Libbey & Dingley Company in 1899.

In 1883 the Union Water Power Company by indentures granted the right to take additional water for power to the corporations then using the water, subject to the thirteen grants above named, and each for twelve hours a day.

The findings and rulings of the presiding Justice material to the decision of the question presented, are as follows:

"I therefore find that the Lincoln Mills was then, and the Libbey & Dingley Company is now, entitled to 250 cubic feet of water per second, falling 27.9 feet as stated, as being the amount which was necessary Dec. 5, 1878, to furnish power for the machinery then in the Lincoln Mill, but subject to prior grants.

"2. As to the number of hours during which this water may be used. There is in the reservation no limitation, in so many words. But the Franklin Company held the water power right reserved, subject to all prior grants by the L. W. P. Co. or itself, and in the indentures making some of those grants, 3, 4, 5 and 7, the Franklin covenanted in effect that all future grants should be made sub-

stantially upon the same terms and conditions as set forth in those indentures, 3, 4, 5 and 7, so far as applicable. In each of those indentures the grant for a day run was for 14 hours only, including the usual meal time, except in 7 which was for 12 hours; and a subordinate right for water during the remainder of the 24 hours, as already stated. The plaintiffs contend that the Franklin Company, and its successors by grant or reservation of remaining amounts of water for power were and are in equity bound by the covenant above stated, if they had notice, actual or constructive; and that they must hold their rights just as they would if their grantor had incorporated into their grants the terms which they knew it had covenanted to incorporate into them. I think this contention is sound. If I were the owner of a series of lots of land on a street, and should sell one with the restriction that no house should be erected thereon nearer than a certain number of feet from the street, and should covenant that all future deeds of my remaining lots on the same street should contain the same restriction, I think that my grantees of those other lots, having notice of the covenant, would be in equity bound by it. I think the same rule applies here.

"But I also think that the same result necessarily follows from a proper interpretation of the language attached to the reservation in the indenture itself (13). The reservation of water was made expressly 'subject to all the conditions, obligations, limitations and provisions applicable, contained in a certain indenture of lease from said Franklin Company to the Hill Manufacturing Company, dated December 30, 1865, and recorded in Androscoggin Registry of Deeds; (10) which said indenture and its record reference is hereby made for a particular enumeration of said conditions, obligations, limitations and provisions.' It happens that this Hill indenture was the last prior grant of water from the upper canal, or Mill Pond, except that to the City of Lewiston. (10). The Hill and the Lincoln took water from substantially the same level, and would be similarly affected by like conditions and changes in the quantity of water in the river. Does the language of indenture 13 mean merely that the reservation is subject to the Hill indenture, with its conditions, obligations, limitations and provisions? Or did it mean

merely, as suggested by counsel, that the Franklin Company was to have the benefit of the limitations upon the Hill? Or was it subject to conditions, obligations, limitations and provisions, the same, that is, the same character, as were those contained in the Hill indenture? I think the last. It could not have meant that the Franklin Company, the owner of the reserved water, was to perform the obligations of the Hill, the owner of granted water at another place. The limitations and provisions in the Hill indenture related to the use of water from the upper canal, upon the Hill's mill lot. The Franklin Company could have nothing to do with such limitations and provisions. I think the language quoted cannot have any intelligible meaning unless it be that the reservation is to be holden subject to the same kinds of conditions, obligations, limitations and provisions as were contained in the Hill indenture, and subject to them, so far as applicable, in the same sense, as it would have been, if the conditions and so forth in the Hill indenture had been copied verbatim into the reservation. It was more than reserving the benefits of the limitations in the Hill indenture. It was to get them, by becoming subject to similar obligations and limitations on its own part, in the use of the water reserved."

"In the Hill indenture the right to use water for the day run was limited to 14 hours, including the usual meal times, and there was the same provision for a night run as was contained in the other leases, and which has already been stated. These provisions and limitations were applicable to the use of water under the reservation in the indenture of Dec. 5, 1878, 13.

"I therefore find that the Lincoln Mills was, and the Libbey & Dingley Company is, entitled under the reservation to draw 250 cubic feet of water for each and every second during 14 hours including the usual meal times, of each and every day, under a head of 27.9 feet as stated, for its day runs; and to the same amount under the same head during the whole of the 24 hours of each and every day, or any portion thereof, more than 14 hours, provided such use and drawing more than 14 hours per day shall not injure or interfere with any other use which the Franklin Company or its assigns, may desire to make of said water during the fourteen hours of each day

and provided that the use of water for more than 14 hours per day shall be stopped whenever the owner of the dams, water power and canals at Lewiston, or its Superintendent or Agent shall determine that such use is, or if continued, would be injurious to those having prior rights to the use of the water, and shall give written notice as is provided in paragraph VI. of the Hill indenture, dated Dec. 30, 1865, numbered by me 6. The latter right, for more than 14 hours per day, relates to night runs."

But it is contended in behalf of the defendant Libbey & Dingley Co. that the clause in question in the conveyance from the Franklin Company of December 5, 1878, referring to the indenture to the Hill Manufacturing Company of December 30, 1865, does not relate to the reservation in the clause immediately preceding, but to the conveyance itself; in other words that it is to be construed as though written "This conveyance is also subject to all the conditions, obligations, limitations and provisions applicable" in the Hill indenture and that the ruling of the presiding Justice is therefore erroneous. The defendant accordingly claims that it takes its rights under this reservation of the Franklin Company in favor of the Lincoln Mill without any limitation whatever respecting the number of hours each day during which it is authorized to draw the quantity of water to which it is entitled.

It is the opinion of the court that the construction adopted by the presiding Justice making the reference to the Hill indenture a part of the reservation is correct. In the first place it is more consistent with established rules for the correct use of language. If the clause containing the reference to the Hill indenture is to be deemed a separate paragraph, the words "It is" must be understood at the beginning in order to constitute a complete sentence, and when supplied the pronoun "it," in the absence of anything showing the contrary, must be presumed to refer to the appropriate substantive immediately preceding, instead of one more remote. According to familiar rules of grammar it would read as follows: "Said reservation is subject to all prior grants of water power."

"It is subject also to all the conditions and provisions of the Hill indenture."

If the scrivener had intended to make this reference to the Hill indenture relate to the conveyance itself, and not to the reservation, it is incomprehensible that he did not say: "This conveyance is subject also "to the provisions of the Hill indenture."

It has been noted that the paragraphs containing this reservation in regard to the Lincoln Mill, are found under the sixth caption of the deed in question, entitled "Gate House Lot;" and it satisfactorily appears from the description of that part of the granted premises, that the paragraphs respecting the Hill indenture would not be relevant or appropriate at that point if designed to refer to the conveyance and not to the reservation. It will also be noticed that not only does the reservation in favor of the Lincoln Mill immediately precede the paragraph relating to the Hill indenture, but the two paragraphs immediately following also relate to the Lincoln Mill.

The presiding Justice was also warranted in holding that the language of the clause referring to the Hill indenture "cannot have any intelligible meaning unless it be that the reservation is to be holden subject to the same kind of conditions, obligations, limitations and provisions as were contained in the Hill indenture, and subject to them so far as applicable, in the same sense as it would have been if the conditions and so forth in the Hill indenture had been copied verbatim into the reservation."

But it appears from the statement of facts that many times between 1893 and 1903 water in excess of their right as found by the presiding Justice, was drawn by Libbey & Dingley and the Libbey & Dingley Company for the purpose of developing electricity; and the defendant contends that the plaintiff acquiesced in this use of the power for twenty-four hours a day for more than ten years, in generating electricity for the public service in Lewiston and Auburn. But the presiding Justice further finds "that the case does not show that this twenty-four hours use of the water for electric lighting by the Libbey & Dingley Company, was injurious to the Union Water Power Company or to the lessees prior in right to the Libbey & Dingley Company for day runs or night runs, or that it interfered with any use which they or any of them desired to

make and had a right to make, of the water under their leases whether they were prior or subsequent to December 5, 1878. Under some conditions, as already found, the Libbey & Dingley Company had the right to use water for night runs, and the case does not show that it exceeded its right until 1903 and 1904." Upon these facts and findings the plaintiffs had no right or authority to prohibit the defendants from running nights unless their night use interfered with day runs in violation of the rights of such prior or subsequent grantees, and there would seem to have been no occasion for the plaintiff to give the written notice and request for a discontinuance of such use until the injurious consequences became manifest during the unprecedented drouth of 1903-4 when the notification was duly given.

As bearing upon the interpretation of the grants, reservations and indentures in question, it is permissible to consider in this connection that this whole water power was created primarily for the sole purpose of furnishing power for the operation of cotton mills, and that the question of the use of the water to generate electricity and develop electric power was not brought to the attention of the proprietors before 1893. It also appears that the Lincoln Mill was constantly used for the purpose of a Cotton Mill until after 1893.

The conclusion that the Lincoln Mill became subject to the provisions of paragraph VI, of the Hill indenture of 1865, providing for a day run and a night run and prescribing the manner in which the right is to be exercised, is thus deduced from a legitimate construction of the reservation to the Franklin Company in the grant of Dec. 5, 1878; but it is a satisfaction to observe that this result is manifestly in general accord with all of the grants above enumerated and described made by the Lewiston Water Power Company, or the Franklin Company prior to 1878, as well as all of the indentures made by the Union Water Power Company after that date, and in harmony with the entire history of the origin and development of this great water power as well as the general policy indicated by its management and control for more than a quarter of a century.

In view of this conclusion respecting the reservation in the conveyance from the Franklin Company of Dec. 5, 1878, it is unnecessary

to consider the proposition, also sustained by the presiding Justice, that the Franklin Company and its successors were and are bound in equity by the covenant found in indentures 3, 4, 5 and 7 hereinbefore specified, that all future grants should be made substantially upon the same terms and conditions as therein set forth so far as applicable. This question was critically examined by counsel and presented to the court in elaborate and exhaustive arguments, but the decision of it is now unnecessary to the determination of the questions presented by the exceptions.

Exceptions overruled.

In Equity.

FANNIE B. CHILDS et als.,

vs.

BYRON C. WAITE, Administrator with will annexed, et als.

Oxford. Opinion April 18, 1907.

Wills. Trust. Same not to fail, when. School District cannot act as trustee. Trustee can be appointed, when.

It is a well established general rule of law that a trust shall not fail for want of a trustee.

Trusts conferring discretionary powers are not to be defeated because the trustee fails to exercise the discretion imposed upon him, either from his inability, legal disability or refusal to act.

A testator by the fourth item of his will provided as follows: "I give bequeath and devise all the rest, residue and remainder of my estate, real personal and mixed, wherever found and however situated unto School District No. 3 in the town of Canton, known as the Canton Point District, the same to be used and appropriated for the purpose of building a Uni-

versalist Church at Canton Point between my residence and that of Granville Child at Canton Point, (so called) in said School District, the balance if any remains after building such a church is to be used in supporting and maintaining preaching in the same, as said School District may designate by a majority vote, said district to use as much money in building the church as a majority of the same may desire." *Held:* (1) that while it was intended by the testator that the school district should act as trustee in executing this provision of his will, yet the school district was legally incompetent to act as such trustee; (2) that the school district did not succeed to the title of the trust fund; (3) that a trustee can be appointed to execute this provision of the will.

In equity. On report. Remanded to Probate Court for appointment of a trustee.

Bill in equity in which the plaintiffs, heirs at law of Albion E. Bradbury, late of Canton, deceased testate, asked for a judicial construction of the fourth item of the last will and testament of said deceased. This will was duly proved and allowed by the Probate Court, Oxford County, and the executor therein named declining to serve, Byron C. Waite, one of the defendants, was duly appointed and qualified as administrator with the will annexed.

The fourth item of said will reads as follows:

"Fourth: — I give, bequeath and devise all the rest, residue and remainder of my estate, real, personal and mixed, wherever found and however situated unto School District No. 3 in the town of Canton, known as the Canton Point District, the same to be used and appropriated for the purpose of building a Universalist Church at Canton Point between my residence and that of Granville Child at Canton Point, (so called) in said School District, the balance if any remains after building such a church is to be used in supporting and maintaining preaching in the same, as said school district may designate by a majority vote, said district to use as much money in building the church as a majority of the same may desire."

After the hearing before the Justice of the first instance, it was agreed that the case should be reported to the Law Court for determination.

The case appears in the opinion.

John P. Swasey, for plaintiffs.

James S. Wright and Alton C. Wheeler, for defendants.

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

SPEAR, J. This is a bill in equity in which the plaintiffs seek judicial construction of the residuary clause of the will of Albion E. Bradbury, late of Canton, in the County of Oxford. The plaintiffs who are the heirs at law, set forth all the necessary jurisdictional facts to enable them to sustain the bill.

Bryon C. Waite, Administrator with the will annexed, and the other defendants in their answer, admit all the allegations of fact in the plaintiffs' bill and join in the prayer of the plaintiffs for the construction of the will as prayed for in the bill.

Mr. Bradbury after making several bequests, disposed of the residue of his property in the fourth item of his will, as follows: "I give, bequeath and devise all the rest, residue and remainder of my estate, real, personal and mixed, wherever found and however situated unto School District No. 3 in the town of Canton, known as the Canton Point District, the same to be used and appropriated for the purpose of building a Universalist Church at Canton Point between my residence and that of Granville Child at Canton Point, (so-called) in said School District, the balance if any remains after building such a church is to be used in supporting and maintaining preaching in the same, as said School District may designate by a majority vote, said district to use as much money in building the church as a majority of the same may desire."

By this clause of his will, Mr. Bradbury clearly intended to devote a portion of his estate to charitable purposes. At the time he made his will, School District No. 3, in the town of Canton, was a legally organized body for the performance of certain specific duties prescribed by the statute. Its powers were limited. If it had remained in existence until the present time, it could not legally have assumed the duties of trustee under the will. The law creating the district did not confer this power. Unfortunately, therefore, Mr. Bradbury appointed a trustee incompetent to act; hence it becomes immaterial to the decision of this case whether the School District had continued its legal existence or was abolished by law, the School District as such

having no authority to act in the capacity of a trustee for the building of the church.

It therefore follows that unless a trustee can be appointed, the charitable trust sought to be created by Mr. Bradbury must fail for want of a competent trustee. It is also clear that the School District did not succeed to the title of the trust fund. While it was undoubtedly intended by Mr. Bradbury that the district should act as his trustee or agent in executing this provision of his will, yet the purposes of the gift and the beneficiaries under it, remain precisely the same as if the trustee appointed had possessed legal authority for the performance of the trust. Moreover, so far as the execution of the trust is concerned, every feature of it can be legally carried into effect as well by any other trustee as by the School District itself if legally capable of acting.

Shall this trust fail because the trustee appointed could not legally act? The general rule is well established that a trust shall not fail for want of a trustee. It is claimed, however, by the plaintiffs that this case is fully settled by the rule laid down in *Brooks* v. *Belfast*, 90 Maine, 318; but that case does not apply. In that case the School District "was at once the beneficiary and the trustee," and not only the trustee but the beneficiary had gone out of existence. Not so in the case at bar. The beneficiary, notwithstanding the disability of the trustee appointed, or the abolition of the district, still exists.

The trust fund was for the charitable purpose of building a Universalist Church at Canton Point, upon a specific location in the School District named. No special duty was imposed upon the trustee, except the determination of the amount to be used in the construction of the church, which was to be done by a majority vote. But this clause of the will invested the district, only with the exercise of a discretion with respect to the amount to be so used. They had a right to use all or they might have retained a part for the support of preaching. Whatever they might have chosen to do in this regard was the mere exercise of a discretionary power.

But trusts conferring discretionary powers are not to be defeated because the trustee fails to exercise the discretion imposed upon him,

either from his inability, legal disability or refusal to act. For a recent discussion of this rule we refer to *Cutter* v. *Burroughs*, 100 Maine, 379. The will of the testator should be carried into effect if possible. Under the rules of law governing this case it can be done. We think the well established principles that a trust shall not fail for want of a trustee, or from the inability, failure or refusal of a trustee to exercise a discretionary power, fully apply.

The only question now before the court is whether a trustee can be appointed. The entry therefore must be,

Bill sustained with costs to both parties to be paid from the estate. Case remanded to the Probate Court for the appointment of a trustee under clause four of the will.

ELIZABETH M. LEPROHON, Appellant from decree of Judge of Probate in Estate of Ellen M. Greene, deceased.

York. Opinion May 1, 1907.

Evidence. Attorney and Client. Privileged Communications. Waiver of question of privilege. Who may waive, stated.

It is a universal rule that the question of privilege, with respect to communications offered in evidence, can be invoked only by the author of the communication.

But in the case of persons deceased the general rule is that the right of waiver, when the character and reputation of the deceased is not involved, is lodged in the personal representative, that is, the executor or administrator or the heirs of the deceased.

In the case at bar, testimony, material to the issue, with reference to a certain interview which the deceased had with an attorney at law and which did not involve the character or reputation of the deceased, was offered in evidence by the defendant, an heir at law. The plaintiff, beneficiary under the alleged will of the deceased, objected to this testimony on the ground that the interview was in the nature of a privileged communication

of the deceased to the attorney, and the testimony was excluded. *Held*: Assuming that the interview between the deceased and the attorney, were the deceased living, falls within the rule of privileged communications, yet the defendant as heir at law had a right to waive the question of privilege and did waive the same and that the testimony should have been admitted.

On motions and exceptions by defendant. Exceptions sustained. Motions not considered.

Appeal from the decree of the Judge of Probate, York County, refusing to allow an instrument as the last will and testament of Ellen M. Greene late of Saco, deceased.

Ellen M. Greene died in December, 1904, and she left as her next of kin and heirs at law one brother, Charles Frederick Greene, and several nephews and nieces, one of whom is the appellant and plaintiff. On the first Tuesday of September, 1905, administration upon the estate of the said Ellen M. Greene was granted to one Melville H. Kelley. Shortly after the death of the said Ellen M. Greene, a mutilated instrument was found purporting to be the last will and testament of the said Ellen M. Greene, but the signature of the said Ellen M. Greene thereto had been cut out. This instrument was afterwards offered for probate, but after hearing, the Judge of Probate dismissed the petition for the probate of the alleged will, and thereupon the plaintiff, Elizabeth M. LeProhon, who is the beneficiary named in the alleged will, took an appeal from this decree to the Supreme Judicial Court sitting as the Supreme Court of Probate, September term, 1905, York County.

The case was continued to the January term, 1906, of said Supreme Judicial Court. During the continuance, Charles Frederick Greene, the aforesaid brother of the said deceased, Ellen M. Greene, died. No administrator of the estate of the said Charles Frederick Greene having been appointed, his widow, Mary C. Greene, appeared as an heir at law to contest the aforesaid appeal.

Tried at the said January term of said Supreme Judicial Court sitting as the Supreme Court of Probate. The verdict sustained the instrument as the last will and testament of said deceased, Ellen M. Greene, and as neither revoked nor cancelled at the time of her death.

The defendant, Mary C. Greene, then filed a general motion for a new trial, also a motion for a new trial on the ground of newly discovered evidence. Also during the trial the defendant offered the testimony of James O. Bradbury, an attorney at law, with reference to an interview which he once had with the deceased, Ellen M. Greene, in relation to "the best way to revoke a will." This testimony was excluded and the defendant took exceptions. Also the defendant requested the following instructions: "It must be proved by indisputable evidence that the cancelled paper once existed as a finished will and it must also be shown by evidence equally indisputable that Miss Greene adhered to it throughout in mind and intention, notwithstanding its cancellation. In the absence of either of these indisputable requisites the presumption is that the paper is not her will." These instructions were refused and the defendant excepted.

The two motions and the last exception were not considered by the Law Court.

The case appears in the opinion.

George W. Heselton and Cleaves, Waterhouse & Emery, for plaintiff.

George F. & Leroy Haley, for defendant.

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

SPEAR, J. This is an appeal from a decree of the Judge of Probate refusing to allow an instrument as the last will and testament of Ellen M. Greene, deceased. Ellen M. Greene, an aged and unmarried woman of Saco, met her death by an accident in her own home, the night before Christmas, A. D. 1904. Her only relative in Saco at the time was Charles Frederick Greene, a brother, who lived on North Street. She left as her next of kin and heirs at law one brother, Charles Frederick Greene, and a large number of nephews and nieces, one of whom is Elizabeth M. LeProhon, the original appellant in this case.

Administration upon her estate was granted to Melville H. Kelley, on the first Tuesday of September, A. D. 1905. A week or more after her decease a mutilated instrument purporting to be her last

will and testament was found. This instrument afterwards offered for probate was mutilated by having the signature of the testatrix cut out, and the contention of the proponent was that this mutilation was done after the death of the testatrix while the contestants claim it was done before. Upon hearing, the Judge of Probate dismissed the petition for probating the will, and Elizabeth M. LeProhon, the beneficiary therein named, claimed and entered an appeal at the September term of the Supreme Judicial Court for York County. The case was continued to the January term, and during the continuance Charles Frederick Greene died. No administrator of his estate having been appointed, his widow, Mary C. Greene, appeared as an heir at law to contest the appeal. The Court submitted to the jury the following questions of fact:

1. Was the instrument offered by the proponent as the last will and testament of Ellen M. Greene properly executed by her as and for her last will and testament at the time of its date?

Answer. Yes.

2. Did such instrument, at the time of her death, exist as the last will and testament of the said Ellen M. Greene, unrevoked by her?

Answer. Yes.

3. Was the cutting of the signature from the paper offered as the will of Ellen M. Greene done by her, or by any person by her direction in her presence?

Answer. No.

4. Was the cutting of the signature done by Ellen M. Greene, or by any person by her direction in her presence, with the intention of revoking her will?

Answer. No.

From these questions it is evident that the issue of fact presented to the jury was whether the mutilation of the will was the act of testatrix herself or agent, or was done by some other person subsequent to her decease.

The case comes here on exceptions and motions. The first exception relates to the exclusion of the testimony of James O. Bradbury of Saco, an attorney at law, with reference to an interview which he had with the testatrix, of the following tenor:

"In the fall of 1903, as I was going down by her house from dinner, she was out at the gate and stopped me, and asked me in. I went in and she asked me some questions about the matters of the real estate, and then she asked me what I thought was the best way to revoke a will.

"I told her that was a practical question; that any actual destruction of the will was sufficient. I told her that sometimes people burned such papers. She asked me if cutting the name from a will was a destruction or revocation of the will, and I told her if the testator cut the name knowingly from the will, that that was a destruction of the will, and then I added that, while as a matter of law it was not necessary, still if I was going to mutilate a will that I had made myself that in order to make it perfectly clear I should take and make a little memorandum on some blank place on the will, giving the date, and stating that on such date I destroyed the will by cutting my name out of it, and then whosoever hands it came into would know. She said she wanted to ask the question, she liked to preserve all her papers, whether they amounted to anything or not. This was substantially what she said.

"Q. Then, as I understand it, the substance of that conversation was the cutting out of the name, you instructed her, would cancel a will, and that you yourself, as a matter of caution, would endorse on it in writing, but you did not instruct her that it was necessary?

A. No, sir."

This testimony, if admissible, was important and material. The ground of its exclusion was that the interview was in the nature of a privileged communication of the decedent to Mr. Bradbury as an attorney. We think the ruling is wrong.

Were it conceded, although it is now unnecessary to determine it, that the interview between the decedent and Mr. Bradbury should be held to come within the rule of privileged communications were the decedent living, it would still be admissible under the principles of law covering the right of waiver by the personal representative or heir. The question involved in the present controversy is the descent of the decedent's property. The parties to the controversy

are the legatee under the mutilated will on the one side and an heir at law upon the other. The heir at law, waiving the question of privilege, offers the testimony of Mr. Bradbury in support of her contention with respect to the alleged mutilation of the will. The legatee objects on the ground only that the communication embodied in the Bradbury testimony was of a privileged character, therefore inadmissible under objection. It is a universal rule that the question of privilege, with respect to the communications offered in evidence, can be invoked only by the author of the communication. It is a personal privilege. The general principle upon which the right of privileged communication rests is too well established to require reiteration.

But in the case of persons deceased it is held that the right of waiver, when the character and reputation of the deceased are not involved, is lodged in the personal representative, that is, the executor or administrator of the estate, or the heirs of the deceased; and the ground upon which they are permitted to exercise the right of waiver is based upon the fact that they are all interested in the protection of the estate and upon the presumption that they would consent to the waiver of the privileged communication only for the purpose of securing that end.

This rule is general. Only two or three States in the Union have adopted the other rule that a privileged communication cannot be waived by the personal representative or the heirs of a deceased person.

Wigmore on Evidence, Sec. 2329, deduces from the decided cases this rule: "That an executor or administrator may exercise authority over all the interests of the estate left by the client, and yet may not incidentally have the right, in the interest of that estate, to waive the privilege of concealing confidential communications affecting it, would seem too inconsistent to be maintained under any system of law. It has, indeed, seldom been maintained for the present privilege; but the denial of this waiver in another field, by some courts, demands here the more emphatic repudiation of such a fallacy."

In support of the rule he cites the following authorities: Turner V. C. in *Russell* v. *Jackson*, 9 Hare, 387, 392. "In the cases of

testamentary dispositions the very foundation upon which the rule proceeds seems to be wanting; and in the absence therefore, of any illegal purpose obtained by the testator, there does not appear to be any grounds for applying it."

Collins, J., in *Layman's Will*, 40 Minn. 372, "There is an abundance of authority for saying that, upon the decease of the only person who could, in his lifetime, exercise the privilege of waiver, the rule should not be so perverted by a strict adherence to it as to render it inconsistent with its objects and thus bring it into direct conflict with the reason upon which it is founded. The object of the rule, so far as it relates to this class of communications, being the protection of the estate, there remains no reason for continuing it when the very foundation upon which it proceeds is wanting.

Brooks v. *Holden*, 175 Mass. 137: "To allow the executor or administrator of the deceased client to waive the privilege, and to call the attorney to testify as to a privileged communication, in a suit involving the client's estate, no more militates against the spirit of public policy involved, than to allow the client himself to waive the privilege. Nor does it tend to weaken the protection which the rule gives for the benefit of the client as an individual. The executor or administrator acts with reference to the question of waiver as the personal representative of the deceased client, and solely in the interests of his estate."

After these quotations, and many others not here given, he proceeds to say: "This view is accepted with practical unanimity. It is further generally agreed that in testamentary contests the privilege is devisable, and may be waived by the executor, the administrator, the heir, the next of kin, or the legatee." This latter position of the text writer relating particularly to the exercise of the right of waiver by the heirs is supported by reference to a foot note citing many opinions from England, Canada, the State Courts and Supreme Court of the United States. *Fossler* v. *Schriber*, 38 Ill. 173. The "only heir of the client, held competent to waive the privilege, and even if there were other heirs not parties" the court would presume their concurrence.

Winters v. *Winters*, 102 Ia. 53, "An heir, devisee or other representative may waive."

Glover v. *Patten*, 165 U. S. 394, "Privilege ceases when contest is between heirs or next of kin."

Wigmore further declares in sec. 2391: "It is incongruous to hold that the person who manages the litigation of the deceased's property interests has no power to waive rules of evidence for the purpose of advancing those interests. The power of an heir may also be conceded, if we remember that the heir, first, is at least equally interested in preserving the ancestor's reputation, and secondly, has an equal moral claim to protect the deceased's property-rights from unwarranted diminution. Except in two or three jurisdictions, it is usually agreed that the deceased's representative (and probably also the heir) may waive privilege."

Under these rules of law we think the testimony of Mr. Bradbury should have been admitted. It in no way reflected upon the character or reputation of Miss Greene and was material under the contention of the heir at law in effecting the protection of the estate. With the death of Miss Greene the seal of secrecy was removed from the lips of Mr. Bradbury and the reason for his silence no longer obtained, and, the reason for the rule having disappeared, the rule itself should no longer be invoked.

As the determination of this exception decided the case, it becomes unnecessary to discuss the motion, or the other exception, except to say that in our opinion the requested instruction was clearly too strong.

Exceptions sustained.

FRED C. TILLSON

vs.

MAINE CENTRAL RAILROAD COMPANY & TRUSTEE.

Somerset. Opinion May 3, 1907.

Master and Servant. Negligence. Fellow Servant. Semaphore. Danger Signals. "Law of Light."

It is the duty of a railroad company, with respect both to the original construction and subsequent maintenance of a semaphore, to exercise due care to have such a permanent adjustment of it that when the lantern is kept in suitable working order, and properly set by the operator, it will display the correct signal to the engineer of an approaching train.

But when a locomotive fireman is injured by a collision between his engine and another, and such collision is caused by the negligence of the switch-tender in failing seasonably to change the semaphore signal from green to red, or by a want of due vigilance and attention on the part of the engineer of his train in failing to observe the red light, if seasonably displayed, it must in each instance be deemed the result of the negligence of a fellow servant and the railroad company is not liable for the fireman's injury.

In an action by a locomotive fireman against a railroad company to recover damages for an injury received in a collision alleged to have resulted from the failure of the defendant company to locate a semaphore in a suitable place and adjust it at a proper angle, it appeared in evidence that the semaphore was permanently set at such an angle that the signal light thrown down the road could be distinctly seen at a distance of 1350 feet from the semaphore by the engineer of an approaching train, that the light would remain in full view for a distance of about 650 feet; that the view was then obstructed by the forward portion of the engine running on an ascending grade for a distance of 350 feet when the signal was again plainly visible for the remaining distance of about 350 feet. It also appeared that the rays of light emitted through the double convex lens of the semaphore lantern were so converged that the angle of refraction was less than fifteen degrees from a parallel line, and that without this lens the rays would have been dispersed at an angle of 60 degrees.

Held: That in view of the immutable law that light must always traverse space in direct lines, and of the fact that the red and green lights of the semaphore lantern are at all times precisely at right angles to each other,

it was impossible that the same light, adjusted at the same angle, should exhibit clear red to one observer, clear green to another and a confusion of red and green to a third, under precisely the same conditions, and that oral testimony in direct contravention of natural laws must be deemed incredible.

Also held: That if the semaphore was seasonably set red it must have sent down the line the danger signal which the engineer in the exercise of proper vigilance could not have failed to distinguish; that the collision resulted either from the engineer's failure of duty in this behalf, or from the failure of the semaphore tender to change the signal from green to red until a moment before the collision when it was too late for the engineer to stop the train in season to prevent it, and that in either event the grevious injury to the plaintiff was caused by the negligence of a fellow servant and the liability of the defendant company is not established.

On motion and exceptions by defendant. Exceptions waived. Motion sustained.

Action on the case to recover damages for severe personal injuries sustained by the plaintiff who was a fireman on one of the defendant's engines, and caused by the alleged negligence of the defendant.

The negligence claimed was that a semaphore in the Waterville yard of the defendant was permanently so set, and its lantern and lights were permanently arranged at such an angle with the track to the west down which its lights were intended to be thrown, as not to show, to trains approaching, the true light intended to be shown, but rather the opposite color, or else such a confusion of both colors that the engineer and fireman on the approaching train could not determine which signal was intended, whether that for danger or for safety, and could not, therefore, determine their duty either to stop or to proceed.

Tried at the March term, 1906, of the Supreme Judicial Court, Somerset County. Plea, the general issue. Verdict for plaintiff for $25,208. The defendant then filed a general motion to have the verdict set aside. The defendant also took exceptions to certain "rulings and statements of the issue and the law" made by the presiding Justice at the trial, but at the argument before the Law Court these exceptions were waived.

The case appears in the opinion.

Forrest Goodwin, for plaintiff.

Orville Dewey Baker and Charles F. Johnson, for defendant.

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

WHITEHOUSE, J. The plaintiff, obtained a verdict of $25,208 for injuries received by him February 13, 1904, in a collision at the Waterville yard between the defendant's engine No. 66 and freight train No. 41 on which the plaintiff was fireman. The case comes to this court on the defendant's motion to set aside this verdict as against the evidence. The exceptions taken at the trial term were waived before argument at the Law Court.

It is alleged in the plaintiff's declaration that "the said defendant had erected, and then and there operated and maintained a semaphore at the Front Street crossing, so called, in said Waterville; that said semaphore consisted of a mast or pole upon the top of which was a lantern with four lights, two sides of which, opposite each other, showed red lights, and the other two opposite each other, showed green lights; that the red lights indicated danger, and the green light that the track was clear; that said defendant issued orders to its servants that all trains approaching the Waterville station, via Augusta, should be governed by the semaphore, at the Front Street crossing, meaning that if the red light was displayed by said semaphore, that the train should stop and not run by it; that said defendant, in the location, erection and operation of said semaphore, did not use due care and reasonable prudence, but carelessly and negligently so located and maintained said semaphore, that when set for danger, it would show to the approaching engineer, a green light, or both red and green, so that the engineer would be deceived, as to the light from the semaphore, until he was so near to the same, that he could not, with reasonable care, stop the train before it run by said semaphore; that all of this was known to the defendant, or by the exercise of reasonable care, ought to have been known."

The plaintiff further avers that on the evening of February 13, 1904, the defendant "ordered engine No. 66 to stand on the main track between the Front Street semaphore and the station and ordered the semaphore to be set for danger so that train No. 41 could be stopped, and the plaintiff says that owing to the defective and danger-

ous location and arrangement of said semaphore, although it was properly set for danger, it showed otherwise to the engineer of train No. 41 as he approached the station," by reason whereof the train was allowed to run past the semaphore and collided with engine No. 66, causing the severe injuries to the plaintiff of which he complains.

On the other hand the defendant contended "that the semaphore and its lights had been in the same permanent position as at the time of accident for about twenty-four years; that they were properly set, both as to location and as to angle with the track, and, during all this period, were so set and directed as to give true, and not false or conflicting signals, to all approaching trains; that during these twenty-four years there had never been any difficulty, complaint or accident in their operation; and that if they were operated or were set improperly or defectively at the time of the accident, it was without notice or knowledge on the defendant's part, and, if such defect existed at all, it was due to the temporary negligence of some fellow servant with the plaintiff, for which the defendant was not legally responsible."

It is a matter of common knowledge that the semaphore is a mechanical device for displaying signals by means of which information is conveyed to a distant point. The etymological definition of the word is "sign bearer." The railroad semaphore consists of a mast twenty-five feet or more in height surrounded by a movable platform with an iron rod to which is secured a lantern with convex lenses on four sides; on two opposite sides the glass is red and on the other two opposite sides it is green. This lantern is used for the night signal, while a board target or arm attached to the same platform, is used for the day signal. Under the defendant's rules the red light exhibited by the lantern at night indicates danger, and the green light indicates safety. The horizontal position of the board target or arm is the day signal for danger and a vertical position of it is the signal for safety. A cable is stretched from the semaphore to the station of the watchman or semaphore tender, and the lantern and target are both operated by means of a windlass and lever.

The semaphore in question in this case was erected in July, 1880, nearly twenty-four years prior to the accident. It was located 103

feet from the easterly end of the Front Street crossing at Waterville and about 16 feet from the south rail of the railway track. It was operated by the switch-tender at College Avenue crossing who has a "shanty" west of the crossing and only a few feet from the rails. In order to set the semaphore to show the green light indicating safety the cable was pulled in over the windlass by means of a lever and this was secured by means of a pawl. But when it was necessary to change the lantern from green, the signal for safety, to red, the signal for danger, it was only necessary to kick off the pawl, and the counterweight at the semaphore automatically turned the lantern one quarter of the distance around and changed the light from green to red.

The defendant's rule pertaining to the Waterville station prescribes that "eastward trains via Augusta will be governed by the semaphore signal near Front Street." According to other rules of the company "the semaphore must always be set to hold out trains while any train is occupying the main line at the station or in the yard, and an engine or train east of the Front Street semaphore was allowed to come down as far as the semaphore, and incoming trains from the west were allowed to come up as far as the semaphore."

Thus it is manifest that the correct location and adjustment of this Front Street semaphore, when erected, and its efficient management thereafter, became of vital importance as an aid to the defendant in the safe transportations of both passengers and freight over its road.

It is conceded that on the evening of the accident the exigency existing at the time the plaintiff's train was approaching Waterville from the west, called for the display of the red light, as the signal for danger; and it is not in controversy that if the collision was caused solely by the negligence of the switch-tender in failing seasonably to change the semaphore signal from green to red, or by a want of due vigilance and attention on the part of the engineer of the train in failing to observe the red light, if seasonably displayed, it would in each instance be the result of the negligence of a fellow servant and the defendant company would not be liable for the unfortunate consequences to the plaintiff.

