"TROS TYRIUSQUE MIHI NULLO DISCRIMINE AGETUR"

MAINE REPORTS

103

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JULY 13, 1907—FEBRUARY 25, 1908

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

HON. LUCILIUS A. EMERY, CHIEF JUSTICE
HON. WILLIAM PENN WHITEHOUSE
[1]HON. SEWALL C. STROUT
HON. ALBERT R. SAVAGE
HON. HENRY C. PEABODY
HON. ALBERT M. SPEAR
[2]HON. CHARLES F. WOODARD
HON. LESLIE C. CORNISH
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ATTORNEY GENERAL
HON. HANNIBAL E. HAMLIN

ASSISTANT ATTORNEY GENERAL
HON. WARREN C. PHILBROOK

REPORTER OF DECISIONS
GEO. H. SMITH

[1]Term expired April 12, 1908. [2]Died June 17, 1907.
[3]Appointed in April, 1908

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1908

LAW TERMS

BANGOR TERM, First Tuesday of June.

SITTING: EMERY, C. J., STROUT, SAVAGE, PEABODY, CORNISH, KING, JJ.

PORTLAND TERM, Fourth Tuesday of June.

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

AUGUSTA TERM, Second Tuesday of December.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, SPEAR, CORNISH, KING, JJ.

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EQUITY

"Whenever equity may justly temper the rigor of the law, let not the whole force of it bear upon the delinquent, for it is better to lean on the side of compassion than severity."

CERVANTES.

PROGRESS

"The world has moved on from sails to steam and from steam to electricity; from the stage coach to the transcontinental railroad; from the sickle to the harvester; from spinning wheels to power looms; from tallow-dips to electric lights; from carrier pigeons to wireless telegraphy; from anvil and forge to the chimney retort and crucible of the most progressive age since time began."

HAMILTON.

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

ELIZABETH A. YOUNG

vs.

NORRIS L. HILLIER.

Penobscot. Opinion July 13, 1907.

Wills. Construction. Life Estate. Power of Sale.

A testator made the following provisions in his will: —

"Item. I give, devise and bequeath to my wife, E. A. M. all my estate both real and personal wherever found and however situate for her use during life.

"Item. At the death of my said wife, whatever may remain of said estates, I give, devise and bequeath to my daughter, E. A. Y."

Held: That a power of sale by the life tenant was annexed by implication, to the devise of the life estate in the first item, and that it sufficiently appears that the testator intended the power of sale to extend to both the real and the personal estate.

The power of sale as to the real estate having been exercised by the life tenant in her lifetime, the remainder man, who is the plaintiff was thereby divested of her title to the real estate which is demanded in this action.

On report. Judgment for defendant.

Real action brought to recover a certain lot of land in Orrington, containing about five acres, and being the former homestead of Nathan P. Marston, deceased testate, and of which he died, seized

and possessed. Plea the general issue with brief statement alleging the title to the demanded premises to be in the defendant and not in the plaintiff.

Tried at the April term, 1907, of the Supreme Judicial Court, Penobscot County. At the conclusion of the evidence, on both sides, it was agreed to report the same to the Law Court, and that court "upon so much thereof as is legally admissible," "to render such judgment as the law and the evidence require."

The action involved a construction of the last will and testament of the said deceased testate, Nathan P. Marston, father of the plaintiff. Said last will and testament is as follows:

"Be it remembered that I, Nathan P. Marston of Orrington in the County of Penobscot in the State of Maine being of sound and disposing mind and memory, but mindful of the uncertainty of this life, do make, publish and declare this my last will and testament, hereby revoking all former wills by me made.

"After the payment of my just debts, funeral charges and expenses of administration, I dispose of my estate, as follows:

"Item. I give, devise and bequeath to my wife, Elizabeth A. Marston, all my estate both real and personal wherever found and however situate for her use during life.

"Item. At the death of my said wife Elizabeth, whatever may remain of said estates, I give, devise and bequeath to my daughter Elizabeth A. Young.

"Item. I nominate and appoint J. Wyman Phillips of said Orrington sole executor of this my last will & testament.