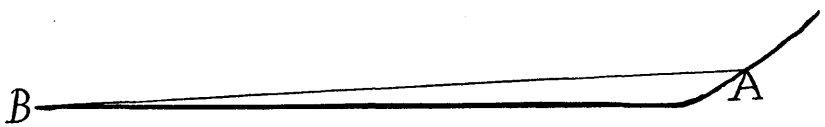
But in accordance with the averments in his declaration the plaintiff contended at the trial and now contends in argument that the

semaphore was properly set red by the operator but by reason of the location of the semaphore on a curve of the railroad track and the improper angle at which it was placed with reference to the track directly in front of it, it gave false and conflicting signals down the line so that when set for red it was seen green by the engineer of the plaintiff's approaching train. Thus the principal question at issue between the parties related to the angle at which the semaphore was permanently adjusted and pointed with reference to the westward track which it was designed to protect. With respect both to the original construction and the subsequent maintenance of the semaphore, the defendant was bound to exercise due care to have such a permanent adjustment of it and that when the lantern was kept in suitable working order and properly set by the operator, it would send a true and not a false message down the line. But whether or not the lantern was so set at the time of the collision that it deceived the engineer upon the plaintiff's train, is not the conclusive test of the defendant's liability, for the reason already suggested that such a condition might have been occasioned by the negligence of a fellow servant.

The semaphore mast was located on a curve of the railroad track east of Front Street crossing, but it satisfactorily appears from the evidence that when the lantern was set at the angle claimed by the witnesses for the plaintiff, as well as at the angle claimed by the defendant, the signal light thrown down the line of the road could be distinctly seen at a distance of 1350 feet from the semaphore by the engineer of a train approaching at a rate of speed at which the plaintiff's train was approaching on the evening in question; that the light would remain in full view for a distance of about 650 feet; that the view was then obstructed by the forward portion of the engine running on an ascending grade, for a distance of 350 feet, when the signal is again plainly visible for the remaining distance of about 350 feet.

The curvature of the railroad track at the point in question west of Front Street and the direction in which the light would be thrown if the semaphore (A) was properly set to give signals to an

approaching train at a point (B) 1350 feet distant, may be illustrated by a simple diagram as follows:



In support of his contention that the lantern was permanently set at such an angle with the track that it either showed the opposite color from that intended or a confusion of colors that was no signal at all, the plaintiff failed to produce any evidence tending directly to show that prior to the accident any change whatever had ever been made either in the location of the semaphore or the angle at which the lantern was originally fixed upon the mast, or to show any defect whatever in any of the appliances or mechanism of the semaphore. He failed to produce any direct evidence that when the pawl was kicked off and the counterweight released, the lantern was not invariably turned one quarter of the distance around, automatically, and thrown exactly into place so as to display a red light. For aught that appeared in direct evidence on the night of the accident the semaphore was permanently set at the same angle as when erected and was accurately performing its office as a true sign-bearer, as it had done during all of the twenty-four years of its existence prior to that time. All the witnesses who might be expected to have some cognizance of the matter, whether called by the plaintiff or the defendant testified that never to their knowledge had any complaint ever been made either to or by any officer or employe of the company that this semaphore was not properly located, having regard to its efficiency, or that it was not placed at a suitable angle with reference to the track, or that there was any defect or want of reliability in the action of the lantern, if properly operated, with respect to the direction in which the signal lights were thrown down the track. The only complaint in regard to its location was heard when the Yankee siding was extended to a point west of College Avenue. It was then stated that under some circumstances switch engines might extend so far westerly that it would be necessary to move the sema-

phore. The relocation thus suggested had no reference whatever to the angle at which the semaphore was erected, or to the efficiency of its action.

But the plaintiff sought to prove by the effect of its action in transmitting the signals down the track, that the semaphore was neither in a suitable location nor set at a proper angle. In support of the proposition thirteen witnesses in all were called by the plaintiff of whom six were experienced engineers. Six of the thirteen testify in substance that at all points west of the curve when the light was visible, it showed such a mixture of red and green, that it was not practicable to distinguish the signal intended. Four of the witnesses testify that when set for red it showed green down the line, while three of the plaintiff's witnesses, including Horeyseck, who was the engineer on the plaintiff's train No. 41 at the time of the accident, testify that when set red it always sent a red line down the line and gave the true signal.

Mr. Baxter, the conductor on the plaintiff's train No. 41, who had been in the employ of the company for twenty-nine years, testifies that he "always considered" the lights "changeable from different points," that it would "show part red and part green at one point and farther up would show red if set for danger." But he admits that he never made any complaint in regard to it, that he never knew the semaphore to fail to stop a train when it was set for the danger signal, and that he never heard of any accident resulting from a want of reliability in the semaphore. On cross examination, in answer to an inquiry respecting statements alleged to have been made by him a few days after the accident different from those made by him on the stand, the witness made this extraordinary statement. "You know in cases like that, under the existing laws of the State of Maine for fellow protection, we sometimes tell things for the best of the men concerned. They might be suspended or laid off for it." The testimony of this witness is so discredited by this remarkable answer that it cannot be deemed worthy of consideration as a medium of proof.

On the other hand, in addition to the direct evidence respecting the angle at which the semaphore was erected, as given by those who constructed and inspected it, fifteen witnesses were called by the

defendant to give evidence in regard to its effect in transmitting signals down the line. Of these eight were experienced engineers and seven were disinterested observers who had made actual tests under conditions satisfactorily shown to be in effect identical with those existing at the time of the collision. They all testify that when the lantern was set red, it uniformly showed a red light at all points down the track west of the curve, not only when set parallel with the rails opposite as claimed by the plaintiff, but also when set at a much greater angle and one more favorable for the plaintiff's contention.

An apparently irreconcilable conflict is thus disclosed in the voluminous testimony upon this point. But whatever variations there may appear to be in the testimony of witnesses who saw the same light set at the same angle and shedding its light under the same conditions, there are immutable laws of physical science, that cannot be disturbed by human testimony. Light from whatever source emanating must always traverse unobstructed space in direct lines. And according to familiar principles in optics, rays of light falling upon a convex lens are converged into a narrow and intense beam. In this case the evidence is unquestioned that the rays of light emitted through the double convex lens of the semaphore lantern were so converged that the angle of refraction was less than 15 degrees from a parallel line, whereas without this lens the rays would have been dispersed at an angle of about 60 degrees. Hence it would be impossible that the same light, adjusted at the same angle, should exhibit clear red to one observer, clear green to another and a mixture of red and green to a third, under precisely the same conditions. Testimony given in direct contravention of physical laws is necessarily deemed incredible.

But the defendant company also introduced direct evidence in regard to the angle at which the semaphore was in fact erected with relation to the track. The superintendent of bridges and buildings who had charge of the original construction of the semaphore in 1880, and set the lantern upon the mast, testifies that while he has no record or independent memory of the precise angle at which it was adjusted, he knows that it was set in such a manner as to accomplish

the purpose for which it was erected and throw the light down the line, and that with reference to the track it was set "as nearly parallel as you could get it, cutting the curve a little." Mr. Rogers, the carpenter who had been specially charged for eight years with the duty of looking after semaphores, testifies that he had inspected this semaphore several times before the accident; that he tested it by climbing to the top of the mast and sighting down the track and then going down the track and sighting back to the lantern, and that he always found it "right," a term which he explains by adding that "it pointed down where he thought the engineer would first see the light." Mr. Rogers also states that five days after the accident he made a thorough examination of the semaphore, testing it in the same manner as before, and found that no change had been made either in its location or the direction in which the lantern threw its light.

The two signal tenders also testify that they had occasion to go to the top of the mast each day every alternate week and noticed the direction in which the lantern pointed. They both state that it was so directed as to throw its light down the straight track cutting the curve a little. Engineer Haines testifies that his train was stopped by the danger signal of this semaphore in 1902 or 1903, and that the lantern was properly set at an angle to throw the light down the track. Mr. Buck who lived in the house just westerly of Front Street crossing, states that when the semaphore was erected, he first saw the green light of the lantern through the window of his sleeping room, and thought it was a new star, and that from that time to the time of the accident, whether set red or green the light always shone directly into the window of that sleeping room. It appears from the plan and other evidence in the case that a straight line from the semaphore to the Buck house, would be substantially parallel with the straight line of track below the curve and not with the rails of the curve opposite the semaphore.

In view of this evidence and of the fact that the obvious and conceded purpose of the semaphore was to safeguard the trains approaching from the west, it is insisted in behalf of the defense that it is wholly improbable and inconceivable that the semaphore was ever

adjusted at any other angle than that which would cause the light to be thrown directly down the straight line of track to the point where it was first visible.

But it is only contended by the plaintiff at most that the semaphore was permanently set at an angle parallel with the rails at a point on the curve of the track opposite the semaphore itself. This is the claim supported by all of the plaintiff's witnesses that testify upon the point, with the exception of Nelson who was acting as semaphore tender at the time of the accident, and his admissions on cross examination clearly show that the lantern could not have been pointed as claimed by him.

That the lantern must have been set parallel with the rails of the curve opposite the semaphore according to the testimony of the plaintiff's witnesses, and could not have been placed at any greater angle is further shown by the uniform testimony of all of his witnesses that the light shown full in front after the train approaching from the west entered upon the curve west of the street crossing.

For the purpose of demonstrating that it would be a physical impossibility for a semaphore lantern thus set parallel with the track opposite and properly operated, to send down the track a signal the reverse of that intended or an indistinguishable mixture of both red and green signals, numerous tests appear to have been made with the lantern of the semaphore set at several different angles. Surveyor Buswell and four other disinterested witnesses made their experiments during the trial with the same lantern and the same locomotive engine in use at the time of the accident. Surveyor Buswell made his tests in the presence of the locomotive engineer who ran the engine when the tests were made. The identical lantern was also used in his experiments, and the engine though not the same, was in all essential respects equivalent to it. It is true that the old semaphore had been removed, for reasons already suggested which had no connection with its efficiency, and a new one had been erected much farther west, but the hole where the old one stood was plainly visible, and the semaphore used in making the tests appears to have been set in substantially the same place.

The value of these tests is sharply questioned by the learned counsel for the plaintiff on the ground that the conditions existing at the time of the accident are not shown to have been in all respects exactly reproduced at the time of the tests; but the facts show that in all essential particulars, the conditions were so nearly identical that the results of these experiments become important evidence tending to show how the light was thrown down the track with the semaphore placed at different angles, including that claimed by the plaintiff. It is unnecessary to review all of these experiments in detail. It is sufficient to state that tests made when the lantern was set at the angle claimed by the plaintiff as well as at the angle claimed by the defendant, confirm the testimony of the principal witnesses for the defendant who observed the actual working of the old semaphore. They testify that the light was first seen at a point about 1350 feet west of the semaphore, that it continued to be plainly visible for a distance of about 650 feet, when the light was obscured by the front part of the engine for about 350 feet; and that from this point to the semaphore, the view was unobstructed and the light plainly visible. They also state that under each of the tests whenever the light was visible at all, it was distinctly one color, a uniform red when set for red and green when set for green. The improbability that the lights could be deflected to the extent involved in the plaintiff's contention or that there would be such a frequent and equal mixture of the two lights down the track, is strengthened by the fact which should not be forgotten that the red and green lights of the semaphore lantern are at all times precisely at right angles each being 90 degrees distant from the other.

All of this evidence must be considered in connection with the fact that for nearly twenty-four years following its erection this semaphore effectually accomplished the purpose for which it was designed, by protecting all of the many thousands of trains that came into the Waterville yard, and that no complaint was ever heard during all of that time, that its signals did not convey the information desired. The defendant confidently asserts that the evidence as a whole, fails to show that the accident was caused by any want of ordinary care on the part of the defendant, with respect to the permanent location,

construction or angle of the semaphore light, but that it was the result either of a failure on the part of the tender to set the red light in due season, or a want of proper vigilance on the part of the engineer in observing the signal.

With respect to the occurrences on the evening of the accident, Horeyseck, the engineer of the plaintiff's train No. 41, who was charged with the responsible duty of carefully observing the signals, testifies emphatically as a witness for the plaintiff, that he was not deceived in the color of the signal. He insisted that he saw it green and that it was green when it was first visible a quarter of a mile distant, and that it continued green until after they were up around the curve. "It was green then after they shouted and called out that there was something on the track." He also testifies to the significant fact that the next moment after the accident he asked Mr. Nelson, who as a substitute was acting as semaphore tender that night "why he didn't have his board set," "board" being the railroad term for semaphore. Nelson admits this in his deposition. He says Horeyseck "claimed that the semaphore showed green. I claimed that it showed red. He claimed that the board was tipped off after he ran into Mr. Marquis. He claimed that the lights were changed after the collision with the Marquis engine."

This suggestion of a sudden change of color appears to have been adopted by the plaintiff himself in the testimony which he gave before the stenographer Haggerty immediately after the accident. According to Haggerty's report the plaintiff then said "After we stopped it showed red, but when we came up the hill I could have sworn by all that is good and holy that it was green." Head-brakeman Stinson, who was on the cab with the plaintiff and the engineer also states that the light was "unmistakably green down below, but just before the collision he looked and saw that the semaphore light was then red."

On the other hand, Nelson testifies positively in his deposition that immediately after the Marquis engine went onto the main line east of the crossing, he tipped the semaphore to the red, that it remained red until the plaintiff's train arrived and was red at the time of the collision. In answer to an inquiry as to his first knowledge of the

accident, he says: "The drug clerk said there was a headlight going round the curve. I jumped up, out through the door; when I got onto the platform they met."

It is undoubtedly true that this and much other evidence for the plaintiff tends strongly to show that the semaphore was properly and seasonably set red, and if so, the proof is convincing that it must have displayed the danger signal down the line which the engineer in the exercise of proper vigilance could not have failed to distinguish. But there is much in the evidence to warrant the belief that the signal was thoughtlessly permitted by the semaphore tender to remain green until the headlight of the engine and the shouts of the men warned him of the danger, when he "jumped out through the door" upon the platform of the shanty and kicked off the lever; then the counterweight instantly swung the lantern to red only a moment before the collision.

From all the evidence now presented the conclusion is therefore irresistible that one of these incidents furnishes the correct solution of the mystery. In either event the grievous injury to the plaintiff appears to have been caused by a want of due care on the part of a fellow servant, and the liability of the defendant company is not established.

It is accordingly the opinion of the court that the entry must be,

Motion sustained.
Verdict set aside.
New trial granted.

FREDERICK O. CONANT, Appellant from decision of County Commissioners of Cumberland County.

Cumberland. Opinion May 9, 1907.

Ways. Laying out town ways. Judicial duties of selectmen. Selectman cannot be petitioner, when. Jurisdiction. Appeal to County Commissioners. Question of jurisdiction may be raised, when. R. S., chapter 23, section 21.

It is a maxim of the law that "a person ought not to be judge in his own cause, because he cannot act both as judge and party," and this maxim applies in all cases where judicial functions are to be exercised, whether in proceedings of inferior tribunals or in courts of last resort.

The duties of municipal officers in laying out town ways are not ministerial merely but judicial.

The laying out of a town way involves the taking of private property for public use, under statute authority, and all statute requirements must be fully and strictly complied with.

Municipal officers in laying out a town way are to exercise their judgment as to the propriety of the way, and as to its location between the termini, and especially in determining whether the pre-requisite conditions exist which warrant the taking of private property for public use and awarding damages to owners of land so taken.

When one of the selectmen of a town signs a petition for the laying out of a town way in his town and such selectman is one of the two selectmen who lay out the way and signs the return upon the petition for the way, the action of the selectmen in laying out such way is void, and would be void even if a sufficient number of the selectmen without him concurred in the result.

When the owner of land over which a town way has been laid out by the selectmen and accepted by the town, presents a petition to the county commissioners praying for the discontinuance of such way and the county commissioners after hearing affirm the location of such way and the petitioner appeals to the Supreme Judicial Court and that Court as provided by statute appoints a committee to hear the parties and report whether

the judgment of the County Commissioners should be in whole or in part affirmed or reversed, and such committee after hearing reports that the judgment of the County Commissioners "be wholly affirmed and in no part reversed," the question of jurisdiction of the County Commissioners, and any other questions affecting the legality of their proceedings, may be raised when the report of the committee is offered for acceptance.

On exceptions by plaintiff. Sustained.

The selectmen of the town of Cape Elizabeth, upon the petition of fifty-two citizens of that town, one of whom was one of the selectmen of that town, laid out a certain town way in that town. The written return of the proceedings of the selectmen was signed by two of their number, one of said two being the selectman who signed the petition for the way. This return was filed with the town clerk as provided by statute. Subsequently at a town meeting of the inhabitants of Cape Elizabeth the report of the selectmen in relation to the matter and the way as laid out by them were accepted.

The plaintiff, one of the owners of land over which the way was laid out, then presented a petition to the County Commissioners of Cumberland County praying that the County Commissioners would "determine that the action of said municipal officers in laying out said town way was unreasonable, and that common convenience and necessity did not require the laying out of said way by said municipal officers, and that common convenience and necessity did not require the acceptance of said town way by the inhabitants of said town; that the action of said town in accepting said way was unreasonable and that your Honors will discontinue said way."

The County Commissioners, after hearing, affirmed the location of the way and dismissed the petition. The plaintiff then appealed to the Supreme Judicial Court as provided by statute. That court in accordance with the provisions of the statute appointed a committee of three disinterested persons to hear the parties and report "whether the judgment of the commissioners should be in whole or in part affirmed or reversed."

The committee, after hearing, reported to the court "that the judgment of the County Commissioners, from which appeal was taken by said appellant in this cause, be wholly affirmed and in no part reversed." When this report was presented, the plaintiff filed several objections

thereto all of which were disallowed and report allowed by the presiding Justice. To these rulings the plaintiff took exceptions.

The case appears in the opinion.

Payson & Virgin, for plaintiff.

Libby, Robinson, Turner & Ives, for Town of Cape Elizabeth.

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

PEABODY, J. This is an appeal from the decision of the County Commissioners of Cumberland County dismissing the appellant's petition dated April 2, 1904, wherein he alleged the action of the municipal officers of the town of Cape Elizabeth in said county upon the petition of certain inhabitants of the town for the laying out of a public way from a point in Fowler Road, so called, to Great Pond, so called, and the subsequent action of the inhabitants of the town in accepting the report of the municipal officers accepting the way as laid out by them, and represented that this action of the municipal officers and of the inhabitants of said town was unreasonable; and considering himself aggrieved by such laying out of the town way by said municipal officers, prayed that the County Commissioners would "determine that the action of said municipal officers in laying out said town way was unreasonable and that common convenience and necessity did not require the laying out of said way by said municipal officers, and that common convenience and necessity did not require the acceptance of said town way by the inhabitants of said town; that the action of said town in accepting said way was unreasonable and that your Honors will discontinue said way.

The case is before the Law Court on exceptions to the rulings of the single Justice of the Supreme Judicial Court hearing the appeal, in allowing the report of the committee which affirmed in whole the judgment of the County Commissioners.

The history of the case is as follows: The selectmen of the town of Cape Elizabeth, upon the petition of A. R. Brown, F. H. Peabbles, and fifty other citizens, laid out a town way leading from the Fowler Road to a pond in the town called Great Pond, and

filed a written return of their proceedings, signed by Charles E. Jordan and F. H. Peabbles, Selectmen of Cape Elizabeth, Maine, with the town clerk, November 27, 1903, and reported the same to the town, at a meeting of its inhabitants held on the seventh day of December, 1903; and at this meeting the town accepted the report and the way as laid out by the municipal officers. Frederick O. Conant, one of the owners of land across which the way was located, presented the petition hereinbefore referred to, to the County Commissioners, who, after a hearing on December 14, 1904, affirmed the location made by the town, and the appellant thereupon appealed to the Supreme Judicial Court, at the January term thereof, 1905. The Appellate Court, at the April term, 1905, appointed Ardon W. Combs, Barrett Potter and Scott Wilson a committee to hear the parties and report whether the judgment of the County Commissioners should be, in whole or in part, affirmed or reversed. The committee gave a hearing and made their report to the court, and objections thereto being filed by the appellant, a hearing was had thereon at the October term, 1905. The objections to the report were stated under seventeen specifications, all of which were disallowed, and the report of the committee was allowed by the presiding Justice. To these rulings the appellant excepted.

The bill of exceptions raises important questions affecting the validity of the laying out of the town way, but we find it unnecessary, and therefore deem it injudicious, to decide all the points presented by the exceptions, and consider one of the exceptions only which is, we believe, decisive against the validity of the way. The appellant moved that the report of the committee be not accepted, for the reason, among others, stated in his third specification of objections, which is as follows:

"III. It appears from the record that F. H. Peabbles, one of the two selectmen, who signed the return upon the petition for the way, also signed the petition for laying out the way."

The laying out of a town way involves the taking of private property for public use, under statute authority, and all statute requirements must be fully and strictly complied with. *Leavitt* v. *Eastman*, 77 Maine, 117.

The bill of exceptions shows that one of the selectmen, who signed the report of the location of the town way, was also a petitioner for the way. The duties of municipal officers in laying out town ways are not ministerial merely, but judicial. They are to exercise their judgment as to the propriety of the way, and as to its location between the termini, and especially in determining whether the prerequisite conditions exist, which warrant the taking of private property for public use and awarding damages to owners of land so taken.

It is a maxim of the law that "A person ought not to be judge in his own cause, because he cannot act both as judge and party," and it applies in all cases where judicial functions are to be exercised, whether in proceedings of inferior tribunals or in courts of last resort. *Dimes* v. *Proprietors of Grand Junction Canal*, 3 House of Lords Cases, 759, 793; *Queen* v. *Justices of Hertfordshire*, 6 Q. B. 753; *State* v. *Castleberry*, 23 Ala. 85; *Meyer* v. *City of San Diego*, 121 Cal. 102; *Tootle* v. *Berkley*, 60 Kan. 446; *Pearce* v. *Atwood*, 13 Mass. 324; Cooley's Constitutional Limitations, 592, 595. This rule has been established since the earliest periods of the common law. *Bonham's Case*, 8 Coke, 118. The reason for it expressed by Bronson, J., in *People* v. *Suffolk Com. Pleas*, 18 Wend. 550, shows its universal application: "Next in importance to the duty of rendering a righteous judgment, is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge." *Lyon* v. *Hamor*, 73 Maine, 56.

Selectman Peabbles was thus disqualified, and this rendered the judgment of the board void, and would have had this effect, even if a sufficient number without him concurred in the result. *State* v. *Delesdernier*, 11 Maine, 473; *ex-parte Hinkley*, 8 Maine, 146; *Friend, Applt.* v. *County Commissioners*, 53 Maine, 387; *Andover* v. *County Commissioners*, 86 Maine, 185; *Case* v. *Hoffman et als.*, 100 Wis. 357.

The petitioner could undoubtedly have attacked the proceedings collaterally, *Small* v. *Pennell*, 31 Maine, 267; he elected, however, to have the question of the validity of the laying out of this town way definitely determined. The closing prayer of his petition to be technically exact should have been to reverse the action of the municipal officers and not to discontinue the way, but the purport of the alle-

gations and prayers of the petition clearly shows that the appellant intended to seek redress of his grievances under the provisions of R. S., ch. 23, sec. 21, and they are sufficient.

The commissioners did not dismiss the petition for want of jurisdiction, but assuming jurisdiction, though erroneously, they sought to affirm the location of the way; and the committee acted upon the same theory as is indicated by their report, "that the judgment of the County Commissioners from which appeal was taken by said appellant in this cause be wholly affirmed and in no part reversed."

The question of jurisdiction of the County Commissioners, and any other questions affecting the legality of their proceedings, may be raised when the report of the committee of appeal is offered for acceptance. *Philips* v. *County Commissioners*, 83 Maine, 541; *Hodgdon* v. *County Commissioners*, 68 Maine, 226; *Goodwin* v. *County Commissioners*, 60 Maine, 328; *Winslow* v. *County Commissioners*, 31 Maine, 444.

The objection of the petitioner should have been sustained and the report of the committee should have been rejected. *Belfast* v. *County Commissioners*, 52 Maine, 529; *Wells* v. *County Commissioners*, 79 Maine, 522; *Donnell* v. *County Commissioners*, 87 Maine, 223.

Exceptions sustained.

Appeal sustained.

Judgment of County Commissioners reversed.

CHARLES E. JORDAN et als.,

Selectmen of Cape Elizabeth, Petitioners for amendment of certain town records.

Cumberland. Opinion May 9, 1907.

Ways. Amendment of Records. Petition therefor dismissed.

In the case at bar, a petition was presented to the Supreme Judicial Court by the plaintiff and two others, formerly selectmen of the town of Cape Elizabeth, praying that they be allowed to amend their return upon a petition for a certain town way in said Cape Elizabeth and that the clerk be ordered to amend the record of the selectmen's return. Motions were made that the petition be dismissed which motions were overruled and exceptions taken. *Held*: That although the petition was presented as an independent proceeding, yet it was in fact incidental and supplemental to the case of Frederick O. Conant, Appellant from decision of the County Commissioners in laying out the town way in question, and as the appeal in that case has been sustained for reasons not involved in the subject matter of the petition, it is considered that a decision of the case at bar is unimportant and that the same should be dismissed.

On exceptions. Same not considered. Case dismissed.

Petition by plaintiff and two others formerly selectmen of Cape Elizabeth, presented to the Supreme Judicial Court, Cumberland County, praying for the amendment of certain town records.

Frederick O. Conant, by consent of court, appeared and filed motions for the dismissal of the petition, which motions were overruled and thereupon Mr. Conant took exceptions.

The case appears in the opinion.

Libby, Robinson, Turner & Ives, for plaintiffs.

Payson & Virgin, for Frederick O. Conant.

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

PEABODY, J. This is a petition addressed to the Supreme Judicial Court by Charles E. Jordan and others, formerly selectmen of the town of Cape Elizabeth, in the County of Cumberland, praying that they may be allowed to amend their return upon a petition for a

town way in the town of Cape Elizabeth, and that the clerk may be ordered to amend the record of the selectmen's return.

Frederick O. Conant appeared, by consent of court, as a tax-payer and as the owner of land over which the proposed way was laid out, to oppose the granting of the petition and moved that it be dismissed, 1st. For want of jurisdiction in the court; 2d. For the reason that amendment asked was not allowable as a matter of law, because the petitioners are no longer selectmen of the town, and because the town clerk is no longer clerk of the town of Cape Elizabeth. These motions were overruled by the presiding Justice, and the case is before the Law Court upon exceptions to these rulings.

The petition in this case was presented as an independent proceeding, but it was, in fact, incidental and supplemental to the case of Frederick O. Conant, Appellant from decision of County Commissioners of Cumberland County, in laying out the town way in question. As the appeal in that case has been sustained by the Law Court for reasons not involved in the subject matter of the petition, it is considered that a decision of this case is unimportant, and that it should therefore be dismissed, without costs.

So ordered.

EDWARD B. MEARS *vs.* MAY C. P. JONES.

Hancock. Opinion June 5, 1907.

Contracts. Lease. Construction. Sale of property leased. Commissions.

The plaintiff, a real estate agent, was requested by the defendant to secure for her a tenant for one or more years for her estate. He secured a tenant, under a written lease, "to hold for five seasons as follows, 1903, 1904, 1905, 1906 and 1907, June 1st to October 15th." The lease provided that in the event of the property being sold . . . . "this lease to be determined and ended at the end of the season immediately following the contract of sale." The plaintiff executed the lease for the defendant as her agent. He was paid an annual commission of one hundred and fifty dollars for each of the years 1903 and 1904. The premises were sold by the defendant during the season of 1904. There was no express contract for commissions, either as to time or amount.

Held: That the defendant is not liable to the plaintiff for commissions, as upon an implied contract, for the years 1905, 1906 and 1907.

It is immaterial, that though the lease gave the tenant an option of purchase, the sale was actually made to the tenant's wife.

On agreed statement. Judgment for defendant.

Assumpsit on account annexed brought by the plaintiff for commissions for five years, alleged to be due him as agent or broker, for leasing property at Bar Harbor, September 6, 1902, then owned by the defendant. The account annexed is as follows:

"BAR HARBOR, MAINE.

"Mrs. May C. P. Jones,

To Edward B. Mears, Dr.

1902.			
September 6th.	To commissions due on lease with A. S. Hewett, 5 per cent on $3,000 each year for five years,		$750
	CREDIT.		
1903.			
September 30th,	By Cash	$150	
1904.			
September 30th,	By Cash	150	300
	Balance due		$450."

Writ dated December 9, 1904. Plea the general issue. The action came on for trial at the October term, 1905, of the Supreme Judicial Court, Hancock County. An agreed statement of facts was then filed and the case was reported to the Law Court without further proceedings at nisi prius.

The agreed statement is as follows:

"It is agreed for the purpose of this case only,

"(1) That the defendant, May C. P. Jones, on the sixth day of September, A. D. 1902, was the owner of an estate consisting of house, land and stable, known as "Reverie Cove," situated at the summer resort known as Bar Harbor, in the town of Eden, Hancock County, Maine, and the estate referred to in the lease hereinafter mentioned;

"(2) That the plaintiff, Edward B. Mears, on said sixth day of September, A. D. 1902, was a real estate agent at said Bar Harbor, and having been previously requested by the defendant to secure a tenant for her for one or more years, then and there as such agent, secured for said defendant a tenant, Abram S. Hewett, for said "Reverie Cove," for the term noted in and subject to the provisions of the written lease, dated September 6, A. D. 1902, between said defendant and said Abram S. Hewett, duly executed, a copy of which is hereto attached, made a part of this agreed statement and may be used by either party.

"(3) That during the years 1903 and 1904, the rents falling due under said lease were fully paid; that during the season of 1904, being one of the seasons included in said lease, the said "Reverie Cove" was sold and conveyed through another agent than the plaintiff (which other agent was not an agent or broker at the time of making the said lease, and did not have any authority at that time, to wit, September 6, A. D. 1902, to offer for sale the said "Reverie Cove," as he did not become an agent or broker in Bar Harbor until the year A. D. 1904) to Sarah A. Hewett, wife of the said Abram S. Hewett, and no further payments under the said lease were made to the said defendant or to the said plaintiff on the defendant's account."

"The question is whether or not the plaintiff is entitled to recover for the commission charged for the years 1905, 1906 and 1907, after the sale of the property.

"Upon the foregoing pleadings, this agreed statement, and the exhibit referred to, the Law Court is to determine whether or not the plaintiff is entitled to recover said commission. If the plaintiff is not entitled to recover, judgment is to be rendered for the defendant. If the plaintiff is entitled to recover, judgment may be rendered for the balance claimed under the declaration (with interest from date of the writ), no question being raised as to the reasonableness of the commission charged."

The lease referred to in the "agreed statement" is as follows:

"This indenture made the sixth day of September in the year of our Lord, one thousand nine hundred and two.

"Witnesseth that May C. P. Jones of the city of Washington, District of Columbia, does hereby lease, demise and let unto Abram S. Hewett of the borough of Manhattan, City, County and State of New York, her estate consisting of house, land and stable known as "Reverie Cove," situated on the shore of Frenchman's Bay, at the foot of Prospect Avenue, in the Village of Bar Harbor, Town of Eden, County of Hancock and State of Maine, together with the furniture therein and all privileges and appurtenances belonging to the said estate.

"To Hold for five seasons as follows, 1903, 1904, 1905, 1906, and 1907; June 1st to October 15th. Yielding and paying therefor the rent of Three thousand dollars ($3,000) dollars each year. And the said lessee does agree to pay the said rent in two equal payments each year as follows: Fifteen hundred ($1,500) dollars on July 1st; Fifteen hundred (1,500) dollars September 1st, each year. And to quit and deliver up the premises to the said lessor or her attorney peaceably and quietly at the end of the term aforesaid in as good order and condition (reasonable use and wearing thereof or inevitable accident, excepted) as the same now are or may be put into by the said lessor, and to pay the water, electric light and telephone taxes duly assessed thereon during the said periods, and not make or suffer any waste thereof. And the said lessor may enter to view and make

repairs and to expel the said lessee if he shall fail to pay the rent aforesaid, or if he shall make or suffer any waste or strip thereof, or shall fail to quit and surrender the premises to the said lessor at the end of each of the said terms in manner aforesaid, or should violate any of the covenants in this lease by said lessee to be performed.

"The said lessee agrees to keep the grounds in order during so much of each of the said terms as he shall occupy the property.

"The said lessor agrees to put and keep the said premises in good repair, suitable for the occupation of a family living in good style; to have the electric lights, gutters, range, laundry stove, furnace, steps to lawn, steps to beach, main entrance floor, blinds, screens and doors in good working order and to make the necessary repairs to stable floor and stalls, and to have the grounds and tennis court put in good order each season.

"The said lessor further agrees to have the house, stable and grounds cleaned and put in good order before the arrival of the tenant or sub-tenant, as the case may be.

"The said lessor hereby gives the right to sub-let the premises for any or all of the said annual terms above specified to a tenant approved of by her or her representative.

"It is agreed and understood by both the parties hereto that in the event of the property being sold, the tenant is to give up possession of the premises and this lease is to be determined and ended at the end of the season immediately following the contract of sale. And in the event of such sale the sum of One thousand, five hundred dollars, which the lessee proposes to expend for plumbing and other improvements, shall be returned to him or may be deducted from any payment of rent thereafter to be made.

"Before completing the sale however of the said property to any other party, the lessor agrees to offer it to the lessee at the same price and upon the same terms procurable from the intending purchaser, and the said lessee shall elect within ten days from receiving such notice whether he will purchase the said property upon the terms offered by said intending purchaser, and in case of election to purchase the said property the lessor agrees to make the proper conveyance in fee simple by usual warranty deed and the lessee agrees to make the payments in accordance with such terms of purchase.

"The obligation to sell and purchase thus provided for is to be regarded as an honourable agreement between the parties hereto, but shall in no case be made the subject of litigation by either party.

"In Witness Whereof the parties hereto have hereunto interchangeably set their hands and seals the day and year first above written."

This lease was duly executed by the parties thereto.

The pith of the case appears in the opinion.

Charles H. Wood and Edward B. Mears, for plaintiff.

Hale & Hamlin, for defendant.

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

SAVAGE, J. The plaintiff, a real estate agent, having been requested by the defendant to secure for her a tenant for one or more years for her estate at Bar Harbor, secured Abram S. Hewitt as tenant, under a written lease, dated September 6, 1902, "to hold for five seasons as follows, 1903, 1904, 1905, 1906 and 1907, June 1st to October 15th." The lease also contained the following provisions:— "It is agreed and understood by both the parties hereto that in the event of the property being sold, the tenant is to give up possession of the premises and this lease is to be determined and ended at the end of the season immediately following the contract of sale. . . .

"Before completing the sale however of said property to any other party, the lessor agrees to offer it to the lessee at the same price and upon the same terms procurable from the intending purchaser, and the said lessee shall elect within ten days from receiving such notice whether he will purchase the said property upon the terms offered by said intending purchaser, and in case of an election to purchase the said lessor agrees to make the proper conveyance in fee simple by usual warranty deed and the lessee agrees to make the payments in accordance with such terms of purchase.

"The obligation to sell and purchase thus provided for is to be regarded as an honorable agreement between the parties hereto, but shall in no case be made the subject of litigation by either party."

The plaintiff executed the lease for the defendant as her agent.

The rents accruing under the lease for the seasons of 1903 and 1904 were fully paid, and the plaintiff was paid each year an annual commission of $150. During the season of 1904, the demised premises were sold by the defendant to Sarah A. Hewett, the tenant's wife. The sale was made through another agent of the defendant, and one who at the date of the lease had no authority to offer the estate for sale.

The question presented for determination is whether the plaintiff is entitled to recover the commission charged by him for the years 1905, 1906 and 1907, after the sale of the property.