"In Testimony Whereof, I hereunto set my hand and seal, and declare this to be my last will and testament, this tenth day of August in the year one thousand eight hundred and ninety-five."

"NATHAN P. MARSTON (L. S.)"

The testator died shortly after making the aforesaid will, and the same was duly approved and allowed by the Probate Court, Penobscot County.

All the material facts are stated in the opinion.

C. A. Bailey and T. D. Bailey, for plaintiff.

P. H. Gillin, for defendant.

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

SAVAGE, J. This is a real action which involved a construction of the will of Nathan P. Marston. The particular clauses which are in question are these:—

"Item. I give, devise and bequeath to my wife, Elizabeth A. Marston, all my estate both real and personal wherever found and however situate for her use during life.

Item. At the death of my said wife Elizabeth, whatever may remain of said estates, I give, devise and bequeath to my daughter Elizabeth A. Young."

Elizabeth A. Marston is now deceased, and the plaintiff, who is the Elizabeth A. Young named in the second devise, claims title as remainder man. The defendant claims title under Elizabeth A. Marston, who in her lifetime mortgaged the demanded premises to Mary F. Blethen. The mortgage was foreclosed, and subsequently the premises were conveyed by the mortgagee to the defendant, Mrs. Marston joining in the deed, as a grantor.

There can be no question but that the first clause of the will, above quoted, standing alone, created a life estate in the widow, and only a life estate.

It follows that the only question at issue is whether by the terms of the will, properly interpreted, a power of disposal was annexed to the devise for life. If so, the estate demanded now belongs to the defendant. If not, it belongs to the plaintiff.

It is contended by the defendant that from the use of the words "whatever may remain of said estates" in the devise of the remainder to the plaintiff, it is to be implied that the testator intended to give to the life tenant more than the mere use of the estate real and personal; that he intended, in fact, to give her a power of disposal both of the real and the personal estate.

To give effect to the intention of the testator, provided it is consistent with the rules of law, lies at the foundation of every judicial construction of a will. The questions always are, what was the intention of the testator, and can it be given effect without

violating legal principles. It is the intention as expressed that must control. *Cotton* v. *Smithwick*, 66 Maine, 360. The language must be construed according to settled canons of interpretation, *Ramsdell* v. *Ramsdell*, 21 Maine, 288, even though it may defeat the probable intention. *Pickering* v. *Langdon*, 22 Maine, 413. But a will, if ambiguous, is to be read and construed in the light of such existing conditions as may properly be supposed to have been in the mind of the testator, such as the situation and relationship of his beneficiaries, and the situation and amount of the estate. *Smith* v. *Bell*, 6 Pet. 68; Follweiler's Appeal, 102 Pa. St. 581.

After making provision for his wife, then sixty-seven years old, by creating a life estate in real and personal property for her use, this testator devised "whatever may remain of said estates," at the death of the wife, to his daughter. It is generally conceded that by the use of such an expression in the devise of a remainder after a life estate is expressly created, or by the use of the expression "if any remains," or by the use of any words of similar import, a power of sale is annexed to the devise of the life estate by implication. This rule has been many times affirmed in this State. *Ramsdell* v. *Ramsdell*, 21 Maine, 288; *Shaw* v. *Hussey*, 41 Maine, 495; *Warren* v. *Webb*, 68 Maine, 133; *Stuart* v. *Walker*, 72 Maine, 145; *McGuire* v. *Gallagher*, 99 Maine, 334. So in Massachusetts *Harris* v. *Knapp*, 21 Pick. 412; *Johnson* v. *Battelle*, 125 Mass. 453. Some courts have held that when a life estate in both real and personal property has been created, a devise of "whatever remains," or the use of words of similar import, annexes to the life estate, by implication, a power of sale of the personal property only. In *Foote* v. *Saunders*, 72 Mo. 616, for instance, a case cited by the plaintiff here, such was held to be the rule. But the court in that case said that the contrary doctrine was favored by the cases in Maine and Massachusetts, and expressed the opinion that the "extreme views" held in these two states were met and answered by *Smith* v. *Bell*, 6 Pet. 68, and *Brant* v. *Coal & Iron Co.*, 93 U. S. 332. In this connection it is worth while to notice that our own court, speaking by Chief Justice PETERS in *Stuart* v. *Walker*, 72 Maine, 145, characterized *Smith* v. *Bell* as "a case differing

somewhat from many of the authorities," and declined to follow it.

But whatever may be the rule in other states, we regard it as well settled in this State that such an implication raised from the general expression "whatever may remain" may apply to real estate as well as to personal estate, when the life estate consists of both, and will so apply, if such appears to have been the intention of the testator. *Ramsdell* v. *Ramsdell*, 21 Maine, 288; and other cases cited supra. So that, if such an intention appears in this will, it can be enforced.

And we think it clear that such was the testator's intention. He was providing for an aged wife, surely in greater need of care than the daughter. He gave her, by implication, the power to sell some of the estate at least. Was that power intended to be limited to the personal estate? It is hardly credible that it was. The personal estate only amounted to $186.25. The real estate from which she could receive only the income or use unless she could sell it, amounted to only $800. If such be the construction of the will, but scant provision was made for the wife, and the bulk of the estate, small though it was, went to the daughter in the end. But we are not left to conjecture. The testator having created a life estate in real estate and a life estate in personal estate, in the wife, devised "whatever may remain of said estates," both of them. It was not whatever should remain of his estate in general, but whatever should remain of the real estate and of the personal estate. The word "estates," in the plural, naturally has this significance, and we think it expressed the real intention of the testator. By saying that only so much of the real estate as might "*remain*" at the death of the wife, should pass to the daughter, he expressed his purpose that the use given to the wife should extend to a sale of it, if she wished or needed. Otherwise there is no practical significance in the use of the word "remain" in this connection.

Accordingly the law implies a power of sale as annexed to the estate for life in the real estate. That power was effectually exercised by the life tenant in her lifetime, and no estate in remainder in the real estate fell to the daughter at the death of the mother. The title to the demanded premises is in the defendant.

Judgment for the defendant.

ISAIAH T. WILLET

vs.

EDWARD R. CLARK.

Cumberland. Opinion July 13, 1907.

Trover. Appeal from Municipal Court. Amendments to Pleadings. New Pleas.

1. An appeal from a municipal court or trial justice vacates the judgment of that court and removes the whole case to the appellate court to be tried and judgment rendered de novo upon both law and fact.
2. In considering and disposing of such case upon appeal the appellate court can allow amendments to pleadings and new pleas to be filed as fully as if the case had been originally brought in that court except as to dilatory pleas.
3. Upon such appeal of an action of trover where the general issue alone had been pleaded in the lower court, the appellate court can allow to be filed a brief statement that the title to the property described in the declaration was in the defendant.
4. The court does not hold however even by implication that such brief statement is necessary to admit that defense.

On exceptions by plaintiff. Overruled.

Trover for the conversion of four cords of wood alleged to have been taken and carried away by the defendant.

The action was brought in the Portland Municipal Court. Plea, the general issue. After trial had, said court rendered judgment for the plaintiff, and thereupon the defendant appealed to the Cumberland County Superior Court. At the trial in the Superior Court, it appearing that the plaintiff did not have the entire title to the wood sued for, he was allowed to amend his writ by adding the names of Grace L. Procter and E. E. Procter as parties plaintiff. The defendant then testified that the title to the land from which the wood was cut was in himself and not in the plaintiffs. The plaintiff seasonably objected to the admission of this testimony, claiming that evidence of title was not admissible under the plea of the general issue but must be specially pleaded by brief statement

or otherwise if the defendant would avail himself of such a defense. This objection was overruled and the plaintiff excepted. At the close of his testimony, the defendant moved to amend his plea by adding the following brief statement: "And the said defendant says that at the time said property was taken the title thereto was in himself, and that therefore he is not guilty of taking property of said plaintiff." The plaintiff seasonably objected to the allowance of this amendment but the objection was overruled and the amendment allowed. To this ruling the plaintiff also excepted, "claiming that this being an appeal case the plea must remain as it was in the lower court as otherwise a new issue is presented to the jury in place of the original issue which was passed upon by the court below." The verdict was for the defendant.