The case shows no express contract for commissions, either as to time or amount, but the plaintiff claims that he secured a tenant for the defendant for the term of five seasons, and that in consequence he is entitled, upon an implied contract, to commissions for the full term. He insists that he should not be affected or his rights limited by the fact that the defendant sold the premises during the term, and thereby determined the lease. That the defendant earned a commission is not in dispute. He accomplished the purpose of his employment. He did more than was necessary to entitle him to a commission. It would have been enough for him to secure one willing to become a tenant upon the defendant's terms, and bring him to the defendant for acceptance as such. But he actually secured a contract of tenancy. The only question is how much did he earn? The commission of a real estate broker is usually understood to be a certain percentage upon the consideration paid, or offered to be paid or received. In the case of a sale, the problem is easy. The consideration is a single amount. In the case of a lease with annual rentals for a specified term, it would be reasonable to expect that the amount of commissions would depend, in some respects, at least, upon the length of the term contracted for. It would not be natural to expect that the parties understood that so large a commission would be earned in securing a lease for one year as one for five years. And that the parties in this case understood that the commission was earned and was to become payable in

annual instalments is, we think, reasonably to be inferred from the annual payments made while the lease was in force. And we agree with the plaintiff that he was entitled to annual commissions for the full term of the lease. But what was the full length of that lease? We think it was not for five seasons absolutely. It was for five seasons, unless the property was sold in the meantime. It was a lease for five seasons, but determinable by a sale within that term. It was made determinable by the very lease which the plaintiff procured. He therefor did not procure a lease for full five seasons, but a lease which might lawfully end sooner. He is entitled to his earnings for the kind of a lease he secured. He was employed to get a tenant for one or more years. The longer the term he secured, the greater the amount of rentals, and naturally the larger the amount of his commissions in the whole. He took the chances of sale. It matters not that the limitation in the lease was for the defendant's benefit, and may have been made, as it probably was, at the defendant's direction. If it was so limited at the instance of the defendant, it was, just the same the kind of a lease which the plaintiff undertook to procure and did procure. And the amount of the rentals which was the consideration of the lease, and which naturally would be the basis of commissions, would vary according to the length of time which should elapse before the lease was determined by sale.

Nor does it matter that while the lease gave the tenant an option to purchase, in case of some other intending purchaser, the sale was actually made, not to the tenant, but to the tenant's wife. That provision was for the benefit of the tenant, and did not concern the plaintiff. If the property was to be sold, it could make no difference to the plaintiff whether it was sold to the tenant or to his wife, or to some one else.

The result is that the plaintiff is not entitled to recover commissions for the years 1905, 1906 and 1907.

Judgment for the defendant.

ANDERSON CARRIAGE COMPANY *vs.* JAMES BARTLEY.

Piscataquis. Opinion June 5, 1907.

Cases on Report. Evidence. Conditional sales. Title retained by vendor. Payment "in money." Acceptance of note no waiver of condition, when. Replevin. Mortgage given by vendee no defense against vendor, when. R. S., chapter 113, section 5.

1. In cases heard on report, the court will consider only such evidence as is competent, relevant and legally admissible, unless otherwise stipulated.
2. When a plaintiff in replevin claims title under the defendant's written order for goods, by the terms of which the vendor is to retain the title until the price is paid, proof of the execution of the order is essential before it can be properly admitted in evidence.
3. But when such an order is admitted, against objection, without proof of execution, and the case is thereafter reported to the Law Court for its determination, and it appears from the whole record that the order was executed by the defendant, the objection is no longer tenable.
4. When a purchaser in his written order for goods stipulates that the title to them shall remain in the seller until payment of the price "in money," and it is therein also provided that a note may be given for the price, the acceptance by the seller of the purchaser's negotiable note for the price, is not to be deemed a waiver of the condition of the sale, so as thereby to pass the title to the purchaser, unless it appears to have been so intended.
5. If the purchaser of goods under a conditional sale mortgages them before the instrument of sale is recorded in the town clerk's office, such mortgage is not a defense in an action of replevin by the seller against the purchaser. The rights of the mortgagee are not affected. But the mortgager cannot set up the mortgage lien created by himself as a defense.

On report. Judgment for plaintiff.

Replevin for five wagons, bargained for in 1903 and delivered by the plaintiff to the defendant in the spring of 1904. Writ dated October 18, 1904. Plea, the general issue with brief statement as follows:

"And for brief statement, defendant further says:

"That he denies that the title to the goods replevied was in the plaintiff at the date of the writ but claims that the title to the light delivery wagon number 104, also to Riverside Heavy Spring Wagon Number 101 was in the Milliken-Tomlinson Company and that the title to the other goods replevied was in Woodruffe Bartley."

Woodruffe Bartley is the son of the defendant.

The written order given by the defendant to the plaintiff when the wagons were ordered, contained, among other things, the following stipulations:

"Please ship on , or as soon thereafter as possible, the following vehicles, subject to terms and conditions herein and warranty printed on back hereof, which is part of this agreement.

"This order is given subject to your approval and acceptance, and cannot be countermanded without your written consent. Title to the goods shipped on this order and all future orders, for any vehicles is to remain in The Anderson Carriage Co., its successors or assigns, until paid for in money, and should said company deem itself insecure at any time, the buyer agrees to give acceptable security, or said account or any notes taken thereon are to become immediately due and payable, and said company may take possession of its goods or bring action on said note or account. The terms of this agreement shall be binding upon all goods shipped, whether ordered by mail or otherwise. After acceptance of the order The Anderson Carriage Co., agrees to ship all goods it is able to supply, but it is not to be held liable for damages for unfilled portions of any order."

Tried at the February term, 1906, of the Supreme Judicial Court, Piscataquis County. The following question was submitted to the jury: "Was the alleged sale of carriages by James Bartley & his son Woodruffe Bartley an actual sale in good faith?" Answer "No."

The case was then "reported to the Law Court with the special verdict, for determination of the whole case."

The case appears in the opinion.

Hudson & Hudson, for plaintiff.

A. L. Fletcher, for defendant.

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

SAVAGE, J. Replevin of five wagons, bargained for in 1903 and delivered by the plaintiff to the defendant in the spring of 1904. The plaintiff claims title by virtue of the terms of the defendant's written order for the wagons, by which it was stipulated that the "title to the goods shipped on this order . . . . is to remain in the Anderson Carriage Co., its successors and assigns, until paid for in money." The defendant pleaded the general issue, and by way of brief statement denied plaintiff's title, and claimed that the title to two of the wagons was in the Milliken-Tomlinson Company, and that the title to the other wagons replevied was in his son. The issue as to the son's title was submitted to a jury, which returned a special finding adverse to the defendant's claim. Thereupon the case was reported to this court for final decision, upon the evidence and special finding.

Under the pleadings, the burden was on the plaintiffs to show title. *Cooper* v. *Bakeman*, 32 Maine, 192; *Pope* v. *Jackson*, 65 Maine, 162. The defendant contends that the plaintiff has failed to produce competent, admissible evidence of title, and further he contends, and correctly, that in cases heard "on report" the court should consider only such evidence as is competent, relevant and legally admissible, unless otherwise stipulated. At the trial plaintiff was permitted, "subject to the defendant's objection," to introduce the written order under which it claims title, without proof of its execution by the defendant. Undoubtedly proof of its execution was essential before it could be properly admitted as evidence, since it did not come within the provisions of Rule X. But, on report, we have to decide upon the record before us, and there is plenary, legitimate proof in the record that the order was executed by the defendant. The defendant, while not now denying the execution of the instrument, complains that he was put to some tactical disadvantage by the fact that the plaintiff was relieved from proving the execution at the outset. If the defendant felt aggrieved, he should have taken

exceptions, and not have consented to a report. Since the fact of execution is proved, the objection that the order was formally admitted before proof of execution is not tenable on report.

When the plaintiff delivered the wagons upon the defendant's written order containing the stipulation expressed above as to title, the transaction constituted a conditional sale. Payment for the wagons was made a condition precedent to the passing of the title. Until payment, the plaintiff's title was good as against the defendant, without record in the town clerk's office, R. S., ch. 113, sec. 5; and after such record it was good as against subsequent purchasers or mortgagees.

The case shows that after the wagons were delivered the plaintiff solicited and received the defendant's negotiable note for the amount due on the wagons and on a prior account. The defendant contends that the note was a payment, that the receipt of it was a waiver of the condition of the sale, and that the title to the wagons thereupon passed to him. We do not think so. The contract provided that the title should remain in the plaintiff until payment "in money." It also provided for the giving of a note for the price. The note given was presumptively a payment of the price, but it was not a payment "in money." It changed the form of the indebtedness, but we think that accepting it was not a waiver of the condition, and so did not release the security, unless it was so intended. There is nothing in the case to show such an intent, and such an intent cannot be presumed under the circumstances disclosed. *Crosby* v. *Redman*, 70 Maine, 56. The case of *Boynton* v. *Libby*, 62 Maine, 253, cited by the defendant, differs from the one at bar, in that, there was no provision in the contract of sale in that case that the title should remain in the vendor until payment *in money*, nor that a note might be given for the price. It follows then that the plaintiff, at the time of bringing the suit had both the title and the right of possession to all the wagons replevied, as against the defendant.

It appears, however, that two wagons were mortgaged by the defendant to the Milliken-Tomlinson Company before the written

order of the defendant to the plaintiff was recorded in the town clerk's office, and the defendant claims that they were among those replevied. He offers the Milliken-Tomlinson mortgage as a defense in this action, as to two of the wagons. The plaintiff disputes the identity of the wagons mortgaged. But even if we assume that the wagons mortgaged were among those replevied, we think the mortgage affords no defense to the defendant. He does not claim under the Milliken-Tomlinson Company so as to be entitled to make any defense that that company might make, but the company must claim, if at all, under him. That company is not a party to this suit, and will not be affected by this judgment. The mortgage given by the defendant did not divest the plaintiff of all title to the wagons, as a sale would have done. It still held the title subject to the mortgage. It had a right to redeem from the mortgage. The defendant cannot set up this mortgage lien created by himself as a defense to this suit.

Judgment for the plaintiff.
Damages assessed at $1.

ANNIE POMROY

vs.

BANGOR & AROOSTOOK RAILROAD COMPANY.

Aroostook. Opinion June 8, 1907.

Railroads. Carriers of Passengers. Care. Ordinary Care. Negligence.

When the relation of passenger and common carrier of passengers exists, the law requires that the passenger should exercise such care as persons of ordinary prudence and intelligence would exercise under the same circumstances.

It is the duty of a common carrier of passengers to do all that human vigilance and foresight can, under the circumstances, considering the character and mode of conveyance, to prevent accidents to passengers.

Ordinary care under the circumstances, is the legal standard in all cases. The significance of the term "ordinary care" varies with the attendant and surrounding circumstances. This care is to be exercised by the carrier of passengers at all times when, and at all places where the parties are in the relation of passenger and carrier, whether during transit, at the stations, upon platforms or in waiting rooms, and it applies to all matters which pertain to the business of the carrier of passengers.

In the case at bar, a short time previous to the accident whereby the plaintiff was injured, the defendant's station buildings at Sherman or Patten Junction were destroyed by fire, and on the date of the accident the defendant was engaged in rebuilding its passenger depot at said Junction, and no waiting room had been completed so as to be used by the public. On the west side of a long platform, which had been newly laid between the tracks, a car had been left for the accommodation of passengers to be temporarily used as a waiting room, and it was customary to allow passengers coming from Patten to Sherman to wait in the passenger car on which they came, until ready to take the trains going north or south. The plaintiff, a passenger from Patten and bound north, remained in the Patten car for some time after its arrival at Patten Junction, and then, as she alleged, on attempting to alight from the car platform, and without previous notice to her the car was suddenly started and she was thrown against the edge of a platform and received bodily injuries. The plaintiff recovered a verdict against the defendant for $3000. *Held:* That on the question of the defendant's liability, the evidence does not manifestly show that the verdict was wrong, but that the damages awarded were excessive and unless remittitur be made the verdict must be set aside.

On motion by defendant. Sustained unless remittitur be made.

Action on the case to recover damages for personal injuries sustained by the plaintiff and alleged to have been caused by the negligence of the defendant while she was alighting from a railroad car at Sherman Station or Patten Junction, so called, on the line of the defendant's railroad.

Tried at the April term, 1905, of the Supreme Judicial Court, Aroostook County. Plea, the general issue. Verdict for plaintiff for $3000. The defendant then filed a general motion for a new trial.

The case appears in the opinion.

Memorandum: One of the Justices did not sit in this case being disqualified by reason of being a stockholder in the defendant company.

Ira G. Hersey and Shaw & Lewin, for plaintiff.

Powers & Archibald, F. H. Appleton and Hugh R. Chaplin, for defendant.

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

PEABODY, J. This was an action on the case brought by the plaintiff against the defendant company to recover damages for personal injuries alleged to have been received through the negligence of the defendant's servants while she was alighting from a railroad car at Sherman Station or Patten Junction so called, on the line of the defendant's railroad.

The jury rendered a verdict of $3000 in favor of the plaintiff.

The case is before the Law Court, on a general motion for a new trial filed by the defendant. The propositions which the jury must have found proved are: 1. That at the time of the accident the plaintiff was in the exercise of reasonable care: 2. That the accident was caused by the defendant's negligence: 3. That the damages awarded were a reasonable compensation for the injuries directly and naturally resulting from the accident.

The issues raised by the motion are: first, whether the verdict is against law; second, whether it is manifestly against the evidence

and weight of evidence: third, whether the damages awarded by the jury are excessive. It is not in controversy that the relation of passenger and common carrier of passengers existed between the parties at the time of the accident. This is an important fact bearing upon the question of the care which the law required of the respective parties for the safety of the passenger while this relation existed. The law requires that the passenger should exercise such care as persons of ordinary prudence and intelligence would exercise under the same circumstances. The duty of the common carrier of goods is distinctly different from that of the common carrier of passengers, the former is under an implied contract to deliver the goods received for transportation safely to the consignee unless loss or injury occurs by the act of God or the public enemy, while the latter is only required to do all that human vigilance and foresight can under the circumstances considering the character and mode of conveyance, to prevent accidents to passengers. *Libby* v. *Maine Central Railroad Co.*, 85 Maine, 34; *Rogers* v. *Kennebec Steamboat Co.*, 86 Maine, 261; *Raymond* v. *Portland Railroad Co.*, 100 Maine, 529. In the last case cited we have decided that the distinctions in degrees of care such as "slight," "ordinary" or "great" is unscientific and impracticable, as the law furnishes no definition of these terms which can be applied in practice. Ordinary care under the circumstances, is the legal standard in all cases. The significance of the term "ordinary care" varies with the attendant and surrounding circumstances. This care is to be exercised by the carrier of passengers at all times when, and at all places where the parties are in relation of passenger and carrier, whether during transit, at the station, upon platforms or in waiting rooms, and it applies to all matters which pertain to the business of the carrier of passengers. *Dodge* v. *B. & B. Steamship Co.*, 148 Mass. 207; *Jordan* v. *N. Y. N. H. & H. Railroad Co.*, 165 Mass. 346; *Shannon* v. *B. & A. Railroad Co.*, 78 Maine, 52.

It appears from the facts not in controversy that a short time previous to August 8th, 1903, the date of the accident, the defendant's station buildings at Sherman or Patten Junction were destroyed by

fire, and that on this date the defendant was engaged in rebuilding the passenger depot, and no waiting room had been completed so as to be used by the public. On the west side of the long platform, which had been newly laid between the tracks, a car had been left for the accommodation of passengers to be temporarily used as a waiting room, and it was customary to allow passengers coming from Patten to Sherman to wait in the passenger car on which they came, until ready to take the train going north to Houlton or south to Bangor.

There is conflicting evidence as to conversations between the plaintiff and conductor and baggage-master relating to the car which was used for the Patten passengers, as to whether it was in motion when she attempted to alight, and as to the direct cause and manner of her falling upon the platform. The plaintiff testifies that the conductor told the lady passengers before the train reached the station that they could remain in the car or get out just as they chose, and said that the car would stay there until the other train came up; that being tired of sitting in the car she thought she would go out, and was going out as carefully as she could and as she got down on the second step of the car it started quick and she was thrown on her right side against the edge of the platform next to the train; that she had no notice that the car was going to move. The conductor in his testimony denies that he made any announcement to the passengers in regard to the car; the baggage-man states that in answer to the plaintiff's inquiry he told her that the car would remain in that place until the train for Houlton arrived, but would probably move around some, and would be back to the station before the arrival of the train for Bangor; that after he gave the signal the car commenced to back up very slowly, slower than a man would naturally walk on the platform. The baggage-master at the station says that the plaintiff was stepping off the car while in motion when she fell. A carpenter who had charge of rebuilding the station buildings states that he saw the plaintiff rush out of the car while it was moving and fall upon the platform, that he should say she jumped. Another carpenter states that he saw the Patten train back in and afterward saw it backing

back, and while looking at the moving train saw the plaintiff come to the door hurriedly and as she stepped or jumped from the car steps she fell on the platform.

In the absence of exceptions we are to assume that the jury were fully and correctly instructed as to the legal principles applicable to the case. The evidence of the plaintiff if substantially correct sustains prima facie the propositions that she received injuries to which no negligence on her part contributed, and that these injuries were caused by the negligence of the defendant. In the absence of notice or warning she had the right to assume that the car which was used as a temporary waiting room would remain stationary until after the arrival of the train for Houlton, and if there was occasion or necessity for moving the car the omission on the part of the servants of the company to notify a passenger would be negligence. And even if the testimony introduced by the defendant corporation is substantially correct it constitutes no such preponderance of evidence in its favor as to manifestly show that the verdict was unwarranted. The facts in the case at bar are more nearly analogous to those in *Shannon* v. *B. & A. Railroad Co.*, supra, than to those in *McDonald* v. *B. & M. Railroad Co.*, 87 Maine, 466.

The defendant's claim in support of the motion, that the damages were excessive, seems to us to have merit.

The manner of the plaintiff's fall upon the platform is described by her, and by witnesses called by the defendant, as already stated. The theory of the plaintiff is that she was thrown by a sudden movement of the car in a partially upright position and struck her side against the edge of the platform, which it is contended would account for the injuries claimed to have been sustained, and that of the defendant is that she jumped, falling on her right side lengthwise on the platform, which it is argued would make the nature of the injuries claimed improbable.

The immediate results of the fall were not sufficiently serious to attract the attention of those at the station or to prevent the plaintiff from continuing her journey to Houlton, instead of returning home by a train soon to arrive; and her statement as to the effects upon her is somewhat inconsistent with her conduct on that day, and for

several months thereafter, and is still more inconsistent with the claim that the abnormal conditions now shown to exist were caused solely by the accident.

If her injuries were indicated by all the symptoms testified to by her and her witnesses, the damages awarded were conservative, and none the less so because they may have been intensified by pre-existing disease; but there should be no confusion as to the suffering and disability naturally resulting from the accident and that to be imputed to other causes. We think it is conclusively shown by the testimony of the medical experts called both by the plaintiff and the defendant that she had been previously suffering from a complication of physical troubles which would account partially at least for the pain, nausea and nervous condition to which she is subject. It appears after careful analysis of the evidence that the jury must have estimated the damages returned by their verdict upon the assumption that the plaintiff had, previous to the accident, always been in perfect health. The testimony which tends to prove this is discredited by the results of the physical examination of the plaintiff made by professional witnesses.

While it is difficult to apportion suffering or disability as between distinct contributing causes, this is necessary when compensation is to be computed, and it should be done with a just consideration of the rights of the parties. In this case the damages awarded by the jury are clearly excessive.

The motion is sustained, unless the plaintiff within thirty days after the rescript is filed remits from the amount of the verdict all above $500.

HERBERT E. KNOWLTON *vs.* MARTIN G. BLACK.

Waldo. Opinion June 8, 1907.

Fire Insurance Policy. Loss. Mortgagee's Lien. Notice to Insurance Company. Accord and Satisfaction. R. S., chapter 49, sections 54, 55; chapter 84, section 59.

1. When it is not stipulated in a policy of fire insurance that the insurance shall be payable to a mortgagee, the mortgagee acquires no lien on such policy until and unless "he files with the secretary of the insurance company a written notice, briefly describing his mortgage, the estate conveyed thereby, and the sum remaining unpaid thereon." R. S., chapter 49, section 54.
2. If such lien be thus acquired and the mortgagor does not consent in writing that the insurance shall be paid to the mortgagee, the lien is lost unless the mortgagee within sixty days after the loss enforces the lien by a suit against the mortgagor and against the insurance company as his trustee. R. S., chapter 49, section 55.
3. If, when no such lien exists and the mortgagor has collected the insurance, he offers it or part of it to the mortgagee in full discharge of the mortgage debt and it is so accepted by the mortgagee, the mortgage debt is thereby fully discharged, though the sum paid was much less than the amount due on the mortgage. R. S., chapter 84, section 59, applies to demands undisputed as well as to demands disputed.

On motion by plaintiff. Overruled.

Assumpsit on seven promissory notes of one hundred dollars each, given by the defendant to the plaintiff. Plea, the general issue with brief statement as follows: "That the notes described in plaintiff's declaration and ten other notes of even date therewith, given by the defendant to the plaintiff, in all amounting to seventeen hundred and fifty dollars, were secured by a mortgage of certain real estate, situated in Northport, that the first of said notes and one year's interest on the whole of said notes became due February 1, 1897, and for non-payment of said first note and a part of said interest the plaintiff foreclosed said mortgage, and the right of redemption thereunder, expired July 8, 1898, and the plaintiff took possession

of said real estate and sold the same, and that after the making of the said several promises and after the foreclosure of said mortgage by the plaintiff, but before the commencement of this action, to wit, on the day of September, A. D. 1898, he paid and delivered to the said Herbert E. Knowlton, and the said Herbert E. Knowlton accepted the sum of seven hundred dollars in payment and satisfaction of all of the notes secured by said mortgage, including the notes declared upon in this action, and this he is ready to verify."

Tried at the January term, 1906, of the Supreme Judicial Court, Waldo County. Verdict for defendant. The plaintiff then filed a general motion to have the verdict set aside.

All the material facts appear in the opinion.

Williamson & Burleigh, for plaintiff.

Dunton & Morse, for defendant.

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

EMERY, C. J. The undisputed facts are these: The notes in suit had been secured by a mortgage upon some buildings and land, which mortgage had been foreclosed. A few days before the right of redemption expired, the buildings, which were insured by the defendant, the mortgagor, were consumed by fire. The plaintiff, the mortgagee, within a week or two after the fire wrote them (the insurance company) and told them, "I (he) was the mortgagee." It does not appear that in such letter he briefly described his mortgage, or the estate conveyed thereby, or the sum remaining unpaid thereon, all of which statements were necessary to give him a lien upon the insurance policy. R. S., ch. 49, sec. 54. Nor did he begin any suit against the insurance company as trustee of the mortgagor within sixty days after the loss, as was necessary to preserve and enforce his lien, had one been acquired. R. S., ch. 49, sec. 55.

The defendant, the mortgagor, made the proofs of loss, but did not collect the insurance upon the buildings until more than sixty days after the fire, before which time the right of redemption had expired and the title to the land had become absolute in the mort-

gagee, the plaintiff, and he sold the land for $500. Upon receiving the insurance money, $700, the defendant paid it over to the plaintiff, thus making a payment of $1200 in all on the notes which amounted to over $1800.

The defendant testified positively that he paid and the plaintiff accepted the $700 of insurance money in full payment and discharge of his indebtedness on the notes. The plaintiff as positively denies that the payment was so made. The jury found the fact to be as contended by the defendant and returned a verdict for him.

We find nothing inherently improbable in the defendant's testimony. He admittedly had no other property or money, and the plaintiff had no reason to believe otherwise. The plaintiff had no lien on the insurance money. It would have been difficult at least for him to have compelled the plaintiff to pay it to him. He had taken the land, and it would not be at all an improbable or unusual transaction had he accepted, and been glad to accept, $700 in complete discharge of the balance of the debt which he had no prospect of collecting in full. We must regard it as established that the demand sued upon was settled by the creditor in full discharge thereof by the receipt of money paid him for that purpose, and that the defendant is entitled to judgment upon the verdict under R. S., ch. 84, sec. 59, which applies to demands undisputed as well as to demands disputed.

Motion overruled.
Judgment on the verdict.

CALVIN CARR *vs.* JOEL W. JUDKINS.

Penobscot. Opinion June 8, 1907.

Statutory Construction. Statute not retroactive, when. Statute 1905, chapter 90. Revised Statutes, chapter 46, section 2.

It is a sound rule of construction that a statute should have a prospective operation only unless its terms show clearly a legislative intent that it should operate retrospectively.

Revised Statutes, chapter 46, section 2, provided that "all loans . . . . . for less than two hundred dollars, secured by mortgage or pledge of personal property, shall be dischargeable by the debtor upon payment or tender of the principal sum actually borrowed, and interest at the rate specified therein, which shall not exceed" certain specified rates, and further provides that "all loans made in violation hereof shall bear interest at the legal rate of interest only." By the provisions of the Public Laws, 1905, chapter 90, said section 2 of said chapter 46 of the Revised Statutes was amended, the amendment providing, among other things, that "all payments made in excess of six per cent interest on loans so made in violation hereof shall be applied to the discharge of the principal; and in case a greater sum has been paid by the borrower than the amount of the principal and interest at six per cent on loans so made in violation hereof, may be recovered from holder of said security by the borrower, in an action on the case." *Held*: That the amendment of 1905 is not retroactive and does not apply to payments voluntarily made before the enactment of the amendatory statute.

On exceptions by plaintiff. Overruled.

Action on the case brought under the provisions of section 2 of chapter 90, Public Laws, 1905, to recover an excess of interest paid by the plaintiff to the defendant upon a promissory note.

Heard before the presiding Justice at the October term, 1906, of the Supreme Judicial Court, Penobscot County, who found the facts and ruled as follows:

"The plaintiff testified that he borrowed $10 of the defendant, April 6, 1903, for which he gave to the defendant a note and chattel security, namely a mortgage, with interest at one dollar per month which interest he paid for 25 consecutive months. The defendant

introduced no testimony or evidence except an absolute bill of sale of the chattels described by the plaintiff as security, signed by the plaintiff and running to one Donnell, which the defendant claimed was the security given for the loan. The plaintiff testified that he signed the paper which he called a mortgage without reading, and without knowing to whom it run.

"I find that the plaintiff contracted for a loan from the defendant of $10 with interest at the rate of one dollar a month, and gave to the defendant a note therefor, and that he paid the interest specified for 25 consecutive months. I find that the plaintiff gave to the defendant, as security for the loan, a straight bill of sale of personal chattels, that the bill of sale run to one Donnell as grantee, that the plaintiff did not have actual knowledge that Donnell was named as grantee, but had reason to suppose and did suppose that the paper which he signed was a mortgage running to the defendant. It is suggested that the defendant was an agent only of Donnell, but there is no proof of this, unless it be found in the fact that Donnell was named as grantee, in the bill of sale. I find that if the defendant was agent that fact was not disclosed to the plaintiff, and that as to the plaintiff, the defendant was a principal. If under such circumstances, the defendant took a note to himself, as I find from the undisputed testimony, and took security running to Donnell, the latter is to be regarded so far as this case is concerned, as trustee for the defendant. I find accordingly that the defendant who made the loan and took the bill of sale and was the cestui que trust and who produced the bill of sale at the trial, was the "holder" of the security within the meaning of chapter 90 of the Acts and Resolves of 1905. I find that the loan was contracted in violation of R. S., chapter 46, section 2, and that the defendant could have collected only six per cent interest, and the payments made by the plaintiff have exceeded the amount due on the note with legal interest. In other words the note is fully paid and more. But I find that the payments in excess of the amount legally due to recover which this suit is brought, were made by the plaintiff voluntarily and under the law as it stood when they were made could not be recovered back. The statute relied upon by the plaintiff, chapter 90 of the

Laws of 1905, was not enacted until after all the payments had been made. And for that reason I rule that it affords no ground for recovery in this action. The entry will be 'judgment for the defendant.'"

To the ruling that said Act of 1905 was not retroactive, and to the order of judgment for the defendant, the plaintiff took exceptions.

Thomas W. Vose, for plaintiff.

Martin & Cook, for defendant.

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

PEABODY, J. This was an action on the case brought under chapter 90 of the Public Laws of 1905 to recover an excess of interest paid by the plaintiff to the defendant upon a promissory note. The case is before the Law Court on exceptions.

The plaintiff on April 6, 1903 contracted for a loan of ten dollars from the defendant with interest at the rate of one dollar a month, and gave to the defendant a note therefor, and thereafter paid the interest specified for twenty-five consecutive months. A bill of sale of personal chattels was given as security to a third person, and the defendant, the cestui que trust, was the "holder" within the meaning of chapter 90 of the Public Laws of 1905. The loan was contracted in violation of R. S., ch. 46, sec. 2, and the defendant could have collected only six per cent interest. The payments made by the plaintiff have exceeded the amount due on the note with legal interest. The court further found that the excess payments were made by the plaintiff voluntarily, and ruled that under the law as it stood when they were made, they could not be recovered back. The amendatory statute relied upon by the plaintiff, chapter 90 of the Public Laws of 1905, was not enacted until after all the payments had been made and the court ruled that for that reason it affords no ground for recovery in this action. The exceptions were to this ruling that the act of 1905 was not retroactive, and to the order of judgment for the defendant.

The statute R. S., ch. 46, sec. 2 provided that "all loans for less than two hundred dollars, secured by mortgage or pledge of personal

property, shall be dischargeable by the debtor upon payment or tender of the principal sum actually borrowed, and interest at the rate specified therein, which shall not exceed" certain specified rates, and further provides that "all loans made in violation hereof shall bear interest at the legal rate of interest only."

The amendment of 1905 further provides that "all payments made in excess of six per cent interest on loans so made in violation hereof shall be applied to the discharge of the principal; and in case a greater sum has been paid by the borrower than the amount of the principal and interest at six per cent on loans so made in violation hereof, may be recovered from the holder of said security by the borrower in an action on the case."

It is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intent that it should operate retrospectively. Cooley's Constitutional Limitations, 7th Ed. page 529; *Rogers* v. *Inhabitants of Greenbush*, 58 Maine, 395; *Lombard, Applt.*, 88 Maine, 587; *Murray* v. *Gibson*, 15 Howard, 421; *Harvey* v. *Tyler*, 2 Wallace, 328; *Chew Heong* v. *U. S.*, 112 U. S. 536.

The language of the amendment does not clearly show such an intention. It would also appear by considering the consequences of such a provision, if retrospective, that no such intention existed. If the amendment were to operate retrospectively it must either disturb a settlement voluntarily made and so interfere with the property rights of the defendant, or on the other hand if this settlement was not made under the protection of the law, and the plaintiff had a right of action in the nature of quasi-contract to recover back the interest in excess of six per cent, this cause of action would be reduced by the amendment, which compels an application of the excess interest first to the principal of the note. In either case a retrospective interpretation of the amendment would seriously affect the property rights of one or the other of the parties, and might even, make the enactment beyond the competence of the legislature. It is sufficient to say that no such intention is to be implied from the language of the amendment.

Exceptions overruled.

HANNIBAL E. HAMLIN, Attorney General,
BY INFORMATION, PETITIONER FOR MANDAMUS,

vs.

HENRY L. HIGGINS, et als.,
OF THE CITY COUNCIL OF ROCKLAND.

Kennebec. Opinion July 9, 1907.

Mandamus. Jurisdiction of Justices. Petition. Filing. Notice. Service. Practice. Proceedings. Allegations. Alternative Writ. Return. Peremptory Writ. Pleadings. Hearing. Waiver. Questions of Fact. Irregularities. Errors. Statute of Anne, chapter 2, section 7. R. S., chapter 85, section 2; chapter 104, sections 17, 18.

1. The authority of the court to issue writs of mandamus is vested in each Justice thereof, to be exercised by him, not as presiding Justice in a regular term of court, but individually and in any county whether holding a term of court there or not.
2. The petition for the writ of mandamus may be presented to any Justice in any county in term time or vacation, and such Justice may take cognizance of the petition whatever the county of its origin and although some other Justice may be then in that county.
3. Upon receiving a petition for the writ of mandamus, the Justice may order notice of hearing thereon returnable before him in that or any other county at a time and place to be fixed by him.
4. At the hearing upon the petition, the only question to be determined is the sufficiency of its allegations. Their truth or falsity will not then be considered unless under agreement of the parties that the whole question of the issuance of the peremptory writ be then determined.
5. If the allegations in the petition are adjudged upon hearing to be sufficient, the Justice may issue the alternative writ of mandamus returnable before him in any county at a time and place to be fixed by him.
6. The alternative writ of mandamus is not an original writ nor a final writ of execution, but is of the nature of an interlocutory rule to show cause, and is sufficiently authenticated by the signature of the Justice issuing it, without the seal of the court and without the signature of any clerk of the court.

7. It is not necessary that the petition or the alternative writ of mandamus be filed or entered upon the docket of the court in the clerk's office in any county prior to the making a final order after the return of the alternative writ. The case remains in the control of the single Justice in whatever part of the State he may be.

8. When there are several respondents to a petition for the writ of mandamus, and one or more of them acknowledge service of the order of notice, the other respondents cannot require such order to be actually served upon those acknowledging such service.

9. The respondents are to make return to the alternative writ of mandamus at the time and place appointed therefor, but the Justice issuing the writ does not lose jurisdiction of the case by not being personally present at such time and place.

10. Upon the return to the alternative writ, the petitioner may demur to or traverse such return, and then a time and place in any county may be fixed by the Justice for hearing thereon.

11. If upon such hearing the Justice orders the peremptory writ of mandamus to issue, he may direct from what county it shall issue from the clerk's office of the court and be made returnable. The case may then be entered on the docket of the court in that county and the papers be there filed.

12. Upon the return to the alternative writ of mandamus, the petitioner may reply to the return, and the Justice has power to allow amendments of the allegations and directions in the alternative writ which do not introduce any new ground for the writ, nor authorize a more stringent command in the peremptory writ.

13. If at the hearing upon the return to the alternative writ the petitioner states that he waives some particular allegation in the alternative writ and offers no proof of it, the respondents have no need to disprove it.

14. A petition for a writ of mandamus addressed "To the Hon. Justice of the Supreme Judicial Court now being holden at Bangor within and for the County of Penobscot" is not necessarily addressed to the court then in session, and may be considered as addressed to the Justice individually.

15. An order of notice upon such petition headed "Supreme Judicial Court, Penobscot County, April Term, 1907" and returnable "at the Supreme Judicial Court now in session at Bangor in and for said County of Penobscot," but signed by the Justice individually, and not as presiding Justice, is a mere irregularity in form and does not effect the jurisdiction of the Justice.

16. That in the alternative writ the respondents were commanded to "make known in our Supreme Judicial Court before our undersigned Justice thereof," &c., is mere error in form, if any error at all, and does not affect the jurisdiction of the Justice.

17. The Attorney General of the State having signed and authorized the petition for the writ of mandamus in a matter affecting the public, it is

immaterial what persons or counsel thereafter prosecute the case in his name and under his authority.

18. In proceedings for the writ of mandamus before a single Justice questions of law only can be taken to and considered by the Law Court. All questions of fact, or of propriety or expediency, are to be determined finally by the Justice having original cognizance of the case.

19. In this case, after the hearing upon the return to the alternative writ, the Justice ordered the case to be entered on the docket of the court and the papers filed in the clerk's office in Kennebec County, and ordered the peremptory writ to be issued from the clerk's office in that county and made returnable there. This was a sufficient compliance with the law, though the parties reside in Knox County.

20. In this case it was not seriously questioned that the allegations in the petition and in the alternative writ justified the issuance of the peremptory writ, provided the proceedings were begun and carried on with sufficient regularity to give the Justice ordering the peremptory writ jurisdiction to do so. No error fatal to that jurisdiction has been pointed out.

On exceptions by defendants. Overruled. Peremptory writ of mandamus to issue as ordered.

Petition by Hannibal E. Hamlin in his capacity of Attorney General of the State of Maine, "who petitions in his own proper person, and for said State on relation of Arnold H. Jones of Rockland, in the County of Knox, Mayor of said Rockland, and R. A. Rhodes, R. A. Crie and H. B. Bird all of said Rockland and members of the Common Council of said Rockland, acting individually for themselves and jointly as a committee of and for said Common Council," for a writ of mandamus to compel the Board of Aldermen of said City of Rockland to go into joint convention with the said Common Council for the election of subordinate city officers as required by the City Charter of said Rockland.

This petition was dated at said Rockland, April 16, 1907, and signed by said Hannibal E. Hamlin, Attorney General, and said Arnold H. Jones, R. A. Rhodes, R. A. Crie and H. B. Bird, and was verified by the oath of each of said persons, except the Attorney General, and was addressed "To the Hon. Justice of the Supreme Judicial Court now being holden at Bangor in and for the County of Penobscot." The gist of the complaint in the petition was that the Board of Aldermen of said Rockland had refused, and continued to refuse, to go into joint convention with the Common

Council of said Rockland for the election of subordinate city officers as required by the City Charter of said Rockland.