Emery G. Wilson, for plaintiff.

George S. Murphy, *Connellan & Robinson*, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, CORNISH, KING, JJ.

EMERY, C. J. This was a personal action of trover for the conversion of personal property. It was begun in the Portland Municipal Court where judgment was rendered for the plaintiff. Whereupon the defendant duly appealed to the Superior Court for Cumberland County and duly entered his appeal. In the Municipal Court the only plea filed by the defendant was the general issue, but in the Superior Court he asked leave to add a brief statement that the title to the property described in the declaration was in himself. Leave to do this was granted against the plaintiff's objection, and he excepted.

The plaintiff urges that the only issue that could be formed and tried in the appellate court was that formed by the pleadings in the court of the first instance, and hence no new pleas can be allowed in the appellate court. This might be so if the appeal operated merely as a writ of error, but an appeal from a Municipal Court, or trial Justice, to a Superior Court, vacates the judgment of the lower court and removes the whole case to the Superior Court to be tried de novo upon both law and fact. The case is then no longer pend-

ing in the lower court and is pending only in the Superior Court, which, if the appeal be properly taken, will render its own judgment and issue its own writ of execution without remanding the case to the lower court. In considering and disposing of the case the Superior Court can allow amendments to pleadings and admit new pleas to be filed as fully as if the case had been originally brought in that court, except perhaps as to dilatory pleas. *King* v. *Lacy*, 8 Conn. 499; *Stalbird* v. *Beattie*, 36 N. H. 455. The amendment was clearly allowable.

The cases cited by the plaintiff, contra, were cases where the title to real estate was put in issue by the pleadings in the lower court and the case was thereby transferred to a Superior Court for trial upon that issue, the judgment of that court to depend upon the determination of that issue. They were not cases of appeal since the lower court rendered no judgment and, indeed, could not hear the case. They were cases where a particular issue was formed by the pleadings in one court and the case thereby, upon that issue alone, transferred to another court. In such cases ordinarily the only issue to be tried in the second court is that thus formed in the first court.

In holding that the amendment in the case at bar was allowable, we by no means, hold even by implication that it was necessary.

Exceptions overruled.

In Equity.

KITTERY WATER DISTRICT, Petitioner,

vs.

AGAMENTICUS WATER COMPANY.

York. Opinion August 3, 1907.

Water District. Meeting. Warrant therefor. Technical objections. Petition for Appraisers. Prior petition no bar. Special Laws, 1907, chapter 424, sections 7, 12. R. S., chapter 4.

In a case where important rights affecting a community are involved, and the substantial rights of all are protected, an objection which at most is only technical, is entitled to but little weight.

When the meaning of an instrument is just as unmistakable as if more directly expressed, it is sufficient in law although not in the mold of fashion or technical form.

In the case at bar, a part of the town of Kittery was incorporated under the provisions of chapter 424 of the Special Laws of 1907, by the name of the Kittery Water District, and was authorized to acquire by purchase or by the exercise of the right of eminent domain the "entire plant, property and franchises, rights and privileges" of the defendant company. Said chapter 424 was to take effect "when accepted by a majority vote of the legal voters within said Water District voting at a meeting" specially called for the purpose on or before the first day of May, 1907. By section 7 of said chapter it is provided that if the trustees of the Water District failed to agree with the defendant company upon the terms of the purchase "on or before June 1, 1907," the Water District might through its trustees on or before June 1, 1907, petition any Justice of the Supreme Judicial Court for the appointment of appraisers to fix the valuation of the defendant company's plant and property. In accordance with the provisions of said chapter a meeting of the inhabitants of said Water District was held April 8, 1907, and at said meeting said inhabitants, by a majority vote voted to accept the aforesaid Act. *Held:* 1. That the warrant calling said meeting was valid although addressed to the "inhabitants of the Kittery Water District." 2. That said meeting was a legal meeting and the acceptance of said Act valid.