Henry L. Higgins, A. B. Clark, A. C. McLoon, B. B. Smith, L. N. Littlehale, Ivan A. Trueworthy and F. A. Blackington constituted the Board of Aldermen of said Rockland at the date of the aforesaid petition.

The case as stated by the bill of exceptions, is as follows:

"The petition of mandamus, dated the 16th day of April, 1907, was presented to Wm. P. Whitehouse, the Justice presiding at the April term of the Supreme Judicial Court at Bangor in the County of Penobscot, upon which the Justice presiding at said court ordered notice to the defendants to appear at the court house in Bangor on Saturday, the twentieth day of April, at five o'clock in the afternoon, a copy of which petition and notice was served upon the defendants forty-eight hours before the time appointed for said hearing. At said time and place appointed these defendants, Blackington, Clark, Littlehale and Smith, appeared by their counsel and objected to the proceedings for several reasons, viz:

"1. Because there had not been seasonable notice or time after same, to answer or show the falsity of several allegations in said petition or to enable the defendants to prove that the time of the commission of the several alleged violations of the law of which the relators complain, all of which, defendants say, happened during or before the session of the Supreme Judicial Court for said County of Knox adjourned, at which court the Chief Justice presided.

"2. Because only four of the seven members of said Board were served with process, the other three members having acknowledged service, and these defendants claim that said members could not legally waive such service, the order of the court being that service be made on all of the seven members. At said time the three members filed their answer, which is made part of these exceptions.

"3. Because the petition had not been filed or entered on the docket of said court in the clerk's office of that or any county in the State. And the defendants also claimed and desired time to show by the records that by the rules of the City Council of Rockland, adopted by the several Boards of the same, it was provided

that the regular meetings of the City Council should be held on the first Monday of each month, and that at the meeting held on the first day of April, 1907, both boards adjourned to the first regular monthly meeting, to be held on the 6th day of May; and that at the special meetings called by the Mayor and held on the 4th and 15th days of April, 1907, since the call did not state the objects or purposes for which said meetings were to be held, any election or attempt to elect officers, were or would have been illegal and void.

"All which requests were, by said Justice, denied, and all the objections interposed by the defendants as aforesaid, were overruled; and thereupon said Justice signed a paper already drawn excepting what writing appears on pages 7 and 8, which did not bear the seal of the court nor the signature of any clerk thereof or appear to have been issued from the Supreme Judicial Court of any county in the State, in which these defendants were commanded, as members of the Board of Aldermen of said City, together with the other three Aldermen to go into joint convention May 6th, 1907, for the purpose of electing certain officers therein named, 'or in default thereof, that you and each of you, make known in our Supreme Judicial Court, before our undersigned Justice thereof, at Augusta on Tuesday, the seventh day of May next at four o'clock in the afternoon, why you should not have the same done, service of the writ to be made by copy seven days before said meeting.'

"SECOND EXCEPTION.

"On said 6th day of May said Aldermen did not vote to meet and did not meet the Common Council in joint convention. That on Tuesday, the 7th day of May, at 4 o'clock in the afternoon, said defendants did appear personally and by counsel at Augusta aforesaid, ready 'to make known in the Supreme Judicial Court before the undersigned Justice thereof' at the court house in Augusta aforesaid, and then and there desired to explain and make known why they did not meet in joint convention as commanded, but found no Supreme Judicial Court in session or Justice thereof present at the time and place designated in said writ. Before 9 o'clock of the

morning of said 7th day of May the clerk of said court at Augusta received a telegram from said Justice Whitehouse, who was absent from the city, stating that the hearing on said mandamus case was adjourned for one week and directing him to notify counsel. But counsel for defendants had already started for Augusta and did not receive such notice. But said notice was received by the clerk of A. S. Littlefield in Rockland and its contents sent to Burpee, the other counsel for plaintiffs, at Brunswick, who informed defendants' counsel of it, that being the only notice in reference to it received by them. Said defendants, being informed that there was no record of any action in the nature of a mandamus as aforesaid pending in the Supreme Judicial Court in Kennebec County, by the clerk thereof, did not 'make known in the Supreme Judicial Court or before any Justice thereof' why defendants did not do as commanded. On the following Monday noon, May 13th, R. I. Thompson, one of the counsel for these defendants, received a letter from Mr. Justice Whitehouse informing him that 'there appeared to be a misunderstanding in regard to the hearing in the mandamus case. The answer to the alternative writ was to be filed the 7th, but I understood that if any hearing was desired it was to be arranged later,' and therein informed said counsel that it would be 'necessary for the hearing, if any, to begin Tuesday morning next,' May 14th, 'at 9 o'clock.' On said day, viz., May 14th, defendants' counsel appeared before said Justice, at the time mentioned in said letter, and then and there plaintiffs' counsel presented to said Justice the process to which these defendants were summoned to answer, dated April 20, 1907. Thereupon defendants' counsel seasonably objected to the irregularity of the proceedings, claiming that defendants had already complied with the order of the court or Justice thereof, and that the court or Justice thereof had, at that time and place, no jurisdiction of the subject matter as said action was not pending in court in any county in the State, but no objection was made because of the hour of hearing, but to a hearing at any hour. Thereupon said Justice, against the objections of these defendants, ordered the clerk of said court in Kennebec County to enter on its docket 'Petition and alternative writ filed as of May 7th, 1907.' After said entry defendants filed

a written motion to quash said alternative writ, which motion was overruled by said Justice, who thereupon ordered said defendants to file a return, which return, under protest of defendants, was then filed.

"To all which rulings and refusals to rule, defendants seasonably objected and noted exceptions.

"THIRD EXCEPTION.

"A. H. Jones, R. A. Crie, H. B. Bird and R. A. Rhodes, by their counsel against the objection of these defendants, were allowed, after the return of the defendants had been made and filed, to file their reply to the return in which they admitted the allegations in the return setting forth authority to elect a road commission instead of a road commissioner and authority to elect not exceeding five assistant engineers of the fire department and asking that 'the proceedings be amended so as to set forth said discretion in accordance with the language of said charter,' and that the peremptory writ of mandamus allow said City Council to exercise said discretion;' said reply making the records of the two Boards of the City Council and the City Charter and Ordinances, so far as they relate to the election of officers of said city, a part thereof. The defendants thereupon asked said Justice for further time to enable them to introduce certain records of the city, and to introduce witnesses as to certain allegations in said petition and writ, as to a 'declared purpose' alleged in said writ, 'to force the majority in joint convention of the City Council to agree in advance to let the minority name one or more of the most important officers, but the petitioner waived all such allegations and made no claim of proofs thereof and said request was denied. Upon which, at the request of the plaintiff's counsel, a decree ordering a peremptory writ of mandamus, signed by Justice Whitehouse, was filed.

"To all which rulings and refusals to rule as heretofore set forth, these defendants except and pray that their exceptions be allowed."

At the argument in the Law Court, the defendants urged certain objections which were not reserved in the bill of exceptions, and as

it was claimed that some of these objections went to the jurisdiction of the Justice to issue the writ alternative or peremptory, the Law Court considered the same, "since a court should always consider a question of its jurisdiction, however raised." These objections are stated in the opinion.

Sections 17 and 18 of chapter 104 of the Revised Statutes, regulating the procedure in mandamus proceedings, are as follows:

"Section 17. A petition for a writ of mandamus may be presented to a justice of the supreme court in any county in term time or vacation, who may, upon notice to all parties, hear and determine the same, or may reserve questions of law arising thereon, upon exceptions or otherwise, for the determination of the full court, which may hear and determine the same as hereinafter provided; but in all cases where exceptions are alleged to any rulings, findings or decrees made upon such petition, the case shall be proceeded with as if no exceptions had been taken, until a decision shall be had and the peremptory writ shall have been ordered, so that the overruling of such exceptions would finally dispose of the case, which shall then be certified to the chief justice of said court as provided in the following section. If on such hearing such writ is ordered, it may be issued from the clerk's office in any county and be made returnable as the court directs."

"Section 18. When a writ of mandamus issues, the person required to make return thereto shall make his return to the first writ, and the person suing the writ may by an answer traverse any material facts contained in such return, or may demur. If the party suing the writ maintains the issue on his part, his damages shall be assessed, and a judgment rendered that he recover the same with costs, and that a peremptory writ of mandamus be granted; otherwise the party making the return shall recover costs. No action shall be maintained for a false return to a writ of mandamus. After judgment and decree that the peremptory writ be granted, the justice of said court before whom the proceedings are pending, shall forthwith certify to the chief justice for decision, all exceptions which may be filed and allowed to any rulings, findings or decrees made at any stage of the proceedings. The excepting party shall,

within fifteen days thereafter, forward to the chief justice his written argument upon such exceptions and shall, within said fifteen days, furnish the adverse party, or his attorney, with a copy of such argument; the adverse party shall, within fifteen days after receipt of such copy forward to the chief justice his written argument in reply; and thereupon the justices of said court shall consider said cause immediately and decide thereon and transmit their decision to the clerk of the court where the petition is pending, and final judgment shall be entered accordingly. If the judgment is in favor of the petitioner, the peremptory writ of mandamus shall thereupon be issued."

By agreement of the parties, the case was argued at the term of the Law Court held at Bangor, in June, 1907.

The case fully appears in the opinion.

E. P. Burpee and Arthur S. Littlefield, for plaintiffs.

Rodney I. Thompson, David N. Mortland and Joseph E. Moore, for defendants.

SITTING: EMERY, C. J., SAVAGE, PEABODY, SPEAR, CORNISH, JJ.

EMERY, C. J. This case comes before the Law Court upon the respondent's exceptions to various rulings of a Justice of this court during proceedings resulting in an order for the issue of a peremptory writ of mandamus.

The writ of mandamus was originally a prerogative writ which the Court of King's Bench was wont to issue to any part of the realm for the prevention of disorder from failure of justice or defect of police. Spelling on Ex. Rem. 1363-1685. Application was made to the court containing allegations of facts requiring the issuance of the writ. If these allegations, assuming them to be true, satisfied the court of the need of the writ, there was issued, with or without notice, a precept called the alternative writ of mandamus. In this precept were recited the allegations upon which it was issued and the respondent was required to do certain acts therein described or make return why he should not do them. If the respondent did the acts,

the purpose of the procedure was answered. If he did not perform the acts, he might move to quash the alternative writ for want of sufficient allegations or other imperfection, or he might make return upon it of matters of fact relied upon to excuse him his non performance. This return was to be taken as true, unless the applicant for the writ could establish its falsity in an action for false return. The court therefore had only questions of law to determine, the disputed questions of fact, if any, being left to be determined in another action. The recitals in the alternative writ constituted the applicant's case. A motion to quash the writ challenged their sufficiency. The return on the writ constituted the respondent's case, the sufficiency of which could be challenged by demurrer, or the case delayed until the verdict of a jury could be had establishing their truth or falsity. The decision of the court upon these questions determined whether the final or peremptory writ should issue, the execution of which the respondent could not escape.

In this State the procedure is regulated by statute, R. S., ch. 104, secs. 17 and 18. It is there provided that the application for a writ of mandamus may be by a petition therefor presented to a Justice of the Supreme Judicial Court in any county in term time or vacation, who may upon notice to all parties hear and determine the same. He may, however, upon exceptions or otherwise reserve questions of law arising thereon for the determination of the Law Court, but notwithstanding any exceptions to any of his rulings, findings or decrees, the case is to be proceeded with until a decision be reached and the peremptory writ be ordered if such be the decision. If on the hearing, such writ (the peremptory writ) is ordered it may be issued from the clerk's office in any county and be made returnable as the court directs.

If the alternative writ of mandamus is granted on the petition, the respondent is to make his return upon that writ. The petitioner may demur to or traverse the return. If he maintains on his part the issue thus formed he obtains an order for the peremptory writ of mandamus, otherwise he fails and pays costs. After granting the peremptory writ, if such be the decision of the issue, the Justice before whom the proceedings are pending shall certify to the Chief

Justice all exceptions to his rulings to be argued within fifteen days, &c. If the judgment of the Law Court on these exceptions is in favor of the petitioner then the peremptory writ is to issue without further hearing.

It is quite evident from the provisions of the statute cited that the purpose was to make the remedy by writ of mandamus readily and quickly available, with prompt, and even summary procedure. This was made necessary by the short tenure of those officials against whom the writ is most often invoked. Each individual Justice of the court is invested with the full judicial power to receive petitions and grant or deny the writ. He may receive and act upon the petition in any county in which he may then personally be and whether he is holding a term of court there or not.

He is to act personally as an individual Justice and not as the presiding Justice of a court in term time. He is not limited to terms or places. The time and place of hearing upon the petition are not fixed by the statute nor limited to any county or term of court. These are to be fixed by the Justice receiving the petition, and for hearing in any county. Nor does the statute fix the time or place when and where the respondent shall make his return to the alternative writ, nor when or where shall be the hearing on the sufficiency or truth of the return if challenged. These also are to be fixed by the same Justice and in any county. He is to try the issue, if any, whether of law or fact at the time and place named by him in any county, and decide it and order or refuse the peremptory writ accordingly.

There is no provision for the issuance of any precept out of the clerk's office in any county except the final or peremptory writ, and even that writ may be issued out of and returned to such clerk's office as the court directs. The whole proceeding is in the breast of the single Justice without being matter of regular court record until his final decision. Questions of law may be reserved on exceptions or otherwise for consideration by the Law Court, but no appeal upon questions of fact is provided for, nor is there any provision for sending the case back to the Justice for re-hearing. It must be sent to

the Law Court, if at all, in such shape that the decision of the Law Court will be the final disposition of the case.

In the case at bar, the petition was for mandamus to compel the Aldermen of Rockland in Knox County to go into joint convention with the Common Council for the election of subordinate City officers as required by the City Charter. It was presented to a Justice of the court while he was in Penobscot County, and during a term of court he was holding there. After notice to all the parties to appear at Bangor, Penobscot County, April 20th, four days afterward, he there heard the matter of the petition and issued the alternative writ requiring the respondents to go into such convention, or to make return why not, before him at Augusta in Kennebec County May 7, 1907. On or after the return day of the alternative writ the Justice fixed May 14th and Augusta as the time and place for the hearing on the return. At that hearing he ordered the case to be entered on the docket of the court in Kennebec County and the peremptory writ to issue from the clerk's office there.

Four of the respondents reserved numerous exceptions which are now to be considered. They complain:—

1. That they did not have sufficient notice (forty-eight hours) of the petition, nor sufficient time in which to show that its allegations were untrue and that the matters complained of in the petition occurred in Rockland, Knox County before and during the presence of a Justice holding court in that county.

As to the length of the notice, that was entirely within the discretion of the Justice which cannot be reviewed on exceptions unless it has been plainly abused. In this case there was no need of time to prove any facts as the only issue then was the sufficiency in law of the allegations in the petition. Their truth or falsity would not be in issue until a return upon the alternative writ. Further, it was immaterial whether a Justice was in Knox County before or during the acts named in the petition. The petitioners were allowed by the statute to present their petition to any Justice and in any county.

2. That the other three of the seven Aldermen respondents acknowledged service of the notice without it being formally served upon them, though the order was for notice to be served upon all

the seven members. None of the three who acknowledged notice makes any complaint, and we cannot see how either of the other four is prejudiced thereby.

3. That the petition was not then filed or entered on the docket of the court in the clerk's office in any county. We find no law requiring that to be done at that stage of the case. So far, the case was in the hands of the Justice individually wherever he might be.

4. That they were not then allowed sufficient time to show by the records certain rules of the City Council affecting meetings in joint conventions. The answer to their first exception above named applies equally well to this. The time had not arrived for the consideration of these rules.

5. At the hearing upon the petition in Penobscot County, the Justice adjudged that the allegations were sufficient and issued the alternative writ of mandamus to be returned before him at Augusta in Kennebec County on the 7th of May next thereafter at four o'clock P. M. This writ was tested and signed by the Justice, but did not bear the seal of the court, nor the signature of any clerk. The four objecting respondents moved to quash the writ for these omissions.

The alternative writ in mandamus proceedings is neither an original writ nor a final writ of execution. It is practically a rule to show cause issued by a Justice in vacation. It proceeds by way of interlocution from the Justice who has received the petition and who alone has jurisdiction of the proceeding. We find no statute nor apposite decision holding that it must bear the seal of the court, or be signed by the clerk. The signature of the Justice himself should be, and in our opinion is, sufficient authentication. *People* v. *Judges*, 3 How Pr. (N. Y.) 164.

6. On the return day and hour of the alternative writ the four respondents and their counsel appeared at the Court House in Augusta, ready to make a return to the writ, but the Justice was absent from town, he having understood that though the return was to be made May 7, the hearing thereon, if any was desired, was to be arranged for later. On that day, or the next, he notified counsel he would hear them at the Court House in Augusta at 9 o'clock A. M.

May 14th. At that time counsel on both sides appeared, and the counsel for the four objecting respondents objected to any further proceedings and moved the alternative writ be quashed on the ground that the Justice had no jurisdiction of the subject matter nor of the proceeding, at that time and place. The Justice overruled these objections and, against the objection of the respondents, directed the clerk of the court for Kennebec County to enter on its docket their "Petition and Alternative Writ filed as of May 7, 1907." The respondents then again moved to quash the writ but the Justice refused and ordered a return to be made which the respondents did under protest.

For reasons already stated we think it clear the Justice had not lost jurisdiction by not being personally present at the time and place named for making return to the writ. There was no need for the respondents to then and there appear in person or by counsel, any more than for an officer to appear in person when he makes return of a precept. 31 Maine, 591-2. The time and place were named for making the return, not for the hearing. There would be no issues disclosed for hearing until after the return and the petitioner's demurrer or answer to it, and non constat that there would be any issue at all. Indeed, the respondents might perform the acts required and so return. True, trial justices to retain jurisdiction must be present in person at the time and place named for the defendant to appear, but that is because the statute, R. S., ch. 85, sec. 2, explicitly so provides, and a trial justice is an inferior magistrate of limited statutory jurisdiction. The jurisdiction of the Justices of the Supreme Judicial Court is not within that statute and is not thus limited.

On the return day or soon after, the Justice fixed a time and place for hearing on the issues raised by the return and gave seasonable notice to the parties. The respondents make no complaint of want of opportunity for hearing. Their objection to the jurisdiction of the Justice must be overruled.

7. The objecting respondents then made to the writ, though under protest, a return setting forth the matters of fact and law relied upon by them as cause for not performing the acts named in

the writ to be performed. The petitioners were then allowed against the respondents objection to file a reply to the return. Assuming, as above held, that the Justice still had jurisdiction of the case there could be no legal objection to allowing the petitioners to file an answer, or reply, as authorized by the statute, R. S., ch. 104, sec. 18.

8. In the alternative writ, the respondents among other matters were required to go into joint convention to elect among other subordinate officers a Road Commissioner, and three Assistant Engineers of the Fire Department. In their return they alleged authority in the City Council to elect at its discretion a Road Commission instead of a single Road Commissioner, and not exceeding five Assistant Engineers of the Fire Department. In their reply to the return the petitioners admitted the authority of the City Council to be as stated and asked that the proceedings be amended accordingly, and that the peremptory writ of mandamus allow the exercise of that discretion. This was done and the respondents excepted.

The allegations in the alternative writ are in the nature of pleadings only. They set forth the petitioners case upon which the writ is based. They are clearly amendable in the discretion of the court or Justice, at least so far as the amendment does not introduce any new ground for the writ, nor authorize a more stringent command in the peremptory writ. 31 Maine, 591-2. *Brown* v. *Rahway*, 51 N. J. L. 279. By the Statute of Anne, c. 2, sec. 7, the statute of jeofails was extended to include "all writs of mandamus." The amendment allowed in this case stated no new ground for the writ, nor did it cause the peremptory writ to press harder on the respondents. On the contrary, it allowed them more discretion as to what they should do.

9. It was also alleged in the alternative writ, that one purpose of the objecting respondents in refusing to go into the joint convention was to force the members of the City Council to agree in advance to let the minority in the joint convention name one or more of the important officers. At the hearing, the respondents, denying this allegation, asked for further time to enable them to disprove it, but the petitioners thereupon waiving all such allegations and making no

claim of proofs thereof, the request was denied and a decree signed and filed in the clerk's office in Kennebec County for the peremptory writ to issue.

The allegation complained of was immaterial and even impertinent and undoubtedly would have been stricken out upon motion therefor, but there was no need to disprove it, especially after the petitioners waived it. The motives of the respondents good or bad did not vary their legal duty.

The foregoing disposes of all the exceptions reserved at the various hearings. At the argument the counsel for the respondents urged still other objections to the proceedings. So far as these objections are to mere irregularities they have not been brought before us by any exception and hence cannot be considered. It is claimed however that some of them go to the jurisdiction of the Justice to issue the writ alternative or peremptory, and such of these as have not already been disposed of will be considered, since a court should always consider a question of its jurisdiction, however raised.

1. The petition was addressed "To the Hon. Justice of the Supreme Judicial Court now being holden at Bangor in and for the County of Penobscot." It is claimed that, being thus addressed, the petition was cognizable only by the court in that county and that the Justice had no jurisdiction thereof at any other place or time than on the bench in that county and in term time. We do not think the argument sound. By express statute the Justice, not the court, is given jurisdiction although the petition may be presented to him at any time. The fact that he is holding a term of court at the time does not oust him of jurisdiction or limit his power as an individual Justice. His name was not stated in the petition but he was sufficiently identified by being described as the Justice holding that term of court. The petition was really presented to him and not to the court then in session.

2. The order of notice on the petition was headed "Supreme Judicial Court, Penobscot County, April Term, 1907," and in it the respondents were notified to appear "at the Supreme Judicial Court now in session at Bangor in and for said County of Penobscot" &c. It was signed however by the Justice, not as "presiding Justice,"

but as "Justice Sup. Jud. Court." It is evident that the error in the form of the notice, if any, is merely an error in procedure not going to the jurisdiction. At the time and place named in the notice the respondents appeared before, and were heard by, the Justice himself who, as above stated, had jurisdiction to hear the case. If there was error in the wording of the notice it was thus fully cured.

3. In the alternative writ the respondents were commanded to "make known in our Supreme Judicial Court before our undersigned Justice thereof at Augusta" &c. This also, if an error, is clearly error in form only. The proceedings were to be, and were, before the Justice signing the alternative writ.

4. The petition was by the Attorney General at the relation of the Mayor and three persons members and a committee of the Common Council of Rockland. These four relators conducted the case for the petitioners. It is objected that they had no such interest in the case as entitled them to do so. The name and authority of the Attorney General are sufficient to give the Justice jurisdiction, the subject matter being of a public nature. It is immaterial who thereafter prosecutes the case.

5. Counsel for the respondents urge that they were subjected to unnecessary trouble and expense in defending against the petition and they also distrust the motives of the relators. These are not questions of law however and are not cognizable by the Law Court.

The case seems to have been carefully considered by the Justice who received the petition and who, as we hold above, undoubtedly had jurisdiction of it. We have carefully read and thought over every argument made in the respondents very able and forceful brief, but we find nothing fatal to the jurisdiction and procedure of that Justice in the case, and nothing to prevent the issuance of the peremptory writ of mandamus from this court in Kennebec County as ordered by him.

Exceptions overruled.

Peremptory writ of mandamus to issue as ordered.

QUESTIONS AND ANSWERS

QUESTIONS SUBMITTED BY THE HOUSE OF REPRESENTATIVES MARCH 14, 1907, WITH ANSWERS OF THE JUSTICES OF THE SUPREME JUDICIAL COURT THEREON.

1. An excise tax prohibiting the assessment of all other taxes upon railroads, their property or stock according to their just value, is not plainly forbidden by any provision in the Constitution and is therefore constitutional.
2. A tax can be lawfully levied upon the franchise of a railroad and also a separate tax upon the road bed, rolling stock and fixtures at their cash value.
3. The present law whereby railroads operating in this State are taxed upon a percentage of their gross receipts is not repugnant to the provisions of the Constitution of this State relative to taxation. The tax is an excise tax upon the franchise and measured as to amount by the gross earnings of the railroad.

STATE OF MAINE.

IN HOUSE OF REPRESENTATIVES, February 7, 1907.

Ordered, That the Justices of the Supreme Judicial Court are hereby respectfully requested to give to this House, according to the provisions of the Constitution of this State in this behalf, their opinion on the following questions:

First. Is an excise tax prohibiting the apportionment and assessment of all other taxes upon railroads, their property or stock according to their just value, constitutional?

Second. Can a tax be lawfully levied upon the franchise of a railroad, and also, a separate tax upon the road bed, rolling stock and fixtures at their cash value?

Third. Is the present law whereby railroads operating in this State are taxed upon a percentage of their gross receipts repugnant to the provisions of the Constitution of this State relative to taxation?

House of Representatives, March 14, 1907.

Read and passed.

E. M. THOMPSON, Clerk.

STATE OF MAINE.

TO THE HOUSE OF REPRESENTATIVES:

In obedience to the Constitution the undersigned Justices of the Supreme Judicial Court individually herein give their opinion required by, and upon the questions stated in, the order of the House of Representatives passed March 14, 1907.

It is a fundamental principle of constitutional law that the legislative power over taxation for public purposes, including all questions of what shall be taxed or exempted from taxation and all questions of kinds, forms and modes of taxation, is limited only by the positive requirements or prohibitions of the Constitution. It is also a fundamental principle that no act of the legislature shall be adjudged unconstitutional unless it is plainly forbidden by some plain provision of the Constitution.

The only provision in the Constitution of this State relating to the exercise of the legislative power of taxation is that in sect. 8 of Art. IX as follows: "All taxes upon real and personal estate assessed by authority of this State shall be apportioned and assessed equally according to the just value thereof." This provision simply requires that any tax which shall be lawfully imposed upon any kind or class of real or personal property shall be apportioned and assessed upon all such property equally, etc. *Portland* v. *Water Co.*, 67 Maine, 135. It does not require the legislature to impose taxes upon all the real and personal property within the State of whatever kind and to whatever use applied. The legislature may, nevertheless, determine what kinds and classes of property shall be taxed and what kinds and classes shall be exempt from taxation. It has exercised

this power of exemption frequently and continually, without question, since the adoption of the Constitution. *Portland* v. *Water Company*, supra. See the eleven paragraphs of section 6 of chapter 9, R. S., for numerous instances of such exemptions. It is now too late to question the power.

Nor does the constitutional provision prohibit the legislature from imposing other taxes than those on real and personal property. The legislature is left free to impose other taxes, such as poll taxes, excise taxes, license taxes, etc. It can impose such taxes in addition to, or instead of, taxes on property. It can subject persons and corporations to both or either kinds of taxation, or exempt them from either kind.

Further, the legislature can adopt such mode, or measure, or rule as it deems best for determining the amount of an excise or license tax to be imposed, so that it applies equally to all persons and corporations subject to the tax. It may make the amount depend on the capital employed, the gross earnings, or the net earnings, or upon some other element.

Applying the foregoing propositions to the questions submitted, it is our opinion,

First, — that an excise tax prohibiting the assessment of all other taxes upon railroads, their property or stock according to their just value, is not plainly forbidden by any provision in the Constitution, and is therefore constitutional.

Second, — that a tax can be lawfully levied upon the franchise of a railroad and also a separate tax upon the road bed, rolling stock and fixtures at their cash value.

Third, — that the present law whereby railroads operating in this State are taxed upon a percentage of their gross receipts is not repugnant to the provisions of the Constitution of this State relative to taxation. The tax is an excise tax upon the franchise and measured as to amount by the gross earnings of the railroad.

In support of the above opinion we cite the following authorities: *State* v. *Western Union Telegraph Co.*, 73 Maine, 518. *State* v. *Maine Central R. R. Co.*, 74 Maine, 383. *Maine* v. *Grand Trunk Ry. Co.*,

142 U. S. 217. *Commonwealth* v. *N. E. Slate & Tile Co.*, 13 Allen, 391. Cooley on Taxation (2d Ed.) 232. *Northampton Co.* v. *Coal Co.*, 75 Pa. St. 100.

March 20, 1907.

Respectfully your obedient servants,

LUCILIUS A. EMERY,
WM. P. WHITEHOUSE,
SEWALL C. STROUT,
ALBERT R. SAVAGE,
FREDERICK A. POWERS,
HENRY C. PEABODY,
ALBERT M. SPEAR,
CHARLES F. WOODARD.

EQUITY FEE BILL

STATE OF MAINE.

SUPREME JUDICIAL COURT. At December Law Term,
Augusta, December 18th, 1906.

Ordered, That the following fees be taxed and allowed to the party entitled to costs, when no fees are provided by statute for the like service.

ATTORNEYS.

Drawing and filing Bill or Answer, including Attorney fee,	$5.00
Drawing Amendment to Bill or Answer when such Amendment is occasioned by an Amendment by the opposing party,	2.50
Drawing and filing each Decree, when not requiring material alteration,	1.00
Drawing each Rule,	.50
Drawing Interrogatories, each set,	1.00
Drawing Demurrer or Plea,	2.00
Travel: For each ten miles to and from Court in filing Bill, Answer, Replication or Decree, and in attending each hearing before a Justice or Master, observing the rule prescribed in R. S., Chap. 117, Section 14,	.33
Attendance: For attendance at each hearing before a Justice or Master,	3.50
For each Jurat attached to Bill, Answer or necessary paper,	.25

LAW COURT: For travel and attendance, the same fees as for attending a hearing before a Justice or Master, but for one term only. If the plaintiff prevails, he may tax one attorney's fee in addition to that embraced in his bill. If the defendant prevails, he may be allowed one attorney's fee in addition to that in his answer.

CLERK.

Entry and filing Bill,	$ .60
Copies, for each 224 words,	.12
Subpoena,	.25
Copies for same, each,	.25
Each notice given,	.25
Summons to show cause,	1.00
Writ of Injunction,	1.00
With ten cents for each 100 words of the allegations in the bill incorporated therein.	
Commission to Receivers, Masters and other Officers Appointed by the Court,	1.00
Taxing costs,	.25

OFFICERS.

Masters, Receivers and others, fees as taxed and allowed by the Court.

A true copy.

Attest:

C. W. JONES, Clerk.

NATURALIZATION ORDERS

STATE OF MAINE.

SUPREME JUDICIAL COURT. At December Law Term,
Augusta, December 17th, 1906.

Ordered, That the Rule established June 29th, 1903, relating to naturalization cases be revoked.

Ordered further, That the second day of each term of the Court be fixed as the stated days on which final action may be had on petitions for naturalization, as provided by the Act of Congress, approved June 29th, 1906.

A true copy.
Attest:

C. W. JONES, Clerk.

RULES OF COURT

AMENDMENTS AND NEW RULES

SUPREME JUDICIAL COURT. At June Law Term, Portland, July 13, 1907.

All the Justices being present.

Ordered, That the following be established and recorded as amendments to present Rules of Court and as additional Rules of Court, viz:

Rule No. 39 of the Rules of Court is amended so as to read as follows, viz:

RULE XXXIX.

The examination and cross examination of each witness shall be conducted by one counsel only on each side except by special leave of Court, and counsel shall stand while so examining or cross examining unless otherwise permitted by the Court. The re-examination of a witness whether direct or cross shall be limited to matters brought out in the last examination by the other party unless by special leave of Court.

CHANCERY RULES

Chancery Rule No. 28 is amended so as to read as follows:

XXVIII.

When a party is entitled to a decree in his favor he shall draw the same and file it, and give notice.

If corrections are desired, they shall be filed within five days after receipt of notice. If the corrections are adopted, a new draft shall be prepared and submitted to the Justice who heard the case for approval. If they are not adopted, notice shall be given of the time and place when and where the matter will be submitted to such Justice for decision, and he shall settle and sign the decree.

When the Law Court has certified its decision upon an appeal or exceptions from a final decree and a decree has been entered therein by a single Justice as in accordance with the certificate and opinion of the Law Court, a party aggrieved by the form of such last named decree may within ten days take exceptions thereto. Such exceptions and the record connected therewith, including a copy of the opinion of the Court, shall be transmitted to the Chief Justice and be argued in writing on both sides within thirty days thereafter, and they shall be considered and decided by the Justices as soon as may be. If the decision is adverse to the excepting party treble costs on these exceptions may be allowed to the prevailing party.

Additional Rule.

A party having rested his case cannot afterward introduce further evidence except in rebuttal unless by leave of the Court.

Attest:

Lucilius A. Emery, Chief Justice.

ANDREW PETERS WISWELL

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT, AT BANGOR, SATURDAY, JUNE 8, 1907, IN MEMORY OF THE

HON. ANDREW PETERS WISWELL,

LATE CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT, WHO DIED ON THE FOURTH DAY OF DECEMBER, A. D. 1906, AT THE AGE OF FIFTY-FOUR YEARS.

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

Hon. OSCAR F. FELLOWS, of Bucksport, presented the following resolutions:

Resolved: That the members of the Bar desire to express their appreciation of the character and public service of Chief Justice ANDREW P. WISWELL and to place upon the records of this Court, he served so faithfully, a heartfelt tribute to his memory.

Resolved: That we admire him for his gentle nature; for his devoted friendship; for his loving kindness; for his charm of manner; grace of speech and sparkling humor; for his attachment to the profession; for his ability as a practitioner; for his regard for the truth and the right; for his courtesy, wisdom and impartiality as a judge; for his clear and accurate knowledge of the principles which govern the law; for his courage and strength of will that bore him through many a grave crisis; and for the unity and harmony of the elements so happily combined in him. We rejoice in his memory. We rejoice in his useful life; in his worldly honors, and in the higher and more enduring honors which crowned him with universal confidence and affection. And now as we bid him farewell, we rejoice that he was permitted to go hence, with the love and gratitude of his associates following him through all eternity.

In presenting these resolutions, MR. FELLOWS said:

In compliance with the wish expressed at the last December law term that some future day be set apart to fittingly commemorate the life of our beloved Chief Justice WISWELL, we have assembled to pay our slight tribute to him whose character was blameless and whose memory is a sweet blessing. The members of the Hancock County Bar have entrusted to me the sad duty of presenting the resolutions respecting his noble life and person; not because of my ability to draw deserving word images but because of my intimate acquaintance and long friendship with this great and good man.

ANDREW PETERS WISWELL was born in Ellsworth in 1852. He attended school in his native city, at the East Maine Conference Seminary, and Bowdoin College. He was admitted to the Bar two years after his graduation from college. His natural abilities soon placed him in the front rank of his profession and when he was called to service on the Bench it met with the approval of all the State. He seated himself most easily and naturally in the chair of justice and gracefully answered every demand upon his station. He viewed all questions submitted to him as a judge with the calm and deliberate consideration of one who feels that he is determining the issues for a remote and unknown future of a great people. The faculty of reason was broad and strong in him, and his education had been of a kind to discipline and invigorate his natural powers.

As a lawyer he was cautious, keen, ever ready, but imbued with the idea that his client was right as every person well knows who came in contact with him at the Bar. As a judge when he would know his public duty he turned within not without. He listened not for the roar of the majority in the street but for the still small voice within his own breast. His mind was vigorous and pure, and his suggestions were couched in friendly terms, untainted by severity or harshness. With the young members of the Bar he was always ready to suggest methods to aid them in the conduct of their cases, for his position and greatness never turned his head from the people in the lower walks of life.

His knowledge of science and literature was broad and comprehensive, yet learning to him was not confined to letters. He loved to study nature. The changing seasons were always a delight to him, and he found perfect happiness in rambling through the woods and fields, o'er hills and valleys. He noted "tongues in trees, books in the running brook, sermons in stones and good in everything."

To me his best characteristic was his love for his friends. To him they only had one side and that the side of goodness. He enjoyed their company and would sacrifice his own pleasure for their entertainment. Their happiness was his gratification; their misfortune his sorrow. He never attempted to tear down the reputation of anyone; faults to him were conditions not intentions. His criticisms were of the highest scale. His sarcasm, though keen, was never employed to lower the estimation of the absent in the minds of those present. It is enough to say of him, that he was the same ANDREW P. WISWELL yesterday and today, to friend and to rival, as lawyer, judge and man.