The Trustees of the Water District failing to agree with the defendant upon the terms of purchase, on May 2, 1907, filed a petition for appointment of appraisers, addressed to a Justice of the Supreme Judicial Court, who

ordered a hearing thereon before another Justice of said court. The latter Justice, at the hearing, ruled that he had no jurisdiction in the matter and dismissed the petition "without prejudice." The defendant then claimed costs and the claim was allowed. On June 1, 1907, the Water District filed another petition for the appointment of appraisers, addressed to a Justice of said court. *Held*: That the petition filed May 2, 1907, and which was dismissed "without prejudice" and on which the defendant claimed and was allowed costs, was no bar to the petition filed June 1, 1907.

In equity. On report. Cause to stand for further hearing below.

Petition for the appointment of appraisers under the provisions of chapter 424, Special Laws, 1907, incorporating the plaintiff Water District and authorizing it to acquire by purchase or by the exercise of the right of eminent domain the entire plant, property and franchises, rights and privileges of the defendant company. Petition dated and filed June 1, 1907. Answer and pleadings filed June 18, 1907. Heard June 18, and June 28, 1907, and decree made appointing three appraisers. The parties consenting thereto, the cause was then "reported to the Law Court for the Western District now in session, the cause to stand for further hearing in the court below or to be dismissed as the Law Court may determine."

The case sufficiently appears in the opinion.

Aaron B. Cole and Heath & Andrews, for plaintiff.

George C. Wing, George C. Wing, Jr., and Cleaves, Waterhouse & Emery, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, SPEAR, KING, JJ.

STROUT, J. By chapter 424 of the Special Laws of 1907 a part of the town of Kittery was incorporated by the name of the Kittery Water District, and was authorized to acquire by purchase or by the exercise of the right of eminent domain the "entire plant, property and franchises, rights and privileges" of the Agamenticus Water Company. That Act was to take effect "when accepted by a majority vote of the legal voters within said Water District voting at a meeting" specially called for the purpose on or before the first day of May, 1907. By section 7 of the Act it is provided that if

the trustees of the Water District fail to agree with the Water Company upon the terms of purchase "on or before June 1, 1907" the Water District might through its trustees on or before June first 1907" petition to any Justice of this court for the appointment of appraisers to fix the valuation of the Water Company's plant and property.

The case before the court is a petition by the Water District for the appointment of appraisers, filed on June 1, 1907, addressed to Justice SPEAR, who, after notice to interested parties, heard the case on June 18, 1907, and appointed three appraisers. The respondents in their answer to this petition denied that the Act had been accepted at a legal meeting of the voters of the District and claimed that the special meeting of the voters of the District held on April 8, 1907, at which the Act was accepted was not legally called or conducted; and that the trustees elected at that meeting were not legally elected. The answer also sets out that the trustees of the Water District on May 2, 1907, filed a petition for appraisers addressed to Justice PEABODY, of substantially the same character as the present petition on which a hearing was ordered for May 21, 1907, before Justice SAVAGE, to which petition the Water Company filed answer and demurrer. At the hearing before Justice SAVAGE he held that he had no jurisdiction, as the petition had been addressed to and received by Justice PEABODY. The docket entry upon this petition at the May term is "May 21st 1907. Petition dismissed without prejudice. Defendant claims costs. Claim allowed." This entry was made after adjournment nunc pro tunc. Respondents claim this petition is still pending and is a bar to the present petition. The case was thereupon reported to this court.

In argument here it is objected that the warrant for the meeting to act upon the question of acceptance of the charter was to warn the "inhabitants of the Kittery Water District" qualified to vote, and it is said that there was no Water District before the Act was accepted. By section 12 of the Act it is provided that on approval by the Governor it should take effect so far as necessary for calling and holding the meeting; so there was a Water District for that

purpose. There is no merit in this objection. The warrant might have been directed to the inhabitants of the territory described in the charter, but no one could be misled by the direction to the Water District. As said by Chief Justice PETERS in *Prentiss* v. *Davis*, 83 Maine, 364, "Although not in the mold of fashion or technical form, the meaning is just as unmistakable as if more directly expressed."