General CHARLES HAMLIN, of Bangor, formerly Reporter of Decisions, then addressed the Court as follows:

It is an honor to be requested to speak on this occasion in memory of the late Chief Justice WISWELL.

I loved him. He was my friend. I knew him from his boyhood, in his college course, at the Bar, and later on the Bench. Visiting his home when I settled in his county, I enjoyed the genial hospitality of his home, saw how his charming mother and congenial father had good cause to fondly look forward to the useful and honorable future of an only son and child. Within the walls of that home, surrounded by an atmosphere charged and laden with culture and happiness, it was early that I discovered the inherited traits which have since proved so winning and of great value to his native State.

There is no place here for tears today. While death is always mournful, our feelings of sorrow are overborne by a just degree of

pride and pleasure as we review the sweet, pure record of the life of Chief Justice WISWELL. Beginning his life at the Bar, when he had received a good education under the sagacious training of a strong lawyer and advocate, his father, ARNO WISWELL, to whose ability his friend Senator HALE, his constant competitor, would bear testimony, if he were present, he found himself well embarked on the life of his chosen profession.

Naturally ambitious, he also sought employment in other channels that broadened his view of life and usefulness. He was made a National Bank Examiner, next became a member of our legislature and its speaker. But it was fortunate for him and the State that he early and from choice gave up his ambition in politics and withdrew from the kind of life, which however promising with honors requires a fortune in these days. His subsequent life proves the wisdom of his choice in following a judicial career.

He went upon the Bench in his youthful vigor and manhood influenced with proper ambition.

The record of his judicial life, like an open book, is before us and clear as the sun in its meridian to be read by all.

I characterize him in his life at the Bar and on the Bench as having quickness of apprehension, breadth of comprehension, patient in industry, learning and firmness—all combined with self reliance and common sense. He blended the functions of the advocate and the good judge equally well. It is to his great credit, that while experience has proven to the contrary, that the world's great advocates, like ERSKINE and GRATTAN, have failed as judges, he easily acquired a calm and pure capacity to see the true issue of cases, whether of law or fact, just as it is. The result of all this is plain to see. He gained the trust and confidence and affectionate regard and admiration of the community and State. He became an ornamental and useful member of a learned, impartial and honored judiciary. Thus clothed as with a robe, he gave evidence of that "dignity of disposition which grows with an illustrious reputation and becomes a sort of pledge to the public for security."

Recalling what I predicted of him as early as 1896 in the "Green Bag," in a biographical sketch necessarily limited, we review his later work on the Bench, impressed by the admirable ease with which he bent the facts of experience to a sterling logical formula, and how the whole trend of things seems to yield to an imperious will that is stronger than fate.

He was never wholly abstracted from business and his experience as National Bank Examiner and President kept him well informed with business life — a great aid to him in all financial causes that came up into the Court — and broadening his mind the same as does foreign travel. No member of the Court has had a higher view of its functions; "to secure a trial as impartial as the lot of humanity will admit; a government of laws and not men; and that every man may find his security there."

His opinions upon which his fame as a jurist will largely rest in the final result, were sure-footed, based upon a clear perception of the issues of fact and law involved. Amplified with inexorable logic they settled all doubt upon the pending question. They are marked with clearness and not at all obscured by doubt, which arises sometimes from brevity. They are full and honest.

The law of his rulings and decisions was seldom questioned.

His power of statement was unexcelled. His charges to the jury were clear and helpful — a great aid to the jury — for they were sincere, earnest and thorough.

I do not regard the Chief Justice in the light of a reformer, nor should he be classed as belonging to the school of "laissez faire." He, in common with other good and wise men, believed that the common law system of our State works as near perfection as the human mind can make it and did not often advise or recommend changes; but his mind was open to the growth of jurisprudence and he was in touch with our habits, customs and public wants. This is seen especially in his interest in young students of the law and in a generous, unrecompensed course of lectures which he annually delivered before the Law School of the University of Maine.

He kept well abreast with the legal and miscellaneous literature of the times. It was only a short time before his death that he spoke to me of his admiration of the Yale Law Lectures, saying that the book was enjoyable as fiction and containing a fund of valuable information to the practising lawyer.

We recall now what statisticians tell us: that the average of life on the Bench scarcely exceeds thirteen years. In this light of science and philosophy we may perhaps mitigate our sorrow in some degree, and console ourselves to the inscrutable decrees of Providence, with the reflection that Chief Justice WISWELL lived out fully his life according to human allotment; but our tears and prayers, could they have availed, would have kept him with us until a serene old age; and when crowned with even greater honors, he could have been permitted a voluntary retirement, like his illustrious and much-beloved predecessor, his uncle Chief Justice PETERS, amidst the plaudits and universal love of the State.

But there remain with us, however sad and unreconciled we may be with what seems a course only half-run, an unfinished career because of its sudden end, the record of a good judge and his sweet and pure life, the memory whereof rests with us a benediction and a blessing forever. *Vale et Valete.*

DAVID W. SNOW, Esq., of Portland, was the next speaker. MR. SNOW said:

May it please the Court:

The last time I saw Chief Justice WISWELL was at the laying of the corner stone of the Cumberland County Court House. The day was cold and bleak, a light snow was falling, and but few spectators were present. After the stone had been set a photograph was taken, showing the little group upon the platform which had been built for the occasion. In this photograph the Chief Justice is discovered, with some difficulty, standing behind other spectators. Distinguished

by his exalted office, representing in his person the majesty of the law, dedicating a great public work to the maintenance of justice, he nevertheless stood among us the simple, unassuming gentleman, the plain American citizen, quietly and unostentatiously doing the work assigned to him. Of him it might be said, as was said of Chief Justice MARSHALL, "Pride, ostentation and hypocrisy are Greek to him; and he really lives up to the letter and spirit of republicanism, while he maintains all the dignity due to his age and office." And as was said of Judge LOWELL, he had a "noble simplicity of life, a courtly simplicity of manners." It is this characteristic of Judge WISWELL which I wish to emphasize — this quiet manner, this freedom from any assumption of superiority, this willingness to meet others in the simple relations of life, which is one of the surest indications of real force and capacity. It was my good fortune to spend four years in college with him, and even then, when all the world was young and care and responsibility had not become a heavy burden, this trait was pronounced. Never a hard working student, never absorbed in the physical activities of college life, he pursued the even tenor of his way, made and kept his friends and devoted himself to the studies and pursuits which were congenial to him and which promised to be useful in the future. He was active in all class and college politics and keenly entered into and enjoyed the contests created thereby, but always the unfailing courtesy and kindliness of manner which marked his later years were present. Always the quick mind and ready tongue were there, quick to understand and ready to assert and reply, but never to wound.

But this quiet manner had nothing of fear or timidity in it. There was no lack of independence of thought or self-reliance in action, no shrinking from responsibility, no unwillingness to form an opinion or lack of courage in maintaining it. As in college, so in later life, he quietly assumed life's responsibilities and performed its duties, formed his opinions and courageously maintained them. Nowhere does this better appear than in his reported opinions, of which I believe there are some two hundred, covering a period of about twelve years.

Thus in *State* v. *Intoxicating Liquors*, he said:

"We fully recognize that the question as to whether a state statute is in contravention of any provision of the Federal Constitution is for the final determination of the Federal Supreme Court, and that its decision, when the question is presented, is conclusive; but we do not consider it obligatory upon this Court to hold, against our own judgment, that a statute of our State is in violation of that constitution, until it has been so decided, even if it may be possible, judging from certain remarks in that court's opinion, that our judgment may be overruled by that tribunal."

And again in refusing to give an opinion on the "Questions submitted by the House of Representatives," as one of the majority of the Court and contrary to the strong and able dissenting opinion of the minority, he said:

"But it has been suggested that it is not proper for the Justices to consider the question as to whether or not a solemn occasion existed when the important questions of law were submitted; that the House of Representatives having propounded the questions, must have determined that such an occasion did exist, and that its determination is to such an extent final and conclusive upon the Justices, that it cannot be inquired into by us; that this preliminary question is a legislative and not a judicial one. We cannot concur in this proposition, or with the arguments urged in its support. . . . . We have no doubt that it is our duty, before we are justified in answering questions propounded in this manner, to determine whether or not a solemn occasion existed at the time of the submission of such questions, within the meaning of the constitution; and that if we are clearly of the opinion that no such occasion existed, to decline to answer the questions."

And again in *State* v. *Sanford*, he says: "We do not think the guilt or innocence of any person accused of crime, whatever his belief may be in this respect, or that the result of a criminal trial should depend upon the beliefs of the members of a jury on the question of the efficacy of prayer as a means of cure for the sick, or upon their religious beliefs in any other respect. If a person

charged with crime were to be convicted or acquitted according to the belief of a jury upon such questions, it would be in direct opposition to our theory that our government is one of laws and not of men."

And again in *Corbin* v. *Houlehan* he says that the legislature can "in the exercise of its police power, or any other of its sovereign powers, in its discretion, enact a law, the practical operation of which may indirectly affect the extent of commercial transactions between the states."

And again in *Stuart* v. *Smith* he says: "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."

The quiet student, the unassuming gentleman, became the Chief Justice of a Sovereign State, jealous of the dignity of his Court, stoutly asserting its independence, declaring that the administration of law shall not be hampered by religious belief, protecting the rights of his State and safeguarding the liberties of its humblest citizen. We live in an age when events crowd upon each other with marvelous rapidity, when life is strenuous and opportunity for normal growth is lost in intense activity, but looking back upon the career of Chief Justice WISWELL, observing the gradual development of his powers, and their full devotion to the public good, the question comes with insistent force, who is the "desirable American citizen" and upon what foundation can State and Nation most surely rest? Does not the life of Chief Justice WISWELL nobly answer this question?

Hon. FREDERICK A. POWERS, of Houlton, a former Justice of the Court, then spoke as follows:

May it please your Honors:

A great judge, a good comrade, a true friend has left us. And while the State mourns today and will continue to mourn the loss of its Chief Justice, there are many who knew and loved ANDREW P. WISWELL for those gifts of heart and mind which made him the

charming personality which he was, who remember and mourn today the man perhaps even more than the judge.

I shall not attempt any extended review or analysis of the life, the career, or the work, of Judge WISWELL. I first made his acquaintance in college. But the line of demarcation between upper and lower classmen in those days was more sharply drawn than at the present time and my acquaintance with him was necessarily slight. I believe that in college he was not specially distinguished for high rank or for close application to the studies of the curriculum, preferring rather to follow in those fields where his natural taste lay. He was known for his love of life, of social enjoyments, and as a leader among his fellows in all things which pertained to the college life.

While those of his classmates who knew him more intimately were undoubtedly aware of the abilities which he possessed, I recollect that to the college at large that fact was first impressed upon many by the part which he took in an original debate in his senior year. And possibly it was due to that, that in the class prophecy, at commencement, given by Mr. Clark, one of his classmates, was assigned to him in the future the position of Chief Justice of this State.

I saw Judge WISWELL only occasionally from the time of his leaving college until he first entered the legislature in 1887, where I had the honor to serve with him on the judiciary committee. He at once took a place in the front rank of the House, of which he was a member. He did not speak often, but when he did speak, he was always listened to with respect and attention. In those days he showed the same characteristics which distinguished him in later life and on a broader and more exalted field. In debate he was clear, fair, logical and eloquent.

During his third term in the House he served as Speaker, and as a member of the other branch of the legislature, I had an opportunity to see much of him. While his position necessarily debarred him from an active participation in debate, yet he kept a vigilant eye upon all proposed legislation, and I think sometimes perhaps exercised a controlling influence. As Speaker he was eminently fair and

impartial, distinguished for his knowledge of parliamentary law and for his dispatch of business, and won the respect and confidence of all members of that body.

I never met Judge WISWELL as a practitioner at the Bar, but I had the pleasure of practising before him while he was on the Bench. As a nisi prius Judge he showed a ready grasp of the controlling points of the case. His charges to juries were eminently clear, bringing out and placing in strong light not only the principles of law which controlled the decision of the case, but also the issues of fact which were to be determined; so that his charges were readily comprehended by the juror of average intelligence. He had the courage of his convictions, as has been said. He was fearless; not listening for the popular voice; not afraid to rule; not afraid of exceptions. And when he did rule it was clean cut, and the attorney practising before him was not in doubt as to whether he had ruled in his favor or against him.

But the reputation of a nisi prius Judge, like that of the advocate, is necessarily fleeting, and the fame of Judge WISWELL must ultimately largely rest upon the results of his labors embodied in the reports of this State. Others who served with him longer than myself can better speak of his opinions and of the value of his services, not only to the people of the State but as a contribution to the great body of the law of this country. His mind, as I have said, was clear having a ready grasp of legal principles, and it was also constructive, having the power to apply old principles to new conditions — a thing that is the boast of the common law and the characteristic of great judges, such as he undoubtedly was.

I read over the other day many of the personal letters which I have received from him in the last twenty years, and as

> "word by word and line by line
> The dead man touch'd me from the past,"

I felt and saw the characteristics of the man painted by his own hand and making a picture of him that stood out clearly in my mind.

Judge WISWELL was a true friend, and where he gave his friendship he did not easily withdraw it. He was capable of self-sacrifice for it. He worked hard and he played hard, and passed from his

judicial labors to social recreation and back again to work with a readiness and a zest that few men possess. He loved life and he drank the cup which it held for him to the full. He was hospitable — hospitality itself. I think he never showed to better advantage than as a husband and host in his own beautiful home.

Above all, Judge WISWELL was a sincere man. He was truth itself. He disliked anything in the nature of evasion or deceit in dealings before him or with him, either as a judge or a man. Doubtless he may have had his faults, because no man who was loved as Judge WISWELL was loved and who had the warm close friends that he had, could have occupied that position unless he had been human. But there is nothing in his life or in his career that anyone who knew him has any reason to regret or apologize for. His fame is as pure and unblemished as it is exalted as a judge, and his friends will mourn his loss through all coming days as the Bench and Bar and people of this State will cherish and reverence his memory.

Hon. ORVILLE DEWEY BAKER, of Augusta, President of the State Bar Association, was the last speaker on the part of the Bar. Mr. Baker said:

May it please the Court: At times we are strikingly reminded that, close beside the borders of life, set with all its blooms, flows the river of death, into whose forbidding waters no man may step and then return, and no man who has once entered may send answer back from the farther shore. When it comes to one who is frail with sickness, or weary with the hardships of life, the fingers of death are soft and even welcome, and draw one gently to repose. But when it overtakes, as it did here, the strong man in harness, it must give us pause, in order that we may cast a glance at the life, the character and the career of him who has left us.

Chief Justice WISWELL passed from us in the full tide of life and honors. It is not here that any just appreciation in detail of his services, his public worth, or even his private character, be said, but we are met here as his associates and friends to place upon his grave the sweet tribute of friendly recognition.

Of those nearer qualities and companionships which form so much of the sweeter aspects of life he was full, fruitful, yielding back in generous measure more than he could receive. For many years he was my close friend, and he was the close friend of many upon this Bench and in this auditory. We knew and loved those brave personal qualities which must endear a man to those who come in touch with him. He had, I think, as was said by one of his late associates and friends to me today, a rare ingenuousness of spirit which added greatly to the charm which all felt in his personality. He was, as my friend Judge POWERS has so justly said, a true man, a sincere man, open, frank, almost like a child in his frankness of feeling and expression, his directness, his sincerity, his simplicity. His simplicity was but the insignia of his greatness.

In his work at the Bar, where he had an extensive, though perhaps not a commanding practice, and especially upon the Bench, where of course, in later years, we knew him best, he had many of the qualities of a great judge. I think he was characterized deeply by a love for justice, a passion almost—innate, unobtrusive, but powerful, for justice. And he had a rare faculty for attaining it in the given cause. He had at the same time the gravest respect for law, and with him I think it may fairly be said it was justice informed by knowledge of the law, and respect for law illumined by justice.

He had a singularly clear insight into the facts of a cause. He penetrated easily through the entanglements of fact. He saw his way rapidly and clearly to the end, and did not hesitate to cleave to the very mark, either in pronouncing the principles of law or in reaching the just end. In his decisions, in his opinions, he made no aim at literary finish. His style never flamed with the fires of imagination. But he had a power of almost crystal statement, of strong, vigorous logic, which enabled him to cut his way through unmeaning technicality down to the deep-lying principles of the cause.

He himself has perhaps best expressed his own view of the duty of the Bench, and held up at the same time, perhaps unconsciously, a clear mirror of his own life and powers, in the remarks that he made at a banquet given Chief Justice PETERS, where he declared that the true office of the Bench was the "search for fundamental

truth." True it is, as this Court so well illustrates by its own practice, that the search for the underlying truth is the highest function possible to any tribunal. And I think it can be justly said, and that the members of the Bar of this State, and of the Bench, will concur in the saying, that his conscious effort was a search for the underlying truth; and when he found it he meant to hold it up and to sustain it against all odds. He did not suffer his mind to be swayed from it by aught else. He minded no popular clamor. He minded not the voices of the majority. He was content to dwell in the serene minority with truth and with the right. And that, may it please the Court, in these days, I would suggest as the great and commanding feature of his lifework and of his personal character. Aside from its endearing traits, aside from its personal charm, its sweetness, its attractiveness to friends, measured from the intellectual standpoint, I believe the fearless courage of the man was the one central characteristic about which all else grouped and subordinated itself.

I heard the other evening an impressive address delivered before a dinner of the Bar of New York, by the retiring Senior Justice of the Circuit Court of the United States for the district of New York, in which he said with great impressiveness and with great truth, that the final refuge for all rights of property, for all rights of the individual, was in the Court. They alone upbear the protecting shield of the Constitution, and encroaching and pernicious legislation will, in the end, run riot, unless they finally interpose this sheltering arm. To their courage in opposing, if the truth requires them to oppose, the feelings of the moment; to their boldness in asserting the constitutional requirements and sustaining them, the people look, all men look, for the final administration of government.

And, in these days, where it is easy to be brave in the institution of measures that are sure to command the assent of the majority, where so often in public life men shrink from opposing what they fear they will be outnumbered in opposing, the bravery of the Chief Justice, the dauntlessness with which he hewed to the line as he saw it, is the trait I believe today most needed and most lacking in public life.

He possessed it; he exercised it, and he did so to the end. And in placing before himself as a lawyer that standard and ideal of the search for underlying truth, he placed himself in accord with that which every man in every calling must obey if he would attain any measure of greatness. Judicially, this is obvious. It is no less so in other arts, in other professions, in other careers. The man of science is no true scientist if he does not above all else place this search for underlying truth, rejecting error. The philosopher works skilfully or unskilfully in proportion as both his analyses and his syntheses rest upon and reveal the underlying truth of things. And even the poet, with whatever sprays of fancy he may adorn his thought, fails as a great poet, unless his verse is but the pipe through which the fundamental truths of nature and humanity may musically stream. It is only when he opens his verse so that the winds and the sky and the resounding sea may stream through it, even as music through great organ-pipes, that he sings in harmony with those underlying forces which make the poem and the poet great.

In judicial life Judge WISWELL perceived these things and acted on them, and we are here today to do honor to what deserves honor, to that high, commanding hewing to principle and that dauntless courage which dares support principle against all odds.

And now, may it please the Court, our sorrowful duty is ended. We wait but the word of the Court, the word of his associates, the final word. I remember in the old Saxon story life was imaged to be the passage of a bird through an old Saxon banquet hall. When the logs were piled high and kindled, and the lords were gathered round the banquet table, forth from the snows outside, a bird flew through the open door, tarried a moment and flew away upon the opposite side. Its stay within was pleasant. For the moment it felt not cold or bitter weather. But the moment was brief. In the twinkling of an eye it had passed, and its passage was from winter to winter. "Such," said the old Saxon bard, "Such, O king, is the life of man on earth." But were it permitted us to have a wider knowledge and a deeper insight, might it not well be that our passage here

is rather from an immortality that has passed, through the shadows and unrealities of life, into an immortality that is to come? There is not only exquisite poetry, but deep philosophy in the thought of the poet:

"Our birth is but a sleep and a forgetting."

But now today, in this belated spring-time, when the splendor is fast coming to the grass, the freshness to the flower, with hints and beckonings of immortality all about us, yet our feeling at the end, in the death of our beloved friend, is a deep sense of personal loss. We can only say, at the last, with the Poet of the Lakes:

"The rainbow comes and goes,
And lovely is the rose;
The moon doth with delight
Look round her when the heavens are bare;
Waters on a starry night are beautiful and fair;
The sunshine is a glorious birth;
But yet I know, where'er I go,
That there hath passed away a glory from the earth."

Chief Justice EMERY then responded for the Court as follows:
Gentlemen of the Bar:

The members of the Court are grateful for the eloquent expressions of your high appreciation of the life, character and services of our lamented Chief Justice WISWELL. As known to us he fully deserved your encomiums, and we most willingly place your resolutions upon our records that the man and the judge may be known to our successors as he was known to us.

It fell to my lot to respond for the Court at exercises in memory of him by his own Bar at the late session of the Court at Ellsworth, where he was born and lived. I there reviewed at some length his life, character and conduct as a practising lawyer, citizen, neighbor and friend. As what was there said will be made matter of record and published in the Court Reports, and as his labors in other departments of the public service have been so well stated in the addresses made here today, I will now speak only, and briefly, of our estimate of his judicial character and labors.

Chief Justice WISWELL was favored by nature with exceptional intellectual ability and strength. He would have been pre-eminent in any career; in any line of work. Had he entered upon any business career he would have achieved much. He had such clearness of understanding, such accuracy of perception, such breadth of comprehension, such quickness of decision, such promptness of action, such force of will, such steadiness and persistence of purpose, he could have brought any feasible business undertaking to successful issue. Had he assumed high legislative, executive, administrative or diplomatic office in the State, he would have rendered most distinguished and valuable service there.

It was fortunate for the judiciary and the jurisprudence of Maine that he chose the profession of law for his life work; fortunate again that he preferred the judicial career to others perhaps holding out more glittering prizes of fortune and fame.

He began his judicial service at the age of twenty-five years, when he was appointed Judge of the Ellsworth Municipal Court, then the only court of the kind in the county and having a large docket with civil jurisdiction up to $100. Though much younger than any of the lawyers practising before him, myself among them, he won and even compelled their respect and deference. It was at once seen that he could sift the truth out of the chaff of evidence, could quickly detect fallacies in argument and that he went in a straight line for the truth, uninfluenced by any personal considerations or feelings. Though it was then supposed he would prefer a congressional career, it was even then believed by his friends that he would render even better service to the public as a judge.

As speaker of the State House of Representatives, to which chair he was elected after having served most acceptably for two sessions upon the floor, he made it evident to the whole State, what was before known to his friends, that he was of the timber for a firm, able, strong and impartial judge of the highest courts, and upon the occurrence of the next vacancy, in 1893, he was appointed a Justice of the Supreme Judicial Court. Before the expiration of his first term under our short tenure he was appointed Chief Justice of the

Court; but alas, before he had served even one full term as Chief Justice, his life and work were suddenly cut short by what seems an untimely death.

When he first came upon the Bench the Justices there before him gladly realized at the very first that their new associate was able, vigorous and helpful, one who would faithfully do his full share of the work of the Court and his full part to maintain the Court in the respect and confidence of the Bar and people. While not unmindful of the honor of the position, he did not regard it as a reward for past services, but rather as a greater opportunity for usefulness, as calling for greater labor still, in fine as calling for the best that was in him for the service of the people. He gave that best, great as it was. At nisi prius, where I often saw him presiding, he gave the closest attention to every case; nothing pertinent in evidence or argument was unheeded. He ruled decisively but not carelessly. However sudden the call for a ruling, his active mind grasped at the point, and his ruling was never haphazard, but the result of quick thinking. His instructions to the jury were always well formulated in his mind, so that as given out they were clear, orderly, concise and yet comprehensive. His statement of the law applicable to the various issues was made in language and with apt illustrations which the laymen could easily understand and apply. As a presiding Justice he was firm, in full command, but courteous. He upheld the rightful power and dignity of the Court, but was scrupulous to show full respect for the rights of counsel and litigants. His rulings, however sharp and decisive, were not arbitrary nor whimsical. They were the result of his judgment. In making them he was conscientious, seeking only to keep the case on the highway of law and truth.

In the Law Court he rendered notably good service. While Junior Justice, charged with the duty when in consultation of stating the case and opening the discussion, he was of great help to the Court. His statement of the case and of the contentions of the parties was brief, pointed and luminous, so that the issue for decision was plain. He then gave his own views modestly, but confidently, if he had formulated any; or else would frankly admit his doubts

and indecision. As he moved up the table in the order of seniority, he showed no less thought and care in finding out the real issue and the determining legal principles. When as Chief Justice he was the last to speak formally before the case was thrown into general and informal discussion, his opinion was awaited with much interest in every doubtful case. It was then found that he had kept in mind every essential fact, every point made in argument and every suggestion made by the other Justices. If differences of opinion had been expressed, he would state them fairly and give clearly and forcibly his reasons for his own opinion. When he was through, the case had been reviewed in all its bearings and the points of difference made apparent. He had confidence in himself, in his own judgment. That all the other Justices had agreed did not deter him from expressing emphatically a contrary opinion when his turn came to speak, and in more than one instance his opinion thus expressed became the judgment of the Court.

He had high ideals of the function of the Court and its Justices. He believed the Court had great duties and corresponding great powers, constitutional and inherent. He held that those powers should be used freely enough to protect both the public and the individual from wrong, but with such care that neither should suffer the least injustice. When convinced that some right even of the humblest had been infringed, he did not hesitate to use the utmost powers of the Court for redress. As an instance of his courage and readiness to act, I recall that once when he was holding a term at Calais an alien was there arrested by some United States officers. The Chief Justice upon habeas corpus was not satisfied of the authority of the officers to hold the petitioner, and ordered his discharge. The officers essayed to re-arrest the man with no better warrant, but were met with explicit notice that to do so would cause their own arrest and punishment. In answer to remonstrances from Washington the Chief Justice calmly replied that the Courts and Justices of Maine would protect every person within its boundaries from what they deemed to be unauthorized arrest by any officials whatsoever.

He was loyal to the law, but was not a slave to precedents. He was reluctant to depart from them, but, when convinced they were

upholding a wrong and unjust rule, he did not hesitate to disregard them and base his judgments on what he believed to be the more enlightened and stable reason. His published opinions were like his mind, logical but practical. He did not attenuate, did not draw fine distinctions, nor indulge in essays upon mere theories or abstract principles. He wrote the opinions not for such purposes, but only to show the reasonableness of the particular judgment rendered. He sometimes said to me that he wrote his opinions to be read for their law, not for their literature, but, nevertheless, they have the literary merit of plain, orderly statement and correct and concise reasoning, of being easily read and understood. Their cogency is manifest. I have no need to call attention to particular cases as his opinions are of uniform excellence, showing in every case careful preparation. They exhibit patient research, accurate discrimination and forceful reasoning. While he had decided views upon questions of politics, economics and sociology, which he expressed freely elsewhere, they do not appear in his judicial opinions, nor did they affect his judicial action. There he sought to establish only his views of the law of the case.

Though he served as Judge for less than twice the seven years, and sixteen volumes of the Maine Reports contain all his opinions, he made in that short time a deep and lasting impress on our jurisprudence. His opinions were largely upon important questions and a number of them dealt with new and difficult problems. They will be found strongly intrenched in reason and authority and will be beacon lights in the law for many years to come.

As Chief Justice he was acceptable to his associates. We recognized his great ability, industry and conscientiousness and his fitness for the headship of the Court. He sought to make the Court efficient, to procure early decisions and meet the rightful expectations of litigants and people. As presiding Justice in the Law Court he was anxious that parties should be fully heard and their contentions be clearly understood. He was even painfully so in the few cases where a party had no counsel. In consultations he fully recognized the equal rights of the other Justices with himself in debate and vote. He assumed no superiority, but nevertheless felt it his duty to pro-

mote the proper purpose of the consultation and have its work fully accomplished. In distributing the work of the Court among the Justices he was eminently fair, taking upon himself his full share and more.

In social intercourse with his associates he was cheerful, cordial and pleasing, a clean gentleman of the first order. He was witty as well as wise, and gave out to us from his store of wit and humor much that was restful to tired minds and stimulating to flagging intellects. We always welcomed the hours when we could gather with the Chief Justice for the needed relaxation and diversion of thought. He won our affection as well as our respect.

He was suddenly taken from us when but little past middle life. His life and service seem all too short for him and the State. Yet we should not measure his life and service by years. "That is a long life which answers life's great end." He accomplished much. He gave full value for all he received in honor or fortune. He answered life's great end, good work, faithful service. Still we cannot but mourn with you his death. We have lost a strong, able associate and a dear, helpful friend. It would seem better for us that he had lived longer. It may be better for him that he left life when he did. We now know that he had long been ill, struggling with physical pain and weakness, uncomplainingly and heroically, asking no indulgence or consideration. We now know how much his splendid service took out of him. We cannot know what further physical and mental anguish he has escaped. We cannot know but that his death, so grievous for us, was best for him. It may be selfish to wish him back, to wish him to take up the burden of life again. Worn and tired, after arduous service, he has fallen asleep. Let us school ourselves to say of him as Shelley said of his friend who died seemingly too soon:

> "Awake him not! Surely he takes his fill
> Of deep and liquid rest, forgetful of all ills."

The response of the Chief Justice concluded the exercises, and the Court then adjourned.

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE SUPREME JUDICIAL COURT AT ELLSWORTH, ON THE EIGHTEENTH DAY OF APRIL, A. D. 1907, BY THE HANCOCK BAR, IN MEMORY OF THE

HON. ANDREW PETERS WISWELL,

LATE CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT, WHO WAS A MEMBER OF THAT BAR AND WHO DIED ON THE FOURTH DAY OF DECEMBER, A. D. 1906, CHIEF JUSTICE EMERY WHO IS ALSO A MEMBER OF THAT BAR, PRESIDING.

The exercises were opened by Hon. L. B. DEASY, President of the Hancock Bar Association who presented the following memorial resolutions:

ANDREW PETERS WISWELL, Chief Justice of the Supreme Judicial Court of Maine, died on December 4, 1906, at the age of fifty-four. He was born in Hancock County. His lifetime home was here. As a practising lawyer in the courts of Hancock County he evinced and developed that intuitive perception of legal principles, keenness of intellectual vision and power of clear and exhaustive analysis that made him the unquestioned leader of the County Bar and one of the great leaders of the Bar and Bench of Maine. From the Hancock County Bar he was, in 1893, appointed an associate Justice of the Supreme Judicial Court, and was in 1900 made Chief Justice. Here, amid scenes he loved so well, in the city and county whose people he served so faithfully, he lies buried.

It is peculiarly fitting that the Bar which was honored by his membership should seek to place upon the records of the Court where the crowning work of his life was done, a lasting memorial of their admiration and their love. Therefore, be it

Resolved, That the members of the Hancock County Bar recall his memory with sorrow and with pride — deep sorrow for his early

death, just pride in the achievements of his too brief life; that with his rugged strength of character and his splendid powers as an advocate and a Judge, which merited and received the esteem and admiration of all men, he combined a depth of genuine sympathy with human weakness and human frailty which gained for him the love of those who knew him best; that in his devotion to truth and justice and his loyalty to the loftiest ideals of his profession he was an exemplar whose influence was and is wide reaching and permanent.

Resolved, That these resolutions be presented to the Court for its action.

In presenting these resolutions, Mr. DEASY said:

May it please the Court:

My brethren of the Bar have intrusted to me the sad duty of making formal announcement to this Court of the death of its Chief Justice, ANDREW PETERS WISWELL.

As a feeble attempt to express in language a sense of bereavement and loss that no language can fully express, they have instructed me to present these resolutions, and to move that they be made a part of the permanent records of the Court.

When at the end of a long life death comes, even as twilight darkens into night; when after a lingering illness it takes the skilled hand of a physician to tell when the tired heart ceases to palpitate; whether it come to the young, with their hopes, or to the old, with their memories, death is ever unutterably sad.

But when it comes suddenly to a man in the meridian of life, to a strong, splendid, masterful type of manhood, — to a man with deft and skilful fingers upon the keyboard of human affairs; when it came unheralded in the night to ANDREW PETERS WISWELL, the first emotion awakened was not grief. Grief and sorrow came afterward in floods and torrents. But, the first mental attitude of those left behind was incredulity, bewilderment; we could not believe it. And even now, after months have passed, after the snows of a long winter have covered the ground which we consecrated when we laid

him to his rest, — even now we cannot, to use an old phrase, "make him dead;" even now it seems that he must be there, just beyond the range of our vision, and that if we listen but intently enough we shall hear the sound of his approaching footsteps.

He was an ideal judge. He hated falsehood, and he unmasked and exposed it with unerring instinct. He loved truth, and was impelled to follow it by every fibre of his being. His mind was attuned from birth unto the law's majestic harmony. And his heart beat ever in unison with the great heart of humanity.

In a few months men from other sections of the State, will at the Law Court, speak appreciative words in eulogy of his greatness as a jurist. As a lawyer, as a judge, he belongs to the State, but in those more intimate relations—as associate, companion, and friend —he belongs to us, and his memory belongs to us. We decline to share it on equal terms with the State.

One characteristic of ANDREW WISWELL upon which I love to dwell was his unswerving loyalty to his friends. He was no fair weather friend. His friendship did not require the stimulus of personal presence nor the applause of the public. He was indeed no flatterer. He did not hesitate to criticise his friend in severe and even caustic language. But he did it face to face. Let any man attempt to traduce an absent friend, then, like a chivalric knight of old, like another Richard of the Lion Heart, he would enter the arena in his defense against all comers.

And it was not friend and intimate alone who enjoyed the protection of his splendid and magnanimous companionship. He was ever the defender of those who had no other, and with him as a defender no man needed any other.

He was a lover of nature. Never did he seem happier than when walking or riding through the woods, or sailing along the coast. I remember vividly one bright day that I spent sailing with him and others in the lower bay. He did not indulge in rhapsodies over the natural beauties that surrounded us, but like Bonnivard,

> "He bent on mount, and wave and sky,
> The quiet of a loving eye."

When I think of that day I am reminded of those beautiful lines of Tennyson:

"Break, break, break,
At the foot of thy crags, oh, sea!
But the tender grace of a day that is dead
Will never come back to me.

"And the stately ships sail on
To their haven under the hill,
But, oh, for the touch of a vanished hand,
And the sound of a voice that is still."

Remarks of HENRY M. HALL, Esq.

May it please the Court and Brethren of the Bar:

I feel that I cannot permit this opportunity and occasion to pass without rendering my own small tribute to our departed Chief. My associations with him were long and friendly both professionally and socially. Whatever frailties he may have had (and there can be nothing born of earth that does not bear the stamp of earth) we have certainly met with a great loss.

Fourteen years ago this very month he whose memory we here venerate today was called from the brotherhood of active members of our Hancock Bar to the Bench of the Supreme Judicial Court of which it is an adjunct. Seven years later he is selected to be the Chief Justice of that Court, and at the close, the very close, of but one short though well-rounded term, while at this summit of legal eminence in our State, he is called to that final court of all human affairs whose summons cannot be evaded or denied.

In the fulness and strength of his young manhood, when answering to this first call, all of us here remember well the great ability and earnestness which he brought to his high office. Impressed by inheritance with a legal mind, trained by cultivation and improved by practice, endowed by nature with a ready and just appreciation of men and affairs, he instantly added lustre to that brilliant galaxy of men, his colleagues and his predecessors.

But it is not these qualities alone that have endeared him to our memory—every younger member of this Bar can recall with emotion

the helping hand stretched out when the way was hard and the steps were halting. Every older member can recall with feeling the fairness with which he was permitted to present his cause and to protect his client. Nor from this well-rounded character were there missing the purely human elements—mirth sparkling like a diamond shower —the social graces, the commercial interests of our community, all had their place within their proper bounds. Large indeed was his bounty, and his soul sincere.

When he was called to sit at the head of our Court, with characteristic loyalty, he rendered valiant service. Changes in the tide of human life had brought many and intricate new controversies into our Courts, but of their decision the full and fair share bears the sign manual of our late honored Chief, even though at that time dire disease had already laid on him relentless hand. And when the final dread summons came, as it did, like a stroke of lightning from a cloudless sky, in the death of ANDREW PETERS WISWELL, I feel that this State has lost a jurist who had added to her eminence, that our Bar has lost a member who had increased its renown, and our community a citizen such as shall not soon be found again.