The meeting was called at 7.30 in the afternoon. The charter provided that the meeting should "be called, advertised and conducted according to the laws relating to municipal elections." Chapter 4 of R. S., relating to elections in towns applied and governed. This special meeting was duly called and its proceedings had in accordance with the provisions of that statute and the charter to which it applied. In the District there were 487 voters; 325 were present at the meeting, and 261 voted to accept the charter. The referendum to the people was designed to obtain an expression of their wishes. Such a full expression as was here had should not be disregarded unless some imperative statute or rule of law requires. We find none. We hold that the meeting was legal and the acceptance of the charter valid.

The first petition for appointment of appraisers, dated May 1, 1907, and filed May 2, addressed to Justice PEABODY, was resisted by the respondents upon the ground (among others) that it was premature. It was claimed that under the provisions of the charter in section 7 for condemnation of defendant's plant, if the parties failed to agree upon terms of purchase "on or before June first," a petition could not be filed before June 1. It is true that in the same section it is provided that the petition may be filed "on or before June first." The two provisions are to be construed together. The argument that the Legislature intended the parties to have the month of May to negotiate for a purchase is strong, but the language quoted as to filing the petition at least raises a serious doubt as to whether the first petition could not be maintained. The complainant did not withdraw that petition but acquiesced in its dismissal by Justice SAVAGE to avoid that doubt and possible future litigation. The defendant claimed and was

allowed costs. It does not lie in its mouth now to reverse itself and claim that the first petition is maintainable and a bar to this. If the first petition was premature it had no life, and no effect upon the later petition. It would seem that no practical inconvenience or effect upon the rights of the parties will accrue if the second petition is upheld and condemnation proceedings had under it. At most, the objection is technical, and in a case like the present where important rights affecting a community are involved, and the substantial rights of all parties are protected, is entitled to but little weight. The present petition is sustained.

The entry must be,

Cause to stand for further hearing in the court below.

In Equity.

MARGARET J. ARMSTRONG

vs.

MARTIN J. A. MUNSTER et als.

Somerset. Opinion August 8, 1907.

Reference. Equity. Appeal.

Where a bill in equity is referred by rule of court, without conditions or limitations, and the referee, having heard the parties, reports the facts found by him, and his conclusions thereon to the court, and his report is accepted, an appeal from a final decree, made in accordance with the terms of the report, cannot be sustained.

Savings Bank v. *Herrick*, 100 Maine, 494, affirmed.

In equity. On appeal by defendants. Appeal dismissed. Decree below affirmed.

Bill in equity brought to obtain relief from a mutual mistake

made in the discharge of a mortgage on real estate. After the pleadings were made up, the cause was referred under rule of court with the stipulation that judgment on the report of the referee should be final and conclusive. After hearing, the referee duly filed his report, to which no objections were filed, and the same was accepted and a final decree in accordance with the report was made and entered by a single Justice. From this decree the defendants took an appeal to the Law Court.

The case appears in the opinion.

Merrill & Merrill, for plaintiff.

J. B. & F. L. Peaks and Walton & Walton, for defendants.

SITTING: EMERY, C. J., STROUT, PEABODY, CORNISH, KING, JJ.

CORNISH, J. This bill in equity was brought to obtain relief from a mutual mistake made in the discharge of a mortgage upon real estate. The defendants, in their answers, admitted the mistake but set up certain allegations of fraud and false representations on the part of the plaintiff in connection with the original sale out of which the mortgage arose.

There were controverted questions both of law and fact and after the pleadings were made up, the cause was referred under rule of court with the stipulation that judgment on the report of the referee should be final and conclusive.

The referee, after a full hearing, filed his report in court, sustaining the bill and prescribing the form of decree that should be entered, which was in effect his finding upon the law and facts of the case. No objections to the report were filed by the defendants, as required by Court Rule XXI, and it was duly accepted. A final decree, in strict accordance with the report, was subsequently made and entered by a single Justice and from that decree an appeal was seasonably taken by the defendants to this court.