I second the motion of my Brother DEASY that the resolutions be made a part of the records.

Remarks of ARNO W. KING, Esq.

May it please the Court:

It was my good fortune to be closely associated with Mr. WISWELL for more than twenty-six years — as student under his care, as partner in professional work, and as interested with him in various business enterprises. Because of this companionship, it seems, almost, as if his wish might be that I speak not today; that for one so near him to speak in his honor might offend that delicate sense of propriety he so fully possessed. Then, too, my own grief and sense of personal loss cloud the mind and bring but thoughts of sorrow and disappointment.

And yet, brethren of the Bar, I am aware that these exercises are for the living, not the dead; for us not for him. His lifework is

done; ours is yet in the doing. What he did, how he did it, and with what purpose, we may well seek to learn and profit thereby; and, too, well may we bring to mind, and express our admiration for, his distinguishing abilities and his noble traits of character.

Chief Justice WISWELL belonged to the class of extraordinary men — of great men, not merely because he was a distinguished lawyer and jurist, for which he was famed indeed in his lifetime, but because he possessed and exercised the qualities and powers of greatness. Prominent men often appear smaller as we come near them; but the really great man grows upon us as we approach him, and when in his presence we are conscious of being in the influence of a superior force, often gentle, nevertheless controlling.

Such was Judge WISWELL'S influence. His was a dominating mind, a controlling spirit, whether at the councils of lawyers, in the directorate of business enterprises, or within the social circle.

What may we recall, then, as some of the qualities and powers of greatness which he manifested? His great mental powers were ever at his command. He did not need to make formal preparation to think. He was not a dreamer, but distinctively a man of thought. As he walked and rode through the streets of this city he loved, he thought — he thought of her people, of their circumstances, of their comforts, of their needs; he thought of her waning industries, of her past and present, and he hoped for and indeed almost made plans for her future prosperity. It was because of this thinking that we so often found him fully alive to the needs and interests of his fellow citizens, and it was this thinking of them that made him ever ready to give of his time and of his substance for that which might benefit his fellow citizens.

He possessed to a remarkable degree an intellectual power to grasp a question and comprehend it so as immediately to restate it with perfect clearness. His power of analysis was so accurate and clear that his statement of a proposition was equivalent almost to his decision upon it. He was confident in his opinion when formed. How often we have seen this manifested in him as a practising attorney. His advice was always given unhesitatingly, and it satisfied

his clients that their rights could be secured, or convinced them that their position was wrong. He never sent them away in uncertainty of mind.

He had that rare power to cause those who came to him in trouble to feel better. He was sincerely interested in them and they felt it. He persisted in examining all of their burdens, but he made them lighter. He was thoroughly honest in mind and heart — an exemplar of the "square deal." He loved truth and right, and he was determined that justice should prevail under all circumstances.

In the balancing of the scales of justice evenly in that high position to which he was called, he carried with him for use strong common sense and a spirit of mercy. Although he was keen to detect fraud and duplicity, still he often appeared as unsuspecting as a child. He believed in men's honesty. With him the innocence and honesty of all men was not a mere dead presumption, but a living belief which could be overcome only by clear and convincing proof.

Charity was one of his marked characteristics. He could always seem to see some excuse for errors in others. His appreciation of their circumstances and surroundings enabled him to see clearer their temptations, while their sins were obscured in the shadow of his kindness. He was sympathetic with the unfortunate — not effusively, but truly. His childlike tenderness, we believe, often prevented him from speaking directly and freely to those for whom he felt deep sorrow, but we who were close to him know how often he would express the tenderest feelings of sympathy for others.

He was solicitous for the comfort and pleasure of others. His whole-hearted interest in the recreations and pleasures of his friends was indeed to them an added enjoyment. He was a public spirited man. Not only was he willing to contribute his time and his money to sustain and maintain our waning industries, but he was, in his quiet way, really the leading spirit in the promotion and furtherance of those enterprises, and he did it with no hope of personal gain, but, on the other hand, with the expectation of personal loss. These are a few of the manifestations which we have so often seen

of the qualities and powers which distinguished Judge WISWELL as an extraordinary man.

Others have spoken eloquently and truly of the great lawyer and jurist. The distinguishing services of his life in his chosen profession are known to Bench and Bar and the people of his State. They will endure as monuments to his fame. We speak of our fellow citizen, our neighbor, our companion, our friend.

Judge WISWELL appreciated the works of nature and was a believer in nature's God. He was interested in his fellow men and his fellow men were made better because he lived. He esteemed his friends, and his friends were made happier by his influence. He dearly loved and fondly cherished his home, and there in that home was always found the charming host, the lovable man, the choice spirit.

On the morning of December 4 last, I was met with the startling question: "Is Judge WISWELL dead?" "No," said I; "He is not dead, he is expected home today. Who say he is dead? It is a mistake."

Although the solemn fact appears by the unquestioned evidence of reality, still the same answer has repeatedly come to me: "No, he is not dead."

Who say he is dead! Go tell them No! For so long as truth shall prevail, so long as justice shall be tempered with mercy, so long as human sighs call not to human hearts in vain, so long as friendship and love shall last, so long must ANDREW P. WISWELL live.

Chief Justice EMERY then responded as follows:

Brethren of the Bar:

I have listened with most sympathetic interest to your resolutions and eulogies upon our deceased Brother WISWELL. In view of the fact that at another time and place I am to speak of his eminent judicial services and of his public career, I will here only speak of him as he was among us, a fellow member of the Hancock Bar, a

neighbor and friend. Unlike most of us, he lived, labored and died in the town and county of his birth. He owed no divided allegiance, — Ellsworth and Hancock County can claim his local monument and memory.

He was fortunate in his ancestry, inheriting from them a strong intellect adapted to the laborious and exacting profession he chose as the sphere of his life work. His father was an accomplished lawyer and gentleman, acknowledged to be among the best lawyers this county has ever possessed. His mother was a sister of lawyers, one a distinguished member of this Bar, another of State and national reputation as a jurist. He was thus born into a legal atmosphere; indeed he often told me that even in his early boyhood, at the age when boys thirst for a life of adventure, he had no desire or thought for any other career than that of the lawyer. He was eager to begin. He was even impatient that a college course of four years was made to intervene before he could apply himself to the study of the law. When at last those four years were over and he had received his college degree, he at once, without any season of rest, devoted himself exclusively and persistently to the books of the law. Soon admitted to this Bar, he went almost immediately into the front rank. We older members were quickly obliged to make way for him.

He had in large, even unusual, degree that rare and yet essential faculty for a lawyer — a legal mind. He could quickly apprehend legal propositions and distinctions. He could easily and clearly apprehend legal principles and their proper applications. He could readily extract the point decided from the verbiage of a judicial opinion; could winnow the grain of decision from the chaff of dicta. In the trial of cases in court he could see almost intuitively the relevancy or irrelevancy of any offered evidence. In argument on issues of fact he could marshal evidence into strong columns of attack, or stout line of defense.

He also possessed intellectual power. There was vigor as well as clearness in his statements, force as well as logic in his argument. His personality was pervasive. The Court, jury and witness felt him

as well as saw and heard him, and so did the opposite party and counsel.

In his Court practice he rarely allowed himself to ask indulgences of the Court or the opposite party. He prepared himself and his cases to meet all foreseeable contingencies. It was very seldom, if ever, that he asked for continuance or postponements as a favor or indulgence. His requests of this kind, which were few, were based upon legal grounds for good cause shown. If all attorneys would follow his example in this respect, the Court would be relieved of great embarrassment and the cause of justice be freed from hurtful hindrances.

In the practice of his profession, as in all other affairs, he was honorable always, truth-lover, truth-teller. He was liberal and obliging when no real right or interest of his client was endangered thereby. His client was always next after truth and honor, and before all else. He was no fomenter of litigation. Like all good, honorable lawyers, he advised adjustments and even concessions rather than subject his client to the travail, expense and risk of litigation. He made little or no account of minor matters provided the essentials were justly arranged. If, however, negotiations failed and the judgment of court and jury had to be invoked, he became the ardent, persistent and powerful advocate, using in his client's behalf every talent God had given him — strong personality, vigorous intellect, forceful logic and keen wit with its attendant weapons of irony and satire. Yet in it all he kept within the bounds of truth and honor. He never wittingly misquoted testimony, nor cited an overruled or misleading authority. He deserved and enjoyed the full confidence of the Court. In the language of the ring, he hit hard, but he always struck fair. If he overcame, it was by strength and skill, never by chicanery.

His intellectual powers and his quick success and pre-eminence would ordinarily and naturally have excited some jealousy and envy in those of the profession less gifted and less successful, but, as Tacitus wrote of Agricola, he conquered even envy by his merit. His success and eminence were recognized to be his due. There was no carping that he was over-estimated, that he was winning by

meretricious qualities, that the public were simply dazzled by surface brilliancy. His professional brethren, myself among them, knew the genuineness and solidity of his character and talents, and looked upon his rapid rise as a matter of course.

But here at home in this town and county he was also something else than a lawyer. He had also what Matthew Arnold called "the talent for affairs." His ability and force of purpose were manifest in other ways than the practice of law. He was largely instrumental in procuring the erection of this commodious and convenient court-house which, though not costly, is the best for its purpose in the whole State. He was the moving spirit in establishing the First National Bank of Ellsworth, an enterprise long talked of, but never really attempted until his energy was applied. He was its president from its beginning in 1887 to the day of his death, and its present condition with its large connections, attests his financial ability and energy. He urged and finally brought about the erection here of the First National Bank building, containing the finest banking-rooms in the State east of the Penobscot River. I feel that these two fine buildings may fairly be regarded as material monuments to his memory.

He was a good citizen and kind neighbor, but he did not wear his heart upon his sleeve, nor was he hail fellow well met withal. Courteous always, there was a dignity and reserve in his manner which repelled familiarity. He had quick sympathy, however. Misfortune and frailty found him charitable in purse and judgment. He was reluctant to punish and quick to pardon. More than once I thought him too lenient and forgiving, but such was his inner nature, though to the world his bearing may have seemed austere.

He was not lavish of promises, but his promises were kept. He was not effusive with verbal assurances of friendship, but showed his friendliness by actual service. I could cite instances of such in my own experience. I doubt not others here can cite like instances from their experience.

Following the advice of Polonius to Laertes, our brother did not "dull his palm with entertainment of each new hatched, unfledged comrade, but the friends he had and their adoption tried, he grappled

them to his soul with hooks of steel." He gave his confidence somewhat slowly and sparingly, but once given it was given unreservedly. He believed in his friends, and was slow to believe any evil of them.

In hours of relaxation and social intercourse he was delightful. He possessed wit in great degree. His talk was varied and interesting. His intimates rejoiced in him. In all social circles he was welcome. He enlightened our social gatherings with his wit and wisdom. He elicited respect and admiration from all. He inspired affection in those who won their way to his regard and confidence. He loomed large among us in all these respects, as lawyer, townsman, neighbor and friend. In all these his death has left a void as yet unfilled. We still feel the shock and grief we felt when we learned he had left us never to return, and we realize more fully what we have lost. Each of us now knows that something has gone out of his life.

We mourn his death and our loss. We mourn the more that death took him before he had lived the allotted span, but this grief may be softened by the thought that "Heaven gives its favorites early death." It may thus have mercifully spared him much earthly pain.

But his life was not short, since "That life is long which answers life's great end." Measured by its service, his life was long. He lived that life faithfully and well. Death was but its perfection.

The resolutions are gratefully accepted and will be spread upon the records of the Court as a memorial to those who come after us of our appreciation of his life and service among us.

As a further token of respect to his memory, the Court will now be adjourned for the day.

MEMORANDUM

Honorable FREDERICK A. POWERS, of Houlton, a Justice of the Supreme Judicial Court, filed his resignation as such Justice on the twenty-second day of March, A. D. 1907, the same taking effect March 31, 1907.

Honorable LESLIE C. CORNISH, of Augusta, was appointed a Justice of the Supreme Judicial Court on the twenty-eighth day of March, A. D. 1907, the appointment taking effect March 31, A. D. 1907.

Honorable CHARLES F. WOODARD, of Bangor, who was appointed a Justice of the Supreme Judicial Court on the fourteenth day of December, A. D. 1906, died in Bangor on the seventeenth day of June, A. D. 1907. Mr. Justice WOODARD was born in Bangor, April 19, 1848, and was admitted to the Penobscot Bar October 1, 1872. He was a strong, able and upright lawyer and was recognized as such by the Bench and the Bar, and his selection and appointment as a member of the Bench was without opposition and gratifying to the whole State.

Honorable ARNO W. KING, of Ellsworth, was appointed a Justice of the Supreme Judicial Court on the twenty-eighth day of June, A. D. 1907.

INDEX

A chart for a ship, an index for a book

ACTIONS.

See CONTRACTS. NUISANCE. PAUPERS. REAL ACTIONS. TENANCY IN COMMON.

The statute, R. S., chapter 84, section 17 et seq. does not authorize the court in an action at law to reform a written instrument to correct mistakes of the scrivener, and such mistakes cannot under that statute be held a legal or equitable defense to the action. *Martin* v. *Smith*, 27.

The court may stay an action at law for a reasonable time to enable a party to procure a reformation of an instrument by appropriate decrees in equity. *Martin* v. *Smith*, 27.

ADMINISTRATION.

See EXECUTORS AND ADMINISTRATORS.

ADMISSIONS AND DECLARATIONS

See EVIDENCE.

ADVERSE POSSESSION.

To work a disseizin of the true owner possession must be adverse. *Lancey* v. *Parks*, 135.

Where one enters into possession of another's land by the owner's consent such owner is not disseized, but at his election, until he has notice actual or constructive that the occupancy is adverse. *Lancey* v. *Parks*, 135.

To constitute such constructive notice there must be some visible change in the character or nature of the occupancy, calculated to put the owner on his guard and notify him that the land is in possession of a hostile claimant. *Lancey* v. *Parks*, 135.

Where one first enters upon land after bidding in the same at a tax sale, his intention to occupy adversely during the year allowed for redemption from such sale must be shown by some unequivocal act hostile to the owner's title, brought home to his knowledge, or which he ought to have known in the exercise of reasonable care and diligence in regard to his property. *Lancey* v. *Parks*, 135.

AMENDMENT OF RECORDS.

See RECORDS.

ANIMALS.

See NEGLIGENCE.

ANNEXATIONS.

See FIXTURES.

APPEAL.

See EXECUTORS AND ADMINISTRATORS. WAYS.

APPEAL AND ERROR.

See CASES ON REPORT. CERTIORARI. COURTS. EXCEPTIONS. EXECUTORS AND ADMINISTRATORS. REVIEW.

ASSIGNEE OF PERMIT.

See LOGS AND LUMBER.

ASSIGNMENT OF BREACHES OF COVENANTS.

See COVENANTS.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See BANKRUPTCY.

ATTACHMENT.

See OFFICER.

When an officer has made a valid attachment of personal property on a writ of attachment, he must maintain it at his peril. *Kelley* v. *Tarbox*, 119.

When an officer has made an attachment of personal property on a writ, his return on the writ is at least prima facie evidence that the property enumerated in such return was attached. *Kelley* v. *Tarbox*, 119.

When an officer has made an attachment of personal property on a writ, the filing in the office of the clerk of the town in which the attachment is made, of an attested copy of so much of his return as relates to the attachment, etc.,

BILLS AND NOTES.

See EVIDENCE. SALES.

A note in which the payor for value received unconditionally promises to pay to the payee or order a fixed sum of money at a fixed date is a promissory note within the purview of the statute R. S., chapter 83, section 89, and if signed in the presence of an attesting witness is not barred in six years from its maturity. *Murray* v. *Quint*, 145.

A note in which the maker for value received unconditionally promises to pay to the payee or order a fixed sum of money at a fixed time and which in addition to such promise contains a statement of the consideration for such note (not being illegal) and a stipulation that the goods for which the note was given shall remain the property of the payee until the payment of the note, does not affect the character of the note as a promissory note, within the purview of Revised Statutes, chapter 83, section 89.

Murray v. *Quint*, 145.

The following instrument is a promissory note within the statute, viz :—

"$112.85. Springvale, Me., Feb. 17, 1896.

Four months after date for value received I promise to pay E. G. Murray or order one hundred twelve and 85-100 dollars, with interest at six per cent, the same being for the following named property which I have this day bought of said Murray, one brown horse 12 years old weight 1130 lbs., one top carriage made by the Water Town Spring Wagon Co., and one set of one-horse sleds called the Nutter sleds, said horse, carriage and sleds is to remain the property of said Murray until said sum and interest are paid. Payable at any Nat. Bank.

Bradford Quint."

"Attest : Dora A. Murray.

Murray v. *Quint*, 145.

BONDS.

See DEEDS. ESTOPPEL. FRAUD. REFORMATION OF INSTRUMENTS.

BRIDGES.

See WATERS AND WATER COURSES.

BROKERS.

A plaintiff, a real estate agent, was requested by the defendant to secure for her a tenant for one or more years for her estate. He secured a tenant, under a written lease, "to hold for five seasons as follows, 1903, 1904, 1905, 1906 and 1907, June 1st to October 15th." The lease provided that in the event of the property being sold . . . . . "this lease to be determined and ended at the end of the season immediately following the contract of sale." The plaintiff executed the lease for the defendant as her agent. He was paid an annual commission of one hundred and fifty dollars for each of the years 1903 and 1904. The premises were sold by the defendant during the season of 1904. There was no express contract for commissions, either as to time or amount. *Held:* That the defendant was not liable to the plaintiff for commissions, as upon an implied contract, for the years 1905, 1906 and 1907. Also *held* immaterial, that though the lease gave the tenant an option of purchase, the sale was actually made to the tenant's wife.

Mears v. *Jones*, 485.

BURDEN OF PROOF.

See BILLS AND NOTES. EVIDENCE. REAL ACTIONS.

CARE.

See COMMON CARRIERS.

CARRIERS.

See COMMERCE. COMMON CARRIERS.

CASES CITED, EXAMINED, ETC.

CASES ON REPORT.

No question arising in a case should be reported to the Law Court for original decision, unless at such a stage of the case that the decision of the question shall in one alternative at least be a final disposition of the case itself, or unless accompanied by a stipulation to that effect.

Casualty Co. v. *Granite Co.*, 148.

CERTIORARI.

CITIES.

See EMINENT DOMAIN. MUNICIPAL CORPORATIONS.

CLAMS.

See FISH AND FISHERIES.

"C. O. D." SHIPMENT.

See COMMERCE.

COLLATERAL EVIDENCE.

See EVIDENCE.

COMMERCE.

Intoxicating liquors were shipped from Boston, Massachusetts to Lewiston, Maine, by a continuous way bill over the Boston & Maine Railroad and the Grand Trunk Railway of Canada. The consignee named in the way bill and upon the packages was fictitious. The car in which the liquors were being transported by the claimant company, after its arrival in the Lewiston yard, was shifted from track to track, and was finally left upon the "team track" so called, about one hour after its arrival. In about ten minutes thereafter the liquors were seized, and subsequently libelled. The team track was about twenty rods from the claimant's freight station, and was commonly used for the purpose of unloading freight directly from cars onto teams. In the ordinary course of business, these liquors, if called for by the consignee or owner within two or three days, would have been unloaded from the car onto a team. But if not so taken within that time, they would have been taken in the car to the freight house and there unloaded by the claimant. Between the time of the arrival of the car at the team track, and the seizure of the liquors by the officer, the car which was sealed had been opened by the claimant's servants, and other merchandise which came in the same car was being taken out of it. But the liquors had not been removed or disturbed by anyone. It did not appear that the consignee had in any way consented to take the liquors from the car on the team track.

Held: That in the absence of evidence showing a special arrangement, or assent, to the contrary, a railroad carrier's contract of carriage contemplates that the freight shall be transported to the carrier's freight house, and there removed from the car. So much is to be implied from the general usages of the business of such carriers. In this case there was no evidence that the carrier's duty in this respect was modified or waived by contract or otherwise. If the consignee had consented to take the liquors from the car on the team track, the carrier's duty of transportation would have been ended. Otherwise, it would still have been the duty of the carrier to complete the transportation by taking the liquors to its freight house, there to be removed from the car. Under the facts shown, the transportation was incomplete, and the liquors were not subject to seizure under the police power of the State, in contravention of the interstate commerce provision of the Federal Constitution. *State* v. *Intox. Liquors*, 206.

(1.) The plaintiffs who were wholesale liquor dealers in the City and State of New York and likewise were citizens of that State, brought an action of assumpsit upon an account annexed to recover the purchase price for intoxicating liquors bought by the defendant, a citizen of the State of Maine, with an intent to sell the same in the State of Maine in violation of law. The defendant interposed the statute, R. S., chapter 29, section 64, in defense to the action.

(2.) While the defendant bought the liquors for the purpose and with the intent of reselling the same in the State of Maine in violation of the statutes of Maine, yet there was no evidence showing that the plaintiffs participated in this illegal design, or did any act in furtherance or even had knowledge of the intent upon the part of the defendant to sell the liquors in violation of law Therefore the sole question presented with reference to the plaintiff's right to maintain the action, in view of R. S., chapter 29, section 64, was whether or not that statute is in violation of the commerce clause of the Federal Constitution

(3.) *Held:* That this was precisely the same question decided by this court in *Corbin* v. *Houlehan*, 100 Maine, 246, and for the reasons stated in the opinion in that case it is again decided that R. S., chapter 29, section 64, is valid and is not in conflict with the Federal Constitution.

Boehm v *Allen*, 217

By the decisions of the Federal Supreme Court, it is settled that intoxicating liquors are articles of commerce, and as such, while being transported from State to State, are within the protection of that clause in the constitution of the United States which gives to Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," and thus are subject to the exclusive jurisdiction of Congress.

State v *Intox. Liquors*, 385.

The act of Congress of August 8, 1890, called the Wilson Act, was a regulation of interstate commerce as related to the transportation of intoxicating liquors. *State* v. *Intox. Liquors*, 385.

The court of this State has heretofore held, under its own construction of the Federal Constitution and the Wilson Act, that when actual transportation of intoxicating liquors had been entirely completed, and when the liquors had not only arrived at the place of their destination, but had been moved by the carrier from the car to its freight house, there to await the order of the shipper, they had arrived in the State within the meaning of the Wilson Act, so as to be subject to the laws of this State.

State v. *Intox. Liquors*, 385.

The Federal Supreme Court in its decision in the case of *Heymann* v. *Southern Railway Co.*, 203 U. S. 270, announced December 3, 1906, has authoritatively settled the following doctrines:

(a) Prior to the Wilson Act, in case of interstate shipment of intoxicating liquors, delivery and sale in the original package was necessary to terminate interstate commerce, so far as the police regulations of the States were concerned.

(b) The Wilson Act did not delegate to the States the right to forbid the transportation of merchandise from one State to another, but "it merely provided in the case of intoxicating liquors that such merchandise, when transported from one State to another, should lose its character as interstate commerce upon completion of delivery under the contract of interstate shipment, and before sale in the original package."

(c) The State statute must permit the delivery of the liquors to the party to whom they were consigned within the State, but after such delivery, the State has power to prevent the sale of the liquors, even in the original package.

(d) The question of whether the liability of the carrier, as such, has ceased, under the State laws, and has become that of a warehouseman, is immaterial.

(e) But the court reserved its opinion upon the question whether if the consignee, after notice and full opportunity to receive the liquors, designedly leaves them in the hands of the carrier for an unreasonable time, they should not be held to have come under the provisions of the Wilson Act, because constructively delivered. *State* v. *Intox. Liquors*, 385.

Under the authority of the decision of the Federal Supreme Court in the case of *Heymann* v. *Southern Railway Co.*, 203 U. S. 270, announced December 3, 1906, the court of this State is compelled to overrule its decision in *State* v. *Intoxicating Liquors*, 95 Maine, 140, and now to hold that intoxicating liquors, transported from another State to this by a common carrier, are not subject to seizure by virtue of the provisions of the prohibitory liquor statute of this State, until there has been a delivery to the consignee.

State v. *Intox. Liquors*, 385.

Whether or not intoxicating liquors transported from another State to this State by a common carrier are subject to seizure by virtue of the provisions of the prohibitory liquor statute of this State, as constructively delivered, in case the consignee, after notice designedly leaves them in the hands of the carrier for an unreasonable time, was not considered as the facts in the cases before the court did not present that question.

State v. *Intox. Liquors*, 385.

Although interstate transportation may end before delivery, yet interstate commerce does not end before delivery to the consignee, either actual or constructive, and it makes no difference whether the consignee was known to the carrier or not, or whether the name of the consignee was fictitious or not.

State v. *Intox. Liquors*, 385.

COMMERCIAL PAPER.

See BILLS AND NOTES.

COMMISSIONS.

See BROKERS.

COMMON CARRIERS.

See COMMERCE.

When the relation of passenger and common carrier of passengers exists, the law requires that the passenger should exercise such care as persons of ordinary prudence and intelligence would exercise under the same circumstances.
Pomroy v. *B. & A. Railroad Co.*, 497.

It is the duty of a common carrier of passengers to do all that human vigilance and foresight can, under the circumstances, considering the character and mode of conveyance, to prevent accidents to passengers.
Pomroy v. *B. & A. Railroad Co.*, 497.

Ordinary care under the circumstances, is the legal standard in all cases. The significance of the term "ordinary care" varies with the attendant and surrounding circumstances. This care is to be exercised by the carrier of passengers at all times when, and at all places where the parties are in the relation of passenger and carrier, whether during transit, at the stations, upon platforms or in waiting rooms, and it applies to all matters which pertain to the business of the carrier of passengers.
Pomroy v. *B. & A. Railroad Co.*, 497.

In an action by a passenger against a railroad company where she recovered a verdict of $3000 for personal injuries sustained by her, *held:* That on the question of the defendant's liability the evidence did not manifestly show that the verdict was wrong, but that the damages awarded were excessive and unless remittitur be made the verdict must be set aside.
Pomroy v. *B. & A. Railroad Co.*, 497.

CONDITION—PRECEDENT AND SUBSEQUENT.

See CONTRACTS.

CONDITIONAL SALES.

See SALES.

CONFESSIONS.

See CRIMINAL LAW. WITNESSES.

CONSTABLE.

See ATTACHMENT. OFFICER.

CONSTITUTIONAL LAW.

See COMMERCE. EMINENT DOMAIN.

CONSTRUCTION.

See CONTRACTS. DEEDS. INSURANCE (ACCIDENT). STATUTES. WATERS AND WATER COURSES. WILLS.

CONTAGIOUS DISEASES STATUTE.

See PAUPERS.

CONTRACTS.

See BILLS AND NOTES. BROKERS. COVENANTS. DAMAGES. INSURANCE. INSURANCE (ACCIDENT). LOGS AND LUMBER. MORTGAGES. MUNICIPAL CORPORATIONS. SALES. STATUTE OF FRAUDS. WATERS AND WATER COURSES.

In the construction of contracts, it is a fundamental rule or consideration paramount to all others that the intention of the parties as gathered from the language of all parts of the agreement considered in relation to each other, and interpreted with reference to the situation of the parties and the manifest object which they had in view, must always be allowed to prevail unless some established principle of law or sound public policy would thereby be violated.
Bell v. *Jordan*, 67.

When a contract is partly written and partly oral, the written and the oral parts must be construed together in determining what the whole contract expresses.
Mercantile Exchange v. *Blunt*, 128.

When any material part of an entire contract which was legal when made, becomes illegal by reason of a statute subsequently enacted, such contract is thereby wholly terminated as soon as the statute takes effect although the time specified in the contract for its performance has not then fully expired.
Mercantile Exchange v. *Blunt*, 128.

When a contract legal at its inception becomes illegal by subsequent statutory enactment, no action can be maintained on such contract for a failure to continue to perform the conditions of such contract after the illegality has attached. *Mercantile Exchange* v. *Blunt*, 128.

While it is true that a contract which was legal at its inception may become illegal by subsequent statutory enactment, yet it does not follow that the acts done under the contract before the enactment of the statute are illegal. In such case the statute puts an end to the contract and no recovery can be had thereon for non-performance after the time when the contract is thus terminated. *Mercantile Exchange* v. *Blunt*, 128.

The plaintiff and defendant made a contract which was partly written and partly oral, wherein it was stipulated, among other things, that the plaintiff should employ its "system" in the collection of claims placed in its hands by the defendant. This contract was a continuing agreement and was intended to be operative until the same was cancelled by the parties or abrogated by law. The parties did not cancel the same. It was a part of the plaintiff's "system" that when judgments had been obtained against debtors, it would advertise such judgments for sale by public posters. By a statute subsequently enacted such advertising was made illegal. *Held:* (1) That the contract was an entire contract; (2) That the contract being an entire contract was wholly terminated as soon as the statute took effect; (3) That the plaintiff cannot recover from the defendant for non-performance of the conditions of the contract after the time when the statute went into effect.
Mercantile Exchange v. *Blunt*, 128.

By the strict rules of the common law in cases where services have been rendered or materials furnished in an honest endeavor to perform a contract, but are found to be at variance with the requirements of its express terms, and yet in some degree beneficial to the party to whom the services have been rendered or for whom the materials have been furnished, full performance was undoubtedly required as a condition precedent to the right of recovery. But in most jurisdictions the rigor of this common law rule has been relaxed even in courts of law, especially in building contracts and other like agreements, where the defendant is practically forced to accept the result of the work and relief is granted to the plaintiff by applying the equitable doctrine of substantial performance. *Water Co.* v. *Village Corporation*, 323.

Although a plaintiff cannot recover upon a contract from which he has departed, yet he may recover upon the common counts for the reasonable value of the benefit which upon the whole the defendant has derived from what the plaintiff has done. If a plaintiff endeavors in good faith to perform, and does substantially perform an agreement he is entitled to recover the fair value of his services having regard to and not exceeding the contract price after deducting the damages sustained by the defendant on account of the breach of the stipulations in the contract.
Water Co. v. *Village Corporation*, 323.

CO-TENANTS.

See TENANCY IN COMMON.

COURTS.

See BANKRUPTCY. CORPORATIONS. JUDGES. JURISDICTION. MANDAMUS. WAYS.

When the only evidence to fix a date is the recollection of witnesses, the court will not revise the judgment of the jury as to whose recollection is the better.
Casco v. *Limington*, 37.

The decisions of the Supreme Court of the United States relating to the interpretation of the Federal Constitution and federal statutes are conclusive upon State courts. *State* v. *Intox. Liquors*, 385.

COVENANTS.

It is a well settled general rule respecting the assignment of breaches of covenants that the plaintiff may allege the breaches generally by simply negativing the words of the covenant, special averments being required only when such a general assignment would not necessarily show a breach.
Damren v. *Trask*, 39.

In an action of covenant broken upon a contract under seal for the purchase of a quantity of clapboards, the plaintiffs in their declaration set out the covenant according to its terms, and alleged performance and breach as follows: "And the plaintiffs aver that, pursuant to such deed, they have done and performed all things by them according to the covenants aforesaid to be performed. Yet said defendant has not taken away from said mill the clapboards as aforesaid, and has not paid the plaintiffs therefor the sum of forty dollars per thousand, but wholly refuses and neglects to do so, and so has not kept his covenant aforesaid, but has broken the same."

Held: That the language of the plaintiff's assignment may reasonably be construed to signify a refusal to pay for the clapboards taken, as well as a refusal to pay for those not taken; and inasmuch as a breach of the contract would be established by evidence of a partial failure, as well as by evidence of a total failure in the respects named, it was a sufficient general assignment of the breach to allege an entire failure to take the clapboards, although a portion had in fact been taken, and to allege an entire failure to pay for them, although a portion had in fact been paid for.
Damren v. *Trask*, 39.

When land conveyed with covenants of warranty has passed by subsequent conveyances, with like covenants of warranty, through the hands of various

covenantees, the last covenantee or assignee in whose possession the land was when the covenant was broken can alone sue for the breach, and he has a right of action against any or all of the prior warrantors. No intermediate covenantee can sue his covenantor until he himself has been compelled to pay damages on his own account. *Thompson* v. *Richmond*, 335.

General covenants of warranty in a deed of land are prospective and run with the estate, and consequently vest in assignees and descend to heirs. But covenants of seizin and those against incumbrances are personal covenants in praesenti which do not run with the land and are not assignable by the general law. *Thompson* v. *Richmond*, 335.

The defendant Richmond conveyed certain premises to the plaintiff Thompson by warranty deed containing the usual covenant against incumbrances. At that time the premises were subject to a mortgage given by the defendant to one Crafts. The plaintiff subsequently conveyed the premises by warranty deed to one Helen C. Thompson who in like manner by warranty deed conveyed to one Bean. The latter by warranty deed conveyed the premises to one Israel Bean who died intestate leaving two sons, to whom the title descended and who had title and possession. The mortgage constituting the incumbrance was foreclosed and by assignment came to one Whittemore, who afterward quitclaimed his interest in the premises to the plaintiff Thompson in consideration of $250. The said owners of the premises had never been disturbed in their quiet possession of the premises by anyone claiming any right or title thereto by virtue of the Crafts mortgage, and the plaintiff had never been sued on his covenants in his deed of the premises to said Helen C. Thompson, and was never threatened with any suit or claim on account of such covenants by any person except said Whittemore. Prior to his purchase of the outstanding interest claimed by said Whittemore the plaintiff Thompson had suffered no damage and might never have sustained any. *Held:* That the voluntary act of the plaintiff Thompson in purchasing the outstanding title without the request or consent of the owners of the premises did not entitle him to recover the amount expended by him for that purpose. But as there was a breach of the covenant against incumbrances at the time the plaintiff received his deed from the defendant, it was also *held* that the plaintiff was entitled to recover nominal damages.
Thompson v. *Richmond*, 335.

The provisions of R. S., chapter 84, section 30, that "the assignee of a grantee, or his executor or administrator, after eviction by an older and better title, may maintain an action on a covenant of seizin or freedom from incumbrances contained in absolute deeds of the premises between the parties, and recover such damages as the first grantee might have recovered on eviction," etc., are not applicable to a case where there has been no eviction of the owners of the premises. *Thompson* v. *Richmond*, 335.

CRIMINAL LAW.

See INDICTMENT. WITNESSES.

The rule is so general as to have become practically universal that the testimony of a witness, since deceased, given at a trial in which he was cross-examined by the opposite party, or where there was an opportunity for cross-examination, is admissible in evidence at a subsequent trial of the same action or proceeding. *State* v. *Herlihy*, 310.

The testimony of a deceased witness, on a former trial of the same action, may be given in evidence, if the substance of it can be proved, although the exact language cannot be. That it is sufficient to prove the substance of the testimony of a deceased witness, as held by the court of Maine, is now the almost universal doctrine. *State* v. *Herlihy*, 310.

When a witness has died since a former trial of the same action or proceeding and the testimony of such deceased witness at the former trial was given in the presence of the accused where he had an opportunity to cross-examine such deceased witness, then the testimony of such deceased witness may be given in evidence at a subsequent trial of the same matter, by the judge before whom the case was originally tried when he can give the substance of the whole of such testimony although he cannot recollect the precise words of the deceased witness. *State* v. *Herlihy*, 310.

The plea of nolo contendere is an implied confession of the offense charged and the judgment of conviction follows that plea as well as the plea of guilty. In such case it is not necessary that the court should adjudge that the defendant is guilty, for that follows by necessary legal inference from the implied confession. *State* v. *Herlihy*, 310.

Objections to testimony, to be available upon exceptions, must be specific. *State* v. *Winslow*, 399.

Where a bill of exceptions states that "the charge is to be referred to as to what was said by the presiding Justice instead of the paragraphs quoted in the exceptions," and no part of the charge is printed or presented to the Law Court, the exceptions to the charge cannot be sustained. *State* v. *Winslow*, 399.

CRIMINAL PLEADING.

See CRIMINAL LAW. INDICTMENT. WITNESSES.

DAMAGES.

See COMMON CARRIERS. CONTRACTS. OFFICER. MUNICIPAL CORPORATIONS. SALES. TENANCY IN COMMON. WATERS AND WATER COURSES.

Where a plaintiff was in possession and occupation of a dwelling house as tenant in common and the defendant, her co-tenant, entered the premises and removed from the dwelling house certain of the doors and windows for the purpose of rendering the house untenantable, and the doors and windows could have been replaced within a few days at comparatively small cost. *Held:* That the plaintiff could not recover for damages which she might have avoided by reasonable diligence. *Davis* v. *Poland*, 192.

In an action to recover damages for breach of contract to purchase the plaintiff's steam laundry business in Camden, the plaintiff claimed as an element of damages that "after he had made a contract for the sale to the defendant of the laundry business he sold the house in which he lived in Camden for the sum of three hundred dollars or more less than it was fairly worth at the time of such sale, intending to move away from Camden because he believed it would be advantageous for the health of one member of his family," and offered to prove "that during the negotiation for the sale of the laundry business and prior to the completion of the contract he informed the defendant that his purpose in making the contract for the sale was so that he could move away from the town, which he desired to do for the reasons above stated, and that to do this he would be obliged to sell the house in which he was living, and gave these as the reasons why he should require the payment of five hundred dollars on account of the purchase before the contract was completed, which sum by agreement was afterwards reduced to two hundred and fifty dollars, and was paid by the defendant to the plaintiff, and that subsequently and after the contract was made, and before the alleged breach, he did sell the house and land for about three hundred dollars less than its fair market value." *Held:* That nothing appears in the evidence offered which naturally should have led the defendant to contemplate a loss to the plaintiff, in the contemplated sale of his house, the presumption being that the sale of the house would produce its market value.
Bennett v. *Dyer*, 361.

Damages which are purely theoretic and speculative are too indefinite and uncertain to be recoverd. *Chase* v. *Cochran*, 431.

DAMNUM ABSQUE INJURIA.

See WATERS AND WATER COURSES.

DAMS.

See WATERS AND WATER COURSES.

DEATH.

See STATUTE OF FRAUDS.

DECEIT.

See BILLS AND NOTES.

DECREE.

See EXECUTORS AND ADMINISTRATORS.

DEEDS.

See BONDS. COVENANTS. ESTOPPEL. FRAUD. MORTGAGES. REAL ACTIONS. REFORMATION OF INSTRUMENTS. WATERS AND WATER COURSES.

The rule that a later specific description controls a prior general description in a conveyance of land is limited to the evident subject matter of the conveyance. It does not require the inclusion of other matter.

Peasley v. *Drisko*, 17.

In the description of land in a deed the expression "the same deeded to me by B." may only indicate the source of the grantor's title, or locate and identify the parcel intended to be conveyed. It does not necessarily adopt all and singular the boundaries named in the deed referred to.

Peasley v. *Drisko*, 17.

The description of land in a deed was as follows: "Also one other lot of meadow land lying on the Main Indian River Stream the same deeded to me by John Burns, meaning and intending to convey all my right in fresh meadow lands on both streams." In the deed from Burns the land conveyed was described by metes and bounds which included meadow and upland. The meadow was only about one-fifth of the parcel described and the line of demarcation between the upland and the meadow was plainly visible. *Held:* That the subject matter of the conveyance was meadow land only; that the reference to the deed of Burns was merely to identify or show the location of the meadow land; and the upland included in the boundaries named in the Burns' deed, did not pass by the deed in question.

Peasley v. *Drisko*, 17.

In a deed of conveyance of land an exception in the covenant of freedom from incumbrances does not limit the extent or effect of the prior unconditional grant. *Martin* v. *Smith*, 27.

A bond or deed procured by fraud will not operate as an estoppel upon the party defrauded; relief may be granted under the circumstances at law, not only when fraud enters into it and vitiates the execution of the instrument, but when it consists in the misrepresentation of the nature and value of the consideration. *Goodwin* v. *Fall*, 353.

DEMAND.

See OFFICER.

DEMURRER.

See MANDAMUS.

DESCENT AND DISTRIBUTION.

See WILLS.

DIRECTING VERDICT.

See TRIAL.

DISMISSAL AND NONSUIT.

See CASES ON REPORT.

DISSEIZIN.

See ADVERSE POSSESSION.

DIVERSION OF WATERS.

See WATERS AND WATER COURSES.

DOMICILE.

See TAXATION.

DOWER.

See TRESPASS.

Until dower has been lawfully assigned the right thereto is a mere chose in action, and confers no title to or seizin of the land itself.

Munsey v. *Hanley*, 423.

EMINENT DOMAIN.

See WATERS AND WATER COURSES. WAYS.

The Constitution of Maine, Article I, section 21, provides that "private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." Under this section, the first proposition arising with respect to the taking of private property by the right of eminent domain is whether the public exigency or necessity requires it. This is a legislative question and is not open to judicial revision.

Hayford v. *Bangor*, 340.

The legislature by the enactment of section 89 of chapter 4 of the Revised Statutes in relation to the taking of "suitable lands for . . . . a public library building" by cities and towns, has not undertaken to say that any specific piece of land may be taken but has declared that the public exigency, requiring that some private property may be taken for "a public library building," exists and thus the exigency or necessity is established by the enactment of the statute authorizing the taking. In such a case, municipal officers do not pass upon the question of necessity as that has already been done by the legislature before the duties of the municipal officers under this section of the statute begin. *Hayford* v. *Bangor*, 340.

The legislature having the constitutional right of taking lands for a public purpose, also has the right to delegate such authority to municipal officers and the act of municipal officers in the exercise of the authority conferred by R. S., chapter 4, section 89, to take land for a public library building is the exercise of a legislative function and is not reviewable by the court.

Hayford v. *Bangor*, 340.

Not only is the question of exigency or necessity for the taking a matter for the legislature, or those to whom it delegates its authority, but also the extent to which property may be taken is also a matter for the legislature.

Hayford v. *Bangor*, 340.

ENTRY, WRIT OF.

See REAL ACTIONS.

EQUITY.

See ACTIONS. NUISANCE. REFORMATION OF INSTRUMENTS. TRUSTS. WATERS AND WATER COURSES.

A bill in equity cannot ordinarily be maintained for the mere violation of a municipal ordinance. The threatened act of violation must amount to a nuisance, if done. *Houlton* v. *Titcomb*, 272.

ESSENCE OF CONTRACT.

See SALES.

ESTATES.

See EXECUTORS AND ADMINISTRATORS. TENANCY IN COMMON. WILLS.

ESTOPPEL.

See BONDS. DEEDS. REFORMATION OF INSTRUMENTS. WAYS.

The general rule that a party will be estopped to question his own deed does not apply where the deed has been procured by fraud, as the doctrine is now well established that a conveyance obtained by fraud will not operate by way of estoppel against the grantor. *Goodwin* v. *Fall*, 353.

A grantee is not estopped by any act or declaration, of which he has no notice, of a grantor in possession at the time of the conveyance.
Chase v. *Cochran*, 431.

Statements not acted upon afford no ground for estoppel.
Chase v. *Cochran*, 431.

EVIDENCE.

See BILLS AND NOTES. CASES ON REPORT. COMMON CARRIERS. CONTRACTS. CRIMINAL LAW. EXCEPTIONS. LOGS AND LUMBER. NEGLIGENCE. REAL ACTIONS. WATERS AND WATER COURSES. WAYS. WILLS. WITNESSES.

In an action for injuries caused by a semaphore wire allowed to sag into a public street, the testimony of one witness that he done what would have removed the danger is not binding on the jury, though uncontradicted by any other witness, when circumstances tend to show that in fact the danger was not removed. *Logue* v. *Grand Trunk Ry. Co.*, 34.

Evidence of a self serving character is uniformly held to be inadmissible. This is a branch of the general rule that a man shall not be allowed to make evidence for himself. *Damren* v. *Trask*, 39.

In the consideration of the testimony of medical experts the test of consistency and reasonableness always having reference to the other testimony in the case, which their opinions may tend to corroborate or contradict, should be applied. *Chandler Will Case*, 72.

down by him from time to time in the book, and the book is turned over to the surveyor and retained by him and from it he makes up the final figures of the scale, such scale book though kept and made up by the assistant may be used by the surveyor to refresh his recollection of the scale and the testimony of the surveyor so given is competent evidence as to the quantity of logs cut or driven, and if not contradicted is conclusive.

M. D. & I. Co. v. *Allen Clothing Co.*, 257.

A defendant was tried upon an indictment charging him with keeping and maintaining a liquor nuisance. The State proved that during the period covered by the indictment, the defendant had paid a United States special tax as a retail liquor dealer. The defendant offered to show the circumstances in relation to his taking out this license, and why the tax had been paid by him, which evidence was excluded. The fact of the payment of this special tax was equivalent to an admission claimed to have been made. But it is always competent, not only to deny the fact of an admission, but as well, to explain its significance by showing other facts which may have that effect. The real question as to the importance and weight of the fact of the payment of this tax was as to the intent of the person who made the payment at the time and whenever the intent of a person is relevant to the issue that person may testify as to what his intention was, although the value of such testimony is always for the jury. *Held:* That the defendant was entitled to make an explanation of the fact relied upon by the State and to have the jury consider it in connection with that fact. *State* v. *Morin*, 290.

Admissions and declarations in disparagement of title are limited to those cases where the subject matter is capable of parol proof.

Munsey v. *Hanly*, 423.

When admissions and declarations do not relate to the declarant's possession, which is provable by parol, but to his legal title, which such evidence is not competent to defeat, then such admissions and declarations are not admissible. *Munsey* v. *Hanly*, 423.

In an action brought by the plaintiff to recover for services alleged to have been rendered on the defendant's farm at her request and for her benefit, the defendant admitted on cross examination that after the plaintiff's claim had been made known to her, she mortgaged the farm for $900 for the purpose of taking up a mortgage given by her husband on property belonging to him, but on re-direct examination, the inquiry whether in giving this mortgage she had any purpose to defeat the collection of the plaintiff's claim, was excluded by the court. *Held:* (1) That if the testimony be called purely collateral, it was not for the plaintiff to call out collateral facts which might prejudice and then object to an explanation of them; (2) That the testimony that the defendant had given the mortgage under such circumstances might operate

EXCEPTIONS.

See CRIMINAL LAW. EVIDENCE.

FISH AND FISHERIES.

See STATUTES.

(1). Section 1 of chapter 161 of the Public Laws of 1905, amendatory of section 34 of chapter 41 of the Revised Statutes reads, in part, as follows: "Towns at their annual meetings may fix the time in which clams may be taken within their limits, and the price for which its municipal officers shall within their limits, and the prices for which its municipal officers shall grant licenses or permits therefor, and the number to be granted; and when not so regulated by vote the municipal officers may fix the times and prices for which permits shall be granted, and the number to be granted. No person shall take clams within the limits of any towns having so regulated the taking of clams, without first obtaining a written license or permit from the municipal officers of such town, unless the clams are for the consumption of himself and family, or for the consumption or use of inhabitants of the town or any person temporarily resident therein. Whoever take clams contrary to the provisions of this section, shall for each offense, be fined not more than ten dollars, or imprisoned not more than thirty days."

(2). This amendatory-act was approved and took effect March 24, 1905. The annual town meeting of the town of Cushing for 1905, was held March 13, eleven days before this amendatory act took effect. At this meeting, the town took no action, in relation to clams, under the provisions of the aforesaid section 34 of chapter 41, R. S., which had not then been amended. April 15, 1905, the municipal officers of Cushing voted to issue not to exceed one hundred and fifty licenses to residents of the town of Cushing to take clams, and also voted not to issue licenses for that purpose to non-residents. The defendant was a resident of the town of Friendship and was arrested for taking clams within the limits of Cushing on October 26, 1905. The clams taken by the defendant were not for the consumption of himself and family, or for the consumption or use of the inhabitants of Cushing or any person temporarily resident therein.

(3). *Held:* (1) That R. S., chapter 41, section 34, as amended by the statute of 1905, is materially different from R. S., chapter 41, section 34, as it stood before the amendment; (2) That the non-action of the town at its annual meeting, March 13, 1905, in relation to clams, was equivalent to an affirmative action in favor of the free taking of clams in Cushing during the ensuing year; (3) That the omission on the part of the town to act was not made in contemplation of any power then in the municipal officers to act; (4) That the municipal officers of Cushing had no authority to act under the statute of 1905 at the time they assumed to act; (5) That such municipal officers will have no authority to act until after an annual meeting of the town to be held subsequently to March 24, 1905, at which no vote is taken to regulate the taking of clams under the terms of the statute of 1905.

State v. *Wallace*, 229.

FISH AND GAME.

See INDICTMENT.

FIXTURES.

Where a structure is affixed to the premises of another by a temporary occupant thereof, or by a licensee, it is deemed temporary in its purpose and not part of the realty. *Young* v. *Chandler*, 251.

Annexations with the consent of the owner or mortgagee of the realty, made by a bare licensee, are presumed to be removable and to remain the property of the one annexing, in the absence of facts indicating a contrary intention, even against a subsequent purchaser without notice.
Young v. *Chandler*, 251.

By agreement between the owner or mortgagee of the realty, personal property may retain its status after annexation, and such agreement or intention may be inferred by circumstances. *Young* v. *Chandler*, 251.

As to what are fixtures, substantially the same rules prevail between grantor and grantee, as between mortgagor and mortgagee, but different rules apply in relation to landlord and tenant from considerations of public policy and because of the temporary nature of the tenure.
Young v. *Chandler*, 251.

A plaintiff purchased from James Fyles, Sr., a greenhouse with its contents, consisting of potted plants, and plants maturely grown, but not severed from the soil, and loam prepared for gardening purposes. The greenhouse had been removed by the vendor from its original location and placed on posts upon land belonging to his son, James G. Fyles, with his consent, and had attached it to the barn, through which he cut a door and in the cellar of which he had set up a boiler and connected pipes into the greenhouse for heating the same, and subsequently he and his son carried on business as florists, using the greenhouse in connection therewith. The land on which this structure was erected had been previously mortgaged by James G. Fyles to the defendant. The mortgage was subsequently foreclosed and the equity purchased by the defendant, and James Fyles and son became his tenants at will until their tenancy was terminated by notice immediately before the date of the alleged trespass. The plaintiff had already removed the plants which had been in the greenhouse, and had taken down the structure. He was in the act of removing the glass frames when the defendant ordered him not to remove his property. The plaintiff testified that the defendant ordered him to remove nothing from the premises. The defendant testified that he forbade the removal of anything which was a part of the realty and that his interference was confined to the class of property which the plaintiff was at the time removing.

Held: (1) That the evidence should have been submitted to the jury.

(2) That the greenhouse was a part of the realty and belonged to the defendant.

(3) That the plants in the pots and fertilized loam remaining on the premises at the termination of the tenancy were not of the nature of fixtures but movable personal property.

(4) That the stock plants which though matured had not been severed from the soil, were emblements and the tenant or his vendee had the right to remove them during the term, or within a reasonable time after its termination. *Young* v. *Chandler*, 251.

FORFEITURES.

See TAXATION.

FORGERY.

See BILLS AND NOTES.

FRAUD.

See BILLS AND NOTES. BONDS. DEEDS. ESTOPPEL. REFORMATION OF INSTRUMENTS. SALES.

If a person states of his own knowledge material facts which are susceptible of knowledge, and the statement is made with an intent that another party shall act upon it, or in such a manner as would naturally induce him to act upon it, the statement so made, if false, is fraudulent both in morals and law. *Shoe Company* v. *Bechard*, 197.

If a person states to another person that which he knows to be false or recklessly states that which he does not know to be true concerning a material matter, and the person to whom such statement is made is justified by the circumstances connected with the matter concerning which such statement is made, in relying upon such statement without further investigation or inquiry, then such statement is characterized in law as a fraudulent representation. It is classified among the wrongs inflicted by one person upon another by means of deception, and in contemplation of law an intention to deceive is always involved. *Goodwin* v. *Fall*, 353.

A fraudulent purpose may be inferred from a wilfully false statement in relation to a material fact; and it is not always necessary to prove that the person making such statement knew that the facts stated by him were false. If he

recklessly states as of his own knowledge material facts susceptible of knowledge which are false, it is in effect, a fraud upon the party who relies and acts upon the statement as true.

Goodwin v. *Fall*, 353.

The original plaintiff, Newell Goodwin, by deed had conveyed to the defendant Fall certain land, also "all the growth" standing on a certain other lot of land bounded on the north "by the above described lot this day deeded to said Charles W. Fall" running easterly to a certain "spotted yellow birch tree standing by an elm." The defendant cut and removed certain growth standing on the last described land, and Mr. Goodwin brought an action of trespass quare clausum against the defendant, although the defendant had only operated within the limits of the last described land. After the commencement of the suit and before trial, Mr. Goodwin died, and the action was prosecuted by his executor. At the trial, the plaintiff claimed that another yellow birch tree standing within one or two rods from a "scraggy maple" about thirty rods westerly from the "spotted yellow birch by the elm," was the monument for the northeasterly corner of the last described land intended and agreed upon by the parties before the deed was executed, and that Mr. Goodwin was induced to assent to the bound described in the deed by means of the defendant's positive assurance that it was only "between one and two rods" from the "scraggy maple." The testimony of the magistrate who wrote the deed was offered in behalf of the plaintiff to show that the defendant made fraudulent representation to the grantor, Mr. Goodwin, respecting the location of the "spotted yellow birch near the elm," for the purpose, as it was claimed, of inducing Mr. Goodwin to accept that monument as the northeast corner to be mentioned in the deed, and that Mr. Goodwin was thereby induced to execute the deed as it was written with calls embracing the growth on six acres more than he intended to sell to the defendant. The plaintiff claimed that this evidence considered in connection with the other evidence, was sufficient to create an estoppel against the defendant and preclude him from claiming the growth on land embraced in the deed thus obtained by means of a false representation, and that the plaintiff was not estopped by a deed thus obtained by fraud. The presiding Justice excluded the evidence of the magistrate and ordered a verdict for the defendant. *Held:* That the evidence of the magistrate should have been admitted and the case submitted to the jury upon the question of estoppel.

Goodwin v. *Fall*, 353.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FRAUDULENT REPRESENTATIONS.

See FRAUD.

GAME.

See FISH AND FISHERIES. INDICTMENT.

GREAT PONDS.

See WATERS AND WATER COURSES.

GUARDIAN AND WARD.

See WILLS.

HIGHWAYS.

See MUNICIPAL CORPORATIONS. NEGLIGENCE. WATERS AND WATER COURSES. WAYS.

HOLMES NOTES.

See BILLS AND NOTES.

HORSE.

See NEGLIGENCE.

HUSBAND AND WIFE.

See WILLS.

ILLEGAL CONTRACTS.

See CONTRACTS.

INDICTMENT.

In an indictment under R. S., chapter 41, section 17, it was charged that the respondent, at the time and place named therein, "did have in her possession sixty-seven live lobsters and 53 cooked lobsters, each less than ten and one-half inches in length, then and there measured in manner as follows:" then followed the language of the statute as to the method by which the lobsters were measured. To this indictment the respondent filed a general demurrer.

Held: (1) That the indictment does not charge two offenses; (2) That as the statute now reads, it is not necessary to allege that the lobsters were not liberated alive, and if such lobsters were liberated alive, that fact may be shown in defense; (3) That it was not necessary to allege that the live lobsters were less than ten and one-half inches in length when caught, but that it was necessary to make this allegation with reference to the cooked lobsters; (4) That the indictment must be regarded as charging the defendant as having in her possession the sixty-seven live lobsters only, and to that extent the indictment was good.

State v. *Brewer*, 293.

INJUNCTION.

See NUISANCE. WATERS AND WATER COURSES.

INSANE PERSONS.

See PAUPERS.

INSOLVENCY.

See BANKRUPTCY. CORPORATIONS.

INSURANCE.

See MORTGAGES.

When it is not stipulated in a policy of fire insurance that the insurance shall be payable to a mortgagee, the mortgagee acquires no lien on such policy until and unless "he files with the secretary of the insurance company a written notice, briefly describing his mortgage, the estate conveyed thereby, and the sum remaining unpaid thereon," as provided by Revised Statutes, chapter 49, section 54. *Knowlton* v. *Black*, 503.

When a mortgagee has acquired a lien on a policy of fire insurance under the provisions of Revised Statutes, chapter 49, section 54 and the mortgagor does not consent in writing that the insurance shall be paid to the mortgagee, the lien is lost unless the mortgagee within sixty days after the loss enforces the lien by a suit against the mortgagor and against the insurance company as his trustee, as authorized by Revised Statutes, chapter 49, section 55.

Knowlton v. *Black*, 503.

INSURANCE (ACCIDENT).

Where a plaintiff was insured by an accident policy containing a provision for illness indemnity, with a clause that in case of illness from rheumatism, and other diseases named, the limit of the company's liability should be one-tenth of the amount which would be otherwise payable under the policy, and the plaintiff was sick with rheumatic fever, *Held:* That the disease with which the plaintiff suffered although acute, was one form of rheumatism and must be considered to have been included within the meaning of the word "rheumatism" as it was used in the policy.

Holmes v. *Casualty Co.*, 287.

INSTRUCTIONS.

See WATERS AND WATER COURSES.

Where in an action for damages sustained by a lower riparian owner caused by the opening of the gates of a mill dam above, there was no averment in the plaintiff's declaration and no suggestion of evidence tending to prove that the defendant's mill dam and mills were not adapted in magnitude to the size and capacity of the stream and the quantity of water usually flowing in it, the instructions to the jury must be presumed to have been given upon the assumption that the defendant's works were adapted in size to the usual flow of the stream. *Barker* v. *French*, 407.

INTEREST.

See STATUTES.

INTERSTATE COMMERCE.

See COMMERCE.

INTERLOCUTORY MOTIONS.

See CASES ON REPORT. MOTIONS.

INTOXICATING LIQUORS.

See COMMERCE. EVIDENCE.

JOINT TENANTS.

See TENANCY IN COMMON.

JUDGES.

See MANDAMUS. TRIAL. WAYS.

It is a maxim of the law that "a person ought not to be judge in his own cause because he cannot act both as judge and party," and this maxim applies in all cases where judicial functions are to be exercised, whether in proceedings of inferior tribunals or in courts of last resort.

Conant's Appeal, 477.

Under the provisions of Revised Statutes, chapter 104, section 17, authority to issue writs of mandamus is vested in each Justice of the Supreme Judicial Court, to be exercised by him individually and in any county in the State.

Hamlin v. *Higgins*, 510.

JUDGMENT.

See COURTS.

JURISDICTION.

See BANKRUPTCY. JUDGES. MANDAMUS. NUISANCE. WAYS.

The very foundation of judicial proceedings is jurisdiction, and the question of jurisdiction may be raised at any stage of the proceedings by any suggestion that will apprise the court of the want of jurisdiction.

Moody v. *Development Co.*, 365.

JUSTICES.

See JUDGES. MANDAMUS.

LAND AGENT.

See PUBLIC LANDS.

LANDLORD AND TENANT.

See FIXTURES.

LANDS RESERVED FOR PUBLIC USES.

See PUBLIC LANDS.

LAPSED LEGACY.

See WILLS.

LAW COURT.

See CASES ON REPORT.

"LAWS OF NATURE."

See EVIDENCE.

LICENSE.

See EVIDENCE. NUISANCE.

LIENS.

See INSURANCE. LOGS AND LUMBER. MORTGAGES. REPLEVIN.

LIFE ESTATE.

See WILLS.

LIMITATION OF ACTIONS.

See ADVERSE POSSESSION. BILLS AND NOTES. MANDAMUS. REAL ACTIONS

LOBSTERS.

See INDICTMENT.

LOGS AND LUMBER.

See EVIDENCE.

The scale bill of a surveyor agreed upon between the parties in a logging or log-driving operation or similar transaction requiring a survey, is, in the absence of fraud, binding upon them, and the scale book is evidence of the scale. *M. D. & I. Co.* v. *Allen Clothing Co.*, 257.

When a surveyor agreed upon by the parties to scale logs employs an assistant to count and scale the logs under his direction, and the surveyor from time to time tests the scale made by his assistant, and the assistant has a book in which he keeps a daily record of the count and scale made by him and put down by him from time to time in the book, and the book is turned over to the surveyor and retained by him and from it he makes up the final figures of the scale, such scale book though kept and made up by the assistant may be used by the surveyor to refresh his recollection of the scale and the testimony of the surveyor so given is competent evidence as to the quantity of logs cut or driven, and if not contradicted is conclusive.

M. D. & I. Co. v. *Allen Clothing Co.*, 257.

When a dam and improvement company is authorized to collect tolls on logs driven over its dams at a rate "not exceeding fifteen cents per thousand feet stumpage scale," and such company and the owner of the logs driven over such dams did not expressly agree upon a surveyor or scaler to determine the quantity of logs driven over such dams, it must be deemed that there was an implied contract that they would be bound by a scale made in accordance with the method customarily adopted by surveyors or scalers and between landowners and operators and recognized as the stumpage scale.

M. D. & I. Co. v. *Allen Clothing Co.*, 257.

When by its charter a dam and improvement company is given a lien for tolls on logs driven down a stream which such company is authorized to improve "for the purpose of facilitating the driving of logs and other lumber down the same," the party whose interest is directly affected by such lien must be considered liable for such tolls.

M. D. & I. Co. v. *Allen Clothing Co.*, 257.

When a contract or permit for cutting, hauling or driving logs has been assigned, the assignee becomes a party in interest and his rights under the contract are subject to the conditions and burdens of the contract.

M. D. & I. Co. v. *Allen Clothing Co.*, 257.

When a dam and improvement company authorized by its charter to collect tolls for logs and other lumber driven down a stream improved by it, undertakes to collect such tolls it is mainly a question of fact whether or not the improvements made by the company have facilitated the driving of logs. If the improvements are of little value, and there is no substantial compliance with the terms of its charter, such company cannot maintain an action for the collection of tolls. But if the improvements are substantial and facilitate the driving of logs, then they are sufficient to comply with the condition upon which toll may be demanded, although it might be possible for the owner or driver of the logs to drive the same at times without the aid of improvements.

M. D. & I. Co. v. *Allen Clothing Co.*, 257.

MANDAMUS.

The writ of mandamus is an extraordinary writ to be issued, not to vindicate a mere abstract, theoretical right, but only when necessary and effective to secure some substantial relief or benefit.

Edwards Mfg. Co. v. *Farrington*, 140.

The writ of mandamus should not be issued to compel municipal assessors of taxes to act upon an application made to them for an abatement of a tax, when it appears from the petition for the writ that the application is barred by the unjustified omission of the applicant to furnish the assessors with a list of his taxable property "at the time appointed."

Edwards Mfg. Co. v. *Farrington*, 140.

The authority of the court to issue writs of mandamus is vested in each Justice thereof, to be exercised by him, not as presiding Justice in a regular term of court, but individually and in any county whether holding a term of court there or not. *Hamlin* v. *Higgins*, 510.

A petition for the writ of mandamus may be presented to any Justice in any county in term time or vacation, and such Justice may take cognizance of the petition whatever the county of its origin and although some other Justice may be then in that county. *Hamlin* v. *Higgins*, 510.

Upon receiving a petition for the writ of mandamus, the Justice may order notice of hearing thereon returnable before him in that or any other county at a time and place to be fixed by him.

Hamlin v. *Higgins*, 510.

At the hearing upon a petition for the writ of mandamus, the only question to be determined is the sufficiency of its allegations. Their truth or falsity will not then be considered unless under agreement of the parties that the whole question of the issuance of the peremptory writ be then determined.

Hamlin v. *Higgins*, 510.

If the allegations in a petition for the writ of mandamus are adjudged upon hearing to be sufficient, the Justice may issue the alternative writ of mandamus returnable before him in any county at a time and place to be fixed by him. *Hamlin* v. *Higgins*, 510.

The alternative writ of mandamus is not an original writ nor a final writ of execution, but is of the nature of an interlocutory rule to show cause, and is sufficiently authenticated by the signature of the Justice issuing it, without the seal of the court and without the signature of any clerk of the court.

Hamlin v. *Higgins*, 510.

It is not necessary that the petition or the alternative writ of mandamus be filed or entered upon the docket of the court in the clerk's office in any county prior to the making a final order after the return of the alternative writ. The case remains in the control of the single Justice in whatever part of the State he may be. *Hamlin* v. *Higgins*, 510.

When there are several respondents to a petition for the writ of mandamus, and one or more of them acknowledge service of the order of notice, the other respondents cannot require such order to be actually served upon those acknowledging such service. *Hamlin* v. *Higgins*, 510.

Respondents are to make return to the alternative writ of mandamus at the time and place appointed therefor, but the Justice issuing the writ does not lose jurisdiction of the case by not being personally present at such time and place. *Hamlin* v. *Higgins*, 510.

On the return to the alternative writ of mandamus, the petitioner may demur to or traverse such return, and then a time and place in any county may be fixed by the Justice for hearing thereon. *Hamlin* v. *Higgins*, 510.

If upon hearing on the return to the alternative writ of mandamus, the Justice orders the peremptory writ to issue he may direct from what county it shall issue from the clerk's office of the court and be made returnable. The case may then be entered on the docket of the court in that county and the papers be there filed. *Hamlin* v. *Higgins*, 510.

Upon the return to the alternative writ of mandamus, the petitioner may reply to the return, and the Justice has power to allow amendments of the allegations and directions in the alternative writ which do not introduce any new ground for the writ, nor authorize a more stringent command in the peremptory writ. *Hamlin* v. *Higgins*, 510.

If at the hearing upon the return to the alternative writ of mandamus the petitioner states that he waives some particular allegation in the alternative writ and offers no proof of it, the respondents have no need to disprove it. *Hamlin* v. *Higgins*, 510.

A petition for a writ of mandamus addressed "To the Hon. Justice of the Supreme Judicial Court now being holden at Bangor within and for the County of Penobscot" is not necessarily addressed to the court then in session, and may be considered as addressed to the Justice individually. *Hamlin* v. *Higgins*, 510.

An order of notice upon a petition for a writ of mandamus headed "Supreme Judicial Court, Penobscot County, April Term, 1907" and returnable "at the Supreme Judicial Court now in session at Bangor in and for said County of

MASTER AND SERVANT.

MEASURE OF DAMAGES.

See SALES.

MEDICAL EXPERTS.

See EVIDENCE.

MENTAL CAPACITY.

See EVIDENCE. WILLS.

MILL ACT.

See WATERS AND WATER COURSES.

MINISTERIAL AND SCHOOL LANDS.

See PUBLIC LANDS.

"MONEY AT INTEREST."

See TAXATION.

MONEY LENT.

See STATUTES.

MORTGAGES.

See ACCORD AND SATISFACTION. DEEDS. REPLEVIN.

MORTGAGOR AND MORTGAGEE.

See FIXTURES.

MOTIONS.

See CASES ON REPORT.

A motion under Revised Statutes, chapter 84, section 83, to require a party to produce books and papers for inspection is merely interlocutory. It may be granted or denied without concluding either party upon any question of law or fact involved in the issue to be tried.
Casualty Co. v. *Granite Co.*, 148.

MUNICIPAL CORPORATIONS.

See EMINENT DOMAIN. EQUITY. FISH AND FISHERIES. MANDAMUS. NEGLIGENCE. NUISANCE. OFFICERS. PAUPERS.

A public officer appointed by a municipality, though subject in some respects to the orders of the municipality cannot recover of the municipality any compensation for his official services unless a compensation therefor has been fixed by law for the municipality to pay, and then only to the extent so fixed. He cannot recover anything upon a quantum meruit count.
Stephens v. *Old Town*, 21.

The Superintendent of Streets in Old Town in 1904-5 was not an employee or agent of the city entitled to damages for breach of contract for employment, but was a public officer possessing official powers and charged with public duties. *Stephens* v. *Old Town*, 21.

The street board of a city though authorized by statute to "make all contracts for labor" on the streets was not thereby authorized to fix the compensation of the superintendent of streets. *Stephens* v. *Old Town*, 21.

The action of a city council in allowing from time to time as presented, bills of the superintendent of streets for services in the care of streets did not fix any salary or compensation for that office.
Stephens v. *Old Town*, 21.

Although a plaintiff may have been de jure superintendent of streets in a city, yet he cannot recover salary when it does not appear that any salary was fixed by law for that office to be paid by the city.
Stephens v. *Old Town*, 21.

Where a plaintiff had been appointed superintendent of streets in a city, but in fact rendered no service as such superintendent, although he was prepared and desired to perform all the duties of the office but was prevented from so

MUNICIPAL OFFICERS.

See WAYS.

NAG.

See NEGLIGENCE.

"NATURAL LAWS."

See EVIDENCE.

NAVIGABLE WATERS.

See NUISANCE.

A public way cannot be located across flats without authority therefor first obtained from the legislature. *Chase* v. *Cochran*, 431.

The owner of flats has in them an estate in fee, subject only to the public rights of fishing, fowling and passing over them in boats, and may maintain trespass quare clausum for any injury done to his possession of the same. *Chase* v. *Cochran*, 431.

NEGLIGENCE.

See BILLS AND NOTES. COMMON CARRIERS. MASTER AND SERVANT. RAILROADS.

When it is proved that a mechanical appliance had at one time been broken and thereby had become dangerous, the burden of evidence is upon the party alleging that the danger was afterward removed. *Logue* v. *Grand Trunk Ry. Co.*, 34.

It is a well settled and familiar rule that in cases of negligence the evidence must be confined to the time and place and circumstances of the injury, and the fact that the same person had been guilty of negligence on certain other specified occasions can have no legitimate bearing upon the question of his carefulness or competency at the time in controversy. *Damren* v. *Trask*, 39.

It is not negligence per se to leave a horse attached to a carriage in the street unhitched. *Moulton* v. *Street Railway*, 186.

The court will not enjoin the proposed erection of a structure which may be a nuisance, unless the right threatened by such structure is clear, and the fact clearly established that the proposed structure will infringe such right; otherwise a plaintiff must first establish his claim at law.
Whitmore v. *Brown*, 47.

The mere fact that structures are, or will be, erected and maintained on one's own land without the license required by statute or ordinance, does not make them outlaws, to be lawfully destroyed by anyone, or abated at the private suit of any person. *Whitmore* v. *Brown*, 47.

The mere fact that structures upon the land of the person maintaining them, lessens the commercial value of other lands, or the enjoyment of them by the owners, does not make such structures subject to abatement by force or by suit. *Whitmore* v. *Brown*, 47.

No one can lawfully erect or maintain a wharf upon his own flats upon tide water without a license from the municipal officers of the town as provided in R. S., chapter 4, sections 96 to 99 inclusive, but if so erected and maintained, the wharf cannot be abated except at the suit of the public, or of some private person showing that it infringes some particular right of his own, distinct from his share in the public right. *Whitmore* v. *Brown*, 47.

That a wharf illegally erected is unsightly and obstructs the view from an adjoining residence lot and thereby reduces the value of the residence, does not infringe any legal right of the owner or tenant of such lot, and does not give him any right to an abatement by suit or otherwise.
Whitmore v. *Brown*, 47.

That a wharf obstructs navigation, or boating facilities, on the tide water in front of an adjoining residence lot is an infringement of a public right only, and does not give the owner or tenant of such lot a right to an abatement even though the wharf thereby lessens the value of the lot.
Whitmore v. *Brown*, 47.

Where a lot of land borders on tide waters the owner or tenant has the right of access to, and departure from, the lot by water, and such right is a private right peculiar to such owner or tenant distinct from the public right of navigation, and if the unlicensed wharf obstructs such right of access and departure, it is to that extent a nuisance which can be abated at the suit of such owner or tenant. *Whitmore* v. *Brown*, 47.

Where a wharf illegally erected infringes no private legal right, except possibly the right of access to, and departure from, a plaintiff's land by water, and such infringement is not clearly established, an injunction will not be granted even against a proposed extension of the wharf, but such plaintiff will be remitted to legal remedies. *Whitmore* v. *Brown*, 47.

R. S., chapter 4, section 93, among other things, provides as follows: "Towns, cities and village corporations may make by-laws or ordinances, not inconsistent with law, and enforce the same by suitable penalties, for the purposes and with the limitations following: . . . . (VIII.) Respecting the erection of buildings therein and defining their proportions, dimensions and the material to be used in the construction thereof; and any building erected contrary to a by-law or ordinance adopted under this specification is a nuisance." *Houlton* v. *Titcomb*, 272.

A thing is not a nuisance simply because a municipal ordinance declares it to be such, but the State may declare what may, at law, be deemed a nuisance, and this State has declared that buildings erected contrary to ordinances legally made in accordance with the provisions of R. S., chapter 4, section 93, are nuisances. *Houlton* v. *Titcomb*, 272.

A court in equity at common law has jurisdiction to restrain nuisances, and has specific jurisdiction in this State "in cases of nuisance and waste." Therefore equity will take jurisdiction for the threatened violation of a municipal ordinance when such violation contemplates an act which is a nuisance in law, not because the act is a violation of the ordinance but because it is a nuisance. *Houlton* v. *Titcomb*, 272.

A municipal corporation as the representative of the equitable rights of its inhabitants may enjoin nuisances affecting matters with reference to which a portion of the power of the State has been confided to it. The prevention of fires is a matter which the State has confided to towns.
Houlton v. *Titcomb*, 272.

OFFICERS.

See ATTACHMENT. EMINENT DOMAIN. FISH AND FISHERIES. MUNICIPAL CORPORATIONS. WAYS.

A public officer for the performance of his official duties is entitled to such compensation only as is fixed by law for that office. If no compensation has been thus fixed he is not entitled to any.
Stephens v. *Old Town*, 21.

(1.) A plaintiff was a judgment creditor of one H. L. S. The original writ in the action in which the plaintiff recovered his judgment against H. L. S. was placed in the hands of the then sheriff of Washington County who attached certain personal property thereon and made return as follows:

"WASHINGTON, ss. APRIL 17, A. D. 1902.
"At 9.45 o'clock in the forenoon by virtue of the within writ, I attached one carpet, one couch, one Morris chair, two rugs, four rockers, one table, one hat-tree, one hardwood chamber set, one rolling top desk, one table, one

bookcase, six chairs, one safe and one blank cabinet in said County of Washington, and within five days after the above attachment I filed in the office of the Clerk of the Town of Machias a true and attested copy of so much of this return as relates to said attachment, with the value of said defendant's property, which I am herein commanded to attach, the names of the parties, the date of the writ and the court to which the same is returnable; and on the same day I gave to the within named defendant a summons in hand for his appearance at court."

(2.) After the plaintiff had obtained his judgment and execution thereon, he placed the execution in the hands of a deputy of the defendant sheriff with instructions to make demand, within thirty days after the date of the judgment, upon the attaching officer, whose term of office had then expired, for the personal property attached on the original writ. *Held*: (1) That the attachment made by the attaching officer was valid; (2) That it was the duty of the defendant's deputy to make demand on the attaching officer, within thirty days after the date of the judgment, for the personal property attached on the original writ; (3) That the defendant's deputy failed to make such demand; (4) That as the failure of the defendant's deputy to make such demand released the attaching officer from all liability relating to the attachment and deprived the plaintiff of any right of action against the attaching officer, the defendant sheriff became liable for all damages occasioned by the neglect of his deputy. *Kelley* v. *Tarbox*, 119.

All acts of officials are not official acts, but only such as are done under some authority derived from the law, or in pursuance of prescribed duties.

Chase v. *Cochran*, 431.

OPTION.

See SALES.

ORDINANCES.

See EQUITY. MUNICIPAL CORPORATIONS. NUISANCE.

PASSENGERS.

See COMMON CARRIERS.

PAUPERS.

Expenses incurred by a town to protect its inhabitants from the danger of injury by insane paupers are not recoverable under the pauper statute, R. S., chapter 27, section 37. *Casco* v. *Limington*, 37.

PRINCIPAL AND AGENT.

See BROKERS. PUBLIC LANDS.

PRIVILEGED COMMUNICATIONS.

See WITNESSES.

PROMISSORY NOTES.

See BILLS AND NOTES.

PROVERBS.

"The crocodile is always at the other ford."

Eastern Proverb.

"When the broth is eaten the spoon is forgotten."

Spanish Proverb.

"In trying to straighten her horns, the cow was killed."

Japanese Proverb.

"Two arrows in the quiver are better than one; and three are better still."

Oriental Proverb.

PUBLIC EXIGENCY.

See EMINENT DOMAIN.

PUBLIC LANDS.

Public Laws of 1830, chapter 480, section 2, empowered the land agent to select and designate for public uses one thousand acres of land to average in quality and situation in each township, which is or may be surveyed into small lots for sale or settlement. *Held:* That a township, which had been surveyed for sale into lots mostly of six hundred and seventy acres each, fell within this description. *Stetson* v. *Grant*, 222.

Under the provisions of Public Laws of 1830, chapter 480, section 2, empowering the land agent to select and designate for public uses one thousand acres of land to average in quality and situation in each township, the land agent's return stated that he had selected land of an average value with the rest of the township.

(1.) *Held:* That this showed a substantial compliance with the requirements of the statute.

(2.) *Held:* Also that the land agent was made the judge of the quality and situation of the land, and that his decision made in good faith cannot be reviewed or reversed. *Stetson* v. *Grant*, 222.

PUNCTUATION.

See STATUTES.

QUIETING TITLE.

A petition to quiet a title to real estate, under R. S., chapter 106, sections 47 and 48, cannot be maintained, when it appears that the respondent, after the filing of the petition, conveyed his interest in the real estate or was adjudged a bankrupt. *Allen* v. *Foss*, 163.

Whether a devisee, before probate of will, can make petition to quiet title to real estate, under R. S., chapter 106, sections 47 and 48, and after probate, maintain the petition, *quaere.* *Allen* v. *Foss*, 163.

RAILROADS.

See COMMON CARRIERS. MASTER AND SERVANT. TAXATION.

The plaintiff was traveling along a highway when she discovered extending nearly across the road a locomotive upon the defendant's railroad. Finding that the locomotive obstructed so much of the highway that it was not safe to pass, she stopped some four hundred feet from the crossing and remained there ten or fifteen minutes. She then moved up to within three hundred and fifteen feet of the crossing and there waited a period of fifteen or twenty minutes more, until the sound of the whistle frightened her horse and caused the injury of which she complained. The horse was frightened by four blasts of the whistle sounded for the purpose of calling in the brakeman who had been sent out to flag the trains.

Held: (1) That under the circumstances of this case, it was not negligence on the part of the defendant to blow its whistle according to the rules and regulations governing the operation of its trains; (2) That the injuries received were due to one of that class of accidents that happen without the fault of anyone. *Berry* v. *Railroad Co.*, 213.

REAL ACTIONS.

See ADVERSE POSSESSION. QUIETING TITLE.

The legal presumption is that by a deed of conveyance of land, duly executed and recorded, the title passed, that the grantor had sufficient title to enable him to convey, and that the seizin and the title correspond with each other. *Stetson* v. *Grant*, 222.

The plaintiff in a real action is bound to prove his allegations of seizin within twenty years. *Stetson* v. *Grant*, 222.

In a real action in order to disprove the allegations of seizin within twenty years, the defendant under the general issue may show title in a third party under whom he does not claim. Such evidence is received not for the purpose of showing a better title in the tenant, but to show no title in the demandant within the twenty years. *Stetson* v. *Grant*, 222.

In a real action if seizin within twenty years is shown by the plaintiff, the defendant under the general issue cannot show a subsequent conveyance to a third party under whom he does not claim. *Stetson* v. *Grant*, 222.

In order to recover in a writ of entry the demandant must prove not only a right of entry at the time of the commencement of his action, but also such an estate in the premises as he has alleged. *Stetson* v. *Grant*, 222.

REAL ESTATE.

See FIXTURES.

RECEIVERS.

See BANKRUPTCY. CORPORATIONS.

RESCISSION.

See SALES.

RECORDS.

See TAXATION. WITNESSES.

Without statutory authority one who was formerly a town clerk, but who is no longer in office, cannot amend a town record made by him when clerk. *Baker* v. *Webber*, 414.

Revised Statutes, chapter 4, section 10, providing that "when omissions or errors exist in the records or tax lists of a town or school district, or in returns of warrants for meetings thereof, they shall be amended, on oath, according to the fact, while in or after he ceases to be in office, by the officer whose duty it was to make them correctly," is limited to amendments made under the sanction of an oath. *Baker* v. *Webber*, 414.

A petition was presented to the Supreme Judicial Court by the plaintiff and two others, formerly selectmen of the town of Cape Elizabeth, praying that they be allowed to amend their return upon a petition for a certain town way in said Cape Elizabeth and that the clerk be ordered to amend the record of the selectmen's return. Motions were made that the petition be dismissed which motions were overruled and exceptions taken. *Held:* That a decision of the case was unimportant and the petition should be dismissed.
Jordan, Petitioner, 483.

RECOUPMENT.

See CONTRACTS.

REFORMATION OF INSTRUMENTS.

See ACTIONS.

When a grantor conveys "all the growth" standing on a lot of land described by metes and bounds, but at the time the deed is executed the grantor is fraudulently induced by the grantee to substitute for one of the monuments previously agreed upon, another monument so that the deed as actually written embraces the growth on six acres more than the grantor intended to convey and the grantee, before the commencement of an action of trespass quare clausum against him by the grantor, cuts and removes all the growth from the six acres and has no further interest in that part of the lot, there is no necessity or occasion for a proceeding in equity to reform the deed.
Goodwin v. *Fall*, 353.

"RELATIVE."

See WILLS.

REMAINDER.

See WILLS.

REPLEVIN.

If the purchaser of goods under a conditional sale mortgages them before the instrument of sale is recorded in the town clerk's office, such mortgage is not a defense in an action of replevin by the seller against the purchaser. The rights of the mortgagee are not affected. But the mortgagor cannot set up the mortgage lien created by himself as a defense.

Carriage Co. v. *Bartley*, 492.

REPORT.

See CASES ON REPORT.

RESERVATIONS.

See WATERS AND WATER COURSES

RETURN.

See ATTACHMENT. OFFICER

REVENUE.

See TAXATION.

REVIEW.

See COURTS. EMINENT DOMAIN. PUBLIC LANDS.

A petition for a review of a civil action is a statutory remedy to be granted only "in the special cases" named in the statute, R. S., chapter 91, section 1.

Donnell v. *Hodsdon*, 420.

Under Revised Statutes, chapter 91, section 1, clause VII, a petition for a review of a civil action must allege and prove to the satisfaction of the court at nisi prius three propositions, viz: (1) That justice has not been done; (2) That the consequent injustice was through fraud, accident, mistake or misfortune; and (3) That a further hearing would be just and equitable.

Donnell v. *Hodsdon*, 420.

A ruling that the negligence of his attorney entitles a petitioner to a review is erroneous, as it ignores the other requisites of the statute, R. S., chapter 91, section 1, clause VII.

Donnell v. *Hodsdon*, 420.

RIPARIAN PROPRIETORS.

See WATERS AND WATER COURSES.

ROADS.

See WAYS.

SALES.

See DAMAGES. REPLEVIN.

(1) Defendants made a contract to sell plaintiff 5000 cases of "High Maine Standard Corn" from the crop of 1903, but in order to safeguard the transaction against extraordinary contingencies, they qualified the proposition to sell 5000 cases by stipulating that "in case of short crop owing to circumstances beyond the control of the packer, 70% delivery to be guaranteed buyer, and 10% of purchase price to be paid buyer by seller for any quantity delivered short of the 70% guaranteed by this contract." *Held:* That it was not the intention of the parties that the defendants should be relieved of the obligation of their guaranty to deliver 70% by any other circumstances than that of a short crop, and in that event the intention disclosed by the contract is that the defendants were to deliver such part of the 70% as the condition of the crop would enable them to provide.

(2) Although the crop of 1903 was short, it was not a total failure, but was such as would have enabled the defendants to deliver 40 per cent of the 5000 cases called for by the contract, or 2000 cases. *Held:* That it was the duty of the defendants to deliver that amount and to pay 10 per cent of the purchase price of the balance. The necessary shortage was only 30 per cent and not 70 per cent of the 5000 cases sold.

(3) For failure to deliver the 2000 cases which they might have delivered, *Held:* That the defendants are liable to pay as damages, the difference between the contract price of the corn and the market value of the same at the time and place stipulated for delivery, and for failure to deliver the balance of 30 per cent which they were unable to deliver, they are liable to pay 10 per cent of the purchase price as liquidated damages with interest on both of said sums from the date of the breach to the time of judgment.
Bell v. *Jordan*, 67.

The defendant, in February 1904, agreed to deliver to the plaintiffs ten carloads of potatoes at New York City in the following March; and by another contract in the same February to deliver ten other cars of potatoes at New York City in the same month of March; and by another contract in the same February, to deliver fifteen other cars of potatoes to the plaintiffs at New York

City in the same March or the first of April. And in the last case, the proposition accepted was to deliver in March if the defendant could get the cars. All the potatoes were to be shipped on the plaintiffs' orders, and were to be shipped from Aroostook County. Up to the night of March 24, only five cars had been ordered out by the plaintiffs, and they, one each day from March 22. On March 24, the defendant refused to perform the contracts, for the alleged reason that the plaintiffs had not seasonably ordered out the potatoes. *Held:*

(1.) That the plaintiffs having the option when to order out the potatoes, it was their duty seasonably to order the shipments, so that the defendant could secure the cars, prepare them for use, load them, and deliver in New York, in the month of March, all the potatoes contracted to be delivered there under the first two contracts.

(2.) That the evidence shows clearly that the plaintiffs failed to order out the potatoes in season for the defendant to obtain cars, fit them, load them and deliver the potatoes in New York in March, it being practically impossible to do so in the time after March 24.

(3.) That time was of the essence of the contract, and that the defendant had a right to be permitted to deliver the potatoes in March, and as the plaintiffs failed to afford him the opportunity so to do, he was justified in refusing to perform.

(4.) That as to the third contract, the defendant had the right to deliver the potatoes at New York in March if cars could be had; that he was entitled to have an opportunity seasonably to try to secure cars; and that it was the duty of the plaintiffs, by giving orders seasonably, to afford the defendant a reasonable opportunity to perform his contract in March, or to endeavor to perform it. This they failed to do.

(5.) By reason of the failure of the plaintiffs to perform their clear duty, the defendant was justified in cancelling the orders, and upon the evidence, the action for the breaches of the three contracts, by way of non-delivery, is not sustainable. *Frommel* v. *Foss*, 176.

Any vendor induced by false and fraudulent representations to sell goods upon credit, upon discovering the fraud, may rescind the sale and maintain trover for the goods so obtained. *Shoe Company* v. *Bechard*, 197.

When at the time of the purchase of goods there is an intent never to pay for them, the sale may be avoided for fraud, although no false and fraudulent representations are made. *Shoe Company* v. *Bechard*, 197.

STATES.

See WATERS AND WATER COURSES.

STATUTES.

See ACCORD AND SATISFACTION. ACTIONS. BANKRUPTCY. COMMERCE. CORPORATIONS. EMINENT DOMAIN. EXECUTORS AND ADMINISTRATORS. FISH AND FISHERIES. INSURANCE. MUNICIPAL CORPORATIONS. STATUTE OF FRAUDS. TAXATION. WATERS AND WATER COURSES. WAYS.

A statutory offense cannot be created by inference or implication, nor can the effect of a penal statute be extended beyond the plain meaning of the language used. *State* v. *Wallace*, 229.

It is a recognized rule that a penal statute is to be construed strictly in favor of a respondent. *State* v. *Wallace*, 229.

It is a principle of statutory construction that, when the meaning of a statute is in doubt, it is well to resort to the original statute and there search for the legislative will as first expressed.
Taylor v. *Caribou*, 401.

While punctuation is subordinate to the text and can never control its plain meaning, yet in cases of doubt it may aid in its construction.
Taylor v. *Caribou*, 401.

Whatever may have been the case formerly in England, when statutes were enrolled upon parchment and enacted without punctuation, in this State, where such a practice has never obtained, there is no reason why punctuation, which is intended to and does assist in making clear and plain the meaning of all things else in the English language, should be rejected in the interpretation of statutes. *Taylor* v. *Caribou*, 401.

It is a sound rule of construction that a statute should have a prospective operation only unless its terms show clearly a legislative intent that it should operate retrospectively. *Carr* v. *Judkins*, 506.

Chapter 90 of the Public Laws, 1905, amendatory of Revised Statutes, chapter 46, section 2, relating to interest on loans secured by mortgage or pledge of personal property, *held* not to be retroactive.
Carr v. *Judkins*, 506.

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

See APPENDIX.

STATUTE OF FRAUDS.

When upon the reasonable construction of the terms of an oral contract for the performance of work or labor which does not state the time within which such contract is to be performed, it appears to have been understood by the parties thereto that the contract was not to be performed within the year, such contract comes within the statute of frauds.

White v. *Fitts*, 240.

An oral contract for the performance of work or labor which does not specify the time within which such contract is to be performed must be interpreted in the light of its subject matter and the circumstances surrounding it, and if the manifest intent and understanding of the parties thereto are that it was not to be performed within the year, such contract falls within the statute of frauds. *White* v. *Fitts*, 240.

Plaintiff and defendant made an oral contract wherein the plaintiff was to cut and saw into suitable lengths all the stave wood on a certain tract of land belonging to the defendant. The contract itself did not specify the time within which this work was to be performed by the plaintiff. The tract of land on which the plaintiff was to operate contained three hundred and fifty acres but about one hundred acres of the same had been cut over previous to the making of the contract. The lowest estimate of the amount of stave wood on this tract of land was 2400 cords. The capacity of the defendant's mill where this stave wood was to be manufactured was three and one-half cords per day, and the plaintiff was to cut this stave wood only as fast as the defendant needed it for use in his mill. After operating a few weeks, the defendant refused to allow the plaintiff to operate further thereupon the plaintiff brought suit against the defendant to recover damages for breach of the contract. *Held:* That it was not the intention of the parties that this contract should be performed within a year from the making thereof and that the same fell within the statute of frauds. Also *held* that the death of the plaintiff within the year would not have taken the contract out of the operation of the statute of frauds, for the reason that in such event the contract would not have been fully performed.

White v. *Fitts*, 240.

STATUTE OF LIMITATIONS.

See BILLS AND NOTES.

STATUTORY ABROGATION OF CONTRACTS.

See CONTRACTS.

STATUTORY CONSTRUCTION.

See STATUTES.

STREET RAILWAYS.

See NEGLIGENCE.

STUMPAGE SCALE.

See LOGS AND LUMBER.

SUBSTANTIAL PERFORMANCE.

See CONTRACTS.

SURVEYORS.

See EVIDENCE. LOGS AND LUMBER.

TAXATION.

See ADVERSE POSSESSION. MANDAMUS.

When a resident applicant for an abatement of a tax has omitted to furnish the assessors a list of his taxable property as provided by R. S., chapter 9, section 73, then to justify such omission he must show that he was unable to offer such list "at the time appointed" as provided by R. S., chapter 9, section 74. *Edwards Mfg. Co.* v. *Farrington*, 140.

That an applicant for an abatement from a tax, supposed in good faith that he was a non-resident and had been so regarded by the assessors for a series of years including the year of the assessment complained of, does not justify his omission to furnish the assessors a list of his taxable property as provided by R. S., chapter 9, section 73, if in fact he was a resident and liable to taxation as such. *Edwards Mfg. Co.* v. *Farrington*, 140.

There never has been in this State any authority in law for taxing the soil of the public lots or reserved lands, while the fee to the same is held in trust by the State. *Stetson* v. *Grant*, 222.

In the assessment of personal property for taxation under Revised Statutes, chapter 9, section 5, the amount which the person to be taxed is owing is to be deducted from the money which he has at interest and the debts due him. *Taylor* v. *Caribou*, 401.

TAX SALES.

See TAXATION.

TECHNICAL WORDS.

See WILLS.

TENANCY IN COMMON.

See DAMAGES.

It is a general rule of law that a tenant in common cannot maintain an action of trespass quare clausum against his co-tenant. But to this general rule there are exceptions, and it is well settled in this State that where the acts of a tenant in common amount to a destruction of the common property or effect a practical destruction of the interest of his co-tenant therein, the injured owner has a right of action, and under such circumstances trespass quare clausum is the proper remedy. *Davis* v. *Poland*, 192.

The plaintiff was an owner in common of certain premises and in possession of the same. The defendant, her co-tenant, entered the premises and removed from the dwelling house on said premises certain doors and windows, without the consent of the plaintiff. In the absence of any circumstances indicating that this act of the defendant was done in good faith as for the purpose of making repairs, it was held that the removal of the doors and windows by the defendant constituted such a destruction of the common property as would make the defendant a trespasser. *Davis* v. *Poland*, 192.

TIME.

See SALES.

TOLLS.

See LOGS AND LUMBER.

TORTS.

See NEGLIGENCE. NUISANCE. TRESPASS.

TOWNS.

See EMINENT DOMAIN. FISH AND FISHERIES. MUNICIPAL CORPORATIONS. PAUPERS. PUBLIC LANDS. RECORDS. TAXATION.

A testator by the fourth item of his will provided as follows: "I give bequeath and devise all the rest, residue and remainder of my estate, real personal and mixed, wherever found, and however situated unto School District No. 3 in the town of Canton, known as the Canton Point District, the same to be used and appropriated for the purpose of building a Universalist Church at Canton Point between my residence and that of Granville Child at Canton Point, (so called) in said School District, the balance if any remains after building such a church is to be used in supporting and maintaining preaching in the same, as said School District may designate by a majority vote, said district to use as much money in building the church as a majority of the same may desire." *Held:* (1) That while it was intended by the testator that the school district should act as trustee in executing this provision of his will, yet the school district was legally incompetent to act as such trustee; (2) That the school district did not succeed to the title of the trust fund; (3) That a trustee can be appointed to execute this provision of the will. *Childs* v. *Waite*, 451.

USURY.

See STATUTES.

VERDICT.

See COURTS.

VENDOR AND PURCHASER.

See FIXTURES. SALES.

WAIVER.

See SALES. WITNESSES.

WATER CONTRACTS.

See CONTRACTS. WATERS AND WATER COURSES.

WATERS AND WATER COURSES.

See CONTRACTS. INSTRUCTIONS.

Lakes and ponds of more than ten acres in extent are known as "great ponds" and are under the ownership and control of the State for the benefit of the public. The State can at its discretion authorize the diversion of their

In an action by a town to recover money expended in erecting a new bridge across a river, to take the place of one alleged to have been destroyed by reason of a dam built by the defendant across the river, below the bridge, evidence *held* to show that the loss of the bridge was not caused by any fault or negligence on the part of the defendant, but that the bridge was destroyed by a very extraordinary freshet caused by unusually heavy rains at a season of melting snow. Also *held* that the ruling ordering a nonsuit was correct.
Palmyra v. *Woolen Co.*, 317.

The continued use of water by a municipal corporation under a contract with a water company for a supply of water, does not conclusively show an acceptance of the service as a performance of the contract.
Water Co. v. *Village Corporation*, 323.

Where a water company is under contract to furnish a supply of water to a municipality, and there is only a partial performance of the contract on the part of the water company, the water company is not entitled to the contract price, nor to any advantage from the contract in the maintenance of a suit against the municipality, but is entitled to recover the fair value of the service, having regard to the contract price, and considering how much less the service is worth to the municipality by reason of the water company's breach of the contract.
Water Co. v. *Village Corporation*, 323.

Where a water company is under contract to furnish a supply of water to a municipality, but is rendering an imperfect service, a discontinuance of the use of the water by the municipality, under some circumstances, having due regard for the necessities of the people, would be unreasonable and impracticable. *Water Co.* v. *Village Corporation*, 323.

A mill owner can only maintain a head of water for the use of his mill, only let it out at such times and in such quantities as are reasonable and proper for the use of his mill. He cannot hold water back when he has no occasion to use his mill, and he cannot turn out more water than is reasonably necessary and proper for the reasonable use of his mill. He must so far have regard for the rights and interests of those below him, but within his right to operate his mill he can exercise his rights and if those below are injured that is their misfortune in owning land below the mill and the mill owner is not liable for such injury. *Barker* v. *French*, 407.

The mill act of Maine does not authorize a complaint for flowing lands below a dam, and hence in an action at common law to recover damages alleged to have been caused by a defendant wrongfully increasing the volume of a stream so as to overflow a plaintiff's land below a dam, the question whether or not there was an unreasonable exercise of such defendant's rights is a question of fact for the determination of a jury under proper instructions.
Barker v. *French*, 407.

A deed of water power construed, and a reservation therein, and not the conveyance itself, *held* "subject to all the conditions, obligations, limitations and provisions applicable" contained in another indenture precisely the same as it would have been if all such conditions, obligations, limitations and provisions had been copied verbatim into the reservation.

Water Power Co. v. *Libbey & Dingley Co.*, 439.

In an equity proceeding by the Union Water Power Company against the Libbey & Dingley Company relating to the use of water for power purposes, *Held:* That as the use of water by the Libbey & Dingley Company in excess of fourteen hours a day was not shown to be injurious to the Union Water Power Company prior to a certain written notice given by the Union Water Power Company to the Libbey & Dingley Company to cease using the water for more than fourteen hours a day, the Union Water Power Company cannot be deemed to have waived any rights by acquiescence in such excessive use prior to the time of giving the aforesaid notice.

Water Power Co. v. *Libbey & Dingley Co.*, 439.

WAYS.

See JUDGES. MUNICIPAL CORPORATIONS. NEGLIGENCE. WATERS AND WATER COURSES.

A petition for a way is necessary to give selectmen jurisdiction to lay out a town way under the statute. (R. S., chapter 23, section 16.)

Cushing v. *Webb*, 157.

The way must be described in the petition therefor, and with such definiteness that, when notice of it is given, the public and property owners will be apprised with reasonable certainty where the way is sought to be located.

Cushing v. *Webb*, 157.

The selectmen's return is prima facie evidence of the fact that they gave notice on a petition for a way and also, of such other facts as are required by law to be embraced in the notice, such as that the notice contained a description of the way, and what it was. *Cushing* v. *Webb*, 157.

In a case where the original petition is not in existence, and the return of the selectmen states that it was for a town way, "beginning on the north side of West Front Street, and running towards the Kennebec river," that they gave notice of their intention to lay out "the same," and that they stated in their notice the "termini thereof," and when it appears that the use of the way has been acquiesced in many years, it is *held* that there is prima facie presumption, at least, that the petition was sufficient in form to give the selectmen jurisdiction to act, and it is not open to collateral attack. Also in such a case, it is to be presumed that the laying out was in accordance with the petition. *Cushing* v. *Webb*, 157.

WHARVES.

See NUISANCE.

WILLS.

See TRUSTS.

It is a general rule in the construction of wills that words not technical are to be understood in their usual, ordinary, popular signification, and that technical words are presumed to be employed in their technical sense, unless there is something in the context or subject matter to indicate that the testator intended a different use of the terms employed.

Jacobs v. *Prescott*, 63.

In a bequest of personal property the word "heirs" means, prima facie, those who would be entitled to it had the testator died intestate, and the word "family" is synonymous with kindred or relations, those who are related by blood and who are entitled as next of kin under the statute of distributions.

Jacobs v. *Prescott*, 63.

A testatrix after giving legacies to numerous persons, the most of whom were related to her by consanguinity and the rest as relatives of her deceased husband, directed "any money remaining after my debts and expenses are paid to be divided between my heirs by my family herein named," excepting N, who was one of the legatees related to her by blood. *Held:* That the words "my heirs by my family herein named" did not embrace those legatees who were related to the testatrix's deceased husband only, and that those of the legatees named in the will, except N, take under this clause, who would have been entitled to the estate had the testatrix died intestate, in the proportions in which they would take under the statute of distributions.

Jacobs v. *Prescott*, 63.

Revised Statutes, chapter 76, section 1, provides as follows: "A person of sound mind, and of the age of twenty-one years, may dispose of his real and personal estate by will, in writing, signed by him, or by some person for him at his request, and in his presence, and subscribed in his presence by three credible attesting witnesses, not beneficially interested under said will." There is no exception or qualification to the requirement that a person must be of sound mind in order to make a valid will, and the burden rests upon the proponent of the will to prove affirmatively that the testator was of sound mind when he made the will. Hence in probating a will the sanity of the testator must be proved; it is not to be presumed.

Chandler Will Case, 72.

The word sanity is used in its legal and not its medical sense. Etymologically, insanity signifies unsoundness. Lexically, it signifies unsoundness of mind, or derangement of the intellect. In law, every mind is sound that can reason and will intelligently, in the particular transaction being considered; and every mind is unsound or insane that cannot so reason and will. The law investigates no further. This definition clearly differentiates the sound from the unsound mind, in the legal sense. *Chandler Will Case*, 72.

A disposing mind involves the exercise of so much mind and memory as would enable a person to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds; and a disposing memory exists when one can recall the general nature, condition and extent of his property and his relation to those to whom he gives, and also to those from whom he excludes, his bounty. But mere intellectual feebleness must be distinguished from unsoundness of mind. The requirements of a "sound and disposing mind" do not imply that the powers of the mind may not have been weakened or impaired by old age or bodily disease.
Chandler Will Case, 72.

It is a well established rule in this State that while confinement in an insane asylum or the disability of guardianship is made prima facie evidence of some mental incapacity, yet it is a rebuttable presumption of fact and may be overthrown by a preponderence of the evidence. The incapacity of guardianship is simply a fact which may be proven like any other fact tending to establish mental incapacity, but it does not work an estoppel upon the proponent of a will. Revised Statutes, chapter 69, section 26, recognizes this principle and provides, among other things, that "when a person over twenty-one years of age is under guardianship, he is incapable of disposing of his property otherwise than by his last will." *Chandler Will Case*, 72.

The fourth clause of the will of Mary J. Stewart is as follows: "All the rest and remainder of my estate of every kind real and personal I give and devise to said Gertrude, Martha and Cara, wives of my sons Charles, Edward and Rowland, and to my son Harry D. Stewart, equally share and share alike, and I wish that the indebtedness of Thos. J. Stewart & Co. shall be deducted from the shares and property so given and devised to the said wives of my sons Charles, Edward and Rowland, and that the property so as above given to said three wives of my three sons be for the education of their children and the support of their families respectively — and I enjoin them so to use and expend it." Since the death of the testatrix Rowland has deceased leaving no children, and the wife Cara has married. *Held:* That she is no longer a member of the family of Rowland; that by said clause she took the entire beneficial interest in the estate devised to her subject to a particular and temporary charge; that the purposes of the trust created upon said estate have been accomplished and the trust thereby terminated; and that said estate should be paid and turned over to her.
Stone v. *McLain*, 168.

It is a general rule that a legacy or devise will lapse when the legatee or divisee dies before the testator. A testator, however, may by express provisions in his will, or by language from which a clear implication may be drawn that such was his intention prevent a lapse of the devise in case of the death of the legatee or devisee before the testator.

Farnsworth v. *Whiting*, 296.

It is well settled that the use of mere words of limitation will not prevent the lapsing of a devise, and that the phrases, in different forms frequently and commonly used in a devise such as "and his heirs" or "and his heirs or assigns" are words of limitation merely, descriptive of the nature of the estate devised, and do not create a substituted devise.

Farnsworth v. *Whiting*, 296.

The first and second clauses of the will of a deceased testator read as follows: "First. I give, devise and bequeath unto my wife Helen A. Farnsworth and her heirs, one half of all my estate, both real and personal, in whatever it may consist or wherever situated at the time of my decease."

"Second. I give, devise and bequeath unto my wife, Helen A. Farnsworth the remaining one half of all my said estate, both real and personal, to be by her used and disposed of during her natural life, precisely the same as I myself might do were I living; and giving my said wife full power to sell, exchange, invest and reinvest the same, in the same manner I might do if living, but if any of the said remaining one half of my said estate shall remain undisposed of, by my said wife at the time of her decease, and my mother, Mary C. Farnsworth, shall then be living, then I give, devise, and bequeath all such residue and remainder of said remaining one half of my estate unto my mother, Mary C. Farnsworth, but in the event that my wife shall survive my mother then, on the decease of my mother I give, devise and bequeath all said residue and remainder of said one half of my estate unto my wife Helen A. Farnsworth and her heirs, it being my intention herein, that on the decease of my mother, all of my estate, real and personal shall become the property of my wife, she to have full power to dispose of the same, by will or otherwise, as she may think proper." The testator died on May 9, 1905, his wife, Helen A. Farnsworth, one of the beneficiaries named in his will, died May 5, 1905, four days prior to the death of the testator. The testator and his wife left no issue. Mary C. Farnsworth, the mother of the testator, to whom, by the will, a remainder in a portion of the estate was given in case she survived the wife, is still living.

Held: (1) That the devise of one-half of the testator's estate under the first clause of the will, lapsed by the death of the devisee prior to that of the testator, that there was no devisee by substitution, and no other testamentary disposition of this one-half of the testator's estate upon the decease of the testator, therefore, this one-half of his estate descended as intestate property according to the statutes of descent and distribution; (2) That to the other half of the testator's estate, mentioned in the second clause of the will the

death of the life tenant merely accelerated the taking of the remainder by the mother. Upon the death of the testator his mother took under the will this one-half of the estate in fee simple. *Farnsworth* v. *Whiting*, 296.

The common law rule that a devise to a devisee who dies prior to the death of the testator, will lapse, has been modified under certain conditions in this State by R. S., chapter 76, section 10, wherein it is provided: "When a relative of the testator, having a devise of real or personal estate, dies before the testator, leaving lineal descendants, they take such estate as would have been taken by such deceased relative if he had survived." But this statutory provision in no way changes the rule in a case where the deceased devisee was the wife of the testator as a testator's wife is not a relative within the meaning of the statute; neither does it change the rule in a case where the deceased devisee, although a relative, does not leave any lineal descendants. *Farnsworth* v. *Whiting*, 296.

WITNESSES.

See CRIMINAL LAW. EVIDENCE. LOGS AND LUMBER.

At a trial in the Supreme Judicial Court, on the charge of keeping intoxicating liquors, intended for unlawful sale, the defendant testified in his own behalf. Thereupon the State for the purpose of affecting the credibility of the respondent as a witness, offered the records of said court which, it was claimed, showed the respondent's conviction of criminal offenses upon two occasions. The record offered in each case contained a summary of the indictment against the respondent, certain statements as to the apprehension of the respondent, and a continuance of the case, and concluded as follows: "And now at this term the respondent is set at the bar of the court and the reading of the indictment waived, and the respondent says that he is not willing to contend against the State. Whereupon, the court orders and sentences that the said Daniel H. Herlihy pay a fine of one hundred dollars and no costs. Fine paid April 18, 1904." These records were admitted in evidence for the purpose stated, subject to the respondent's exceptions. *Held:* That these records were admissible for the purpose of affecting the credibility of the respondent who had testified in his own behalf.

State v. *Herlihy*, 310.

It is a universal rule that the plea of privilege, with respect to communications offered in evidence, can be invoked only by the author of the communication.

LeProhon, Appellant, 455.

The plea of privilege with respect to communications of a deceased person offered in evidence may be waived by the personal representative or heirs of the deceased when the character and reputation of the deceased is not involved. *LeProhon, Appellant*, 455.

Testimony, material to the issue, with reference to a certain interview which a deceased had with an attorney at law and which did not involve the character or reputation of the deceased, was offered in evidence by the defendant, an

heir at law. The plaintiff, beneficiary under the alleged will of the deceased, objected to this testimony on the ground that the interview was in the nature of a privileged communication of the deceased to the attorney, and the testimony was excluded. *Held:* Assuming that the interview between the deceased and the attorney, were the deceased living, falls within the rule of privileged communications, yet the defendant as heir at law had a right to waive the question of privilege and did waive the same and that the testimony should have been admitted. *LeProhon, Appellant*, 455.

WORD AND PHRASES.

WORK AND LABOR.

See STATUTE OF FRAUDS.

WRIT OF ENTRY.

See REAL ACTIONS.

WRITS.

See ATTACHMENT. CERTIORARI. MANDAMUS. OFFICER. REPLEVIN.

APPENDIX.

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF MAINE.

ENGLISH STATUTES.

STATUTES OF UNITED STATES.

COLONIAL ORDINANCES OF MASSACHUSETTS.

SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES OF MAINE.

ERRATA.

On page 21, in fourth line of second head note, read "therefor" for "thereof."

On page 68, in second line of last head note insert "as" between the words "pay" and "damages."

On page 194, in second line of second paragraph of opinion read "claiming" for "claming."

On page 217, in fourth line of second head note, read "bought" for "brought."

On page 264, in second line of head note at top of page, tenth word, read "or" for "of."

On page 273, in last line of head note at top of page, read "section 93" for "section 1."

On page 306, in fourth line of first head note, between the words "contained" and "this" strike out the word "in."

On page 311, in second line of last head note, between the words "purpose" and "affecting," substitute "of" for "or."

On page 384, in seventh line from the top, read "chapter 85" for "chapter 95."