The appeal cannot be sustained. The opinion of this court in the very recent case of *Savings Bank* v. *Herrick*, 100 Maine, 494, is decisive of the case at bar. The language of that opinion applies here with equal force. "The cause was referred without any con-

ditions or limitations as to the powers of the referee. And in such case it is well settled that the referee has full power to decide all questions arising, both of law and of fact, and in the absence of fraud, prejudice or mistake on the part of the referee, objections for which should be made when the report is offered for acceptance, his decision is final. *Sweetsir* v. *Kenney*, 32 Maine, 464; *Hall* v. *Decker*, 51 Maine, 31; *Long* v. *Rhodes*, 36 Maine, 108; *Hatch* v. *Hatch*, 57 Maine, 283. By agreement the parties submitted the cause to a tribunal of their own choosing. To that tribunal were transferred all the powers of the court. Having chosen to go to that tribunal, the parties cannot now be heard upon the merits by the court. . . . . The result is that the appeal from a decree made in accordance with the report of the referee is not sustainable."

The decree here was in exact accordance with the report of the referee and the same result must follow.

Appeal dismissed.

Decree below affirmed with additional costs.

GEORGE L. BRYANT

vs.

THE GREAT NORTHERN PAPER COMPANY.

Somerset. Opinion August 10, 1907.

Master and Servant. Negligence. Assumption of Risk. Nonsuit. Evidence.

The standard of care which the law requires of the servant is that which a reasonably cautious and intelligent person would exercise under the same circumstances, and the hazards and risks attendant upon his employment which he assumes are those which are open and obvious, of which he has been informed, or which he ought to have known by using reasonable care.

Where upon the unquestioned facts it is apparent that a plaintiff's action cannot be maintained, it is not only competent but proper for the presiding Justice so to declare by directing a nonsuit.

In an action on the case to recover damages for personal injuries where a plaintiff recovered a verdict and that verdict has been set aside, it would be useless for the court to reverse its own action by sustaining exceptions of the plaintiff to the ordering of a nonsuit in the second trial of the same action, unless the evidence on which the nonsuit was ordered differs materially from that introduced at the first trial, either as being of greater weight or proving new facts.

Where in an action on the case to recover damages for injuries sustained by a plaintiff and caused by the alleged negligence of the defendant, and the plaintiff recovered a verdict and that verdict has been set aside by the Law Court on the ground that the injury was caused by the plaintiff's want of due care, and the case is again tried and new evidence is introduced by the plaintiff and that evidence is of doubtful admissibility and at least is inadequate to prove that the plaintiff was not bound to have knowledge of conditions existing at the time of the accident, the presiding Justice is justified in ordering a nonsuit.

See *Bryant* v. *Paper Co.*, 100 Maine, 171.

On exceptions by plaintiff. Overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant. Tried at the December term, 1903, of the Supreme Judicial Court, Somerset County. Plea, the general issue. Ver-

dict for plaintiff for $2500. The defendant then filed a general motion for a new trial and the verdict was set aside. See 100 Maine, 171. The action was then again tried at the December term, 1905, of said Supreme Judicial Court, Somerset County. After the plaintiff's evidence was all in, the presiding Justice ordered a nonsuit and the plaintiff excepted.

The case appears in the opinion.

Forrest Goodwin, for plaintiff.

Merrill & Merrill, for defendant.

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

PEABODY, J. This is an action on the case to recover damages for injuries sustained by the plaintiff February 2, 1903, while employed by the defendant company in its mill at Madison, Maine.

The case was tried at the December term, 1903, of the Supreme Judicial Court and the jury rendered a verdict for the plaintiff. On motion of the defendant a new trial was granted by this court. The case was again tried at the December term, 1905, and at the conclusion of the plaintiff's evidence, the presiding Justice ordered a nonsuit. To this ruling the plaintiff excepts and makes the writ, pleadings and evidence a part of his bill of exceptions.

The evidence introduced by the plaintiff shows that he was employed by the defendant company from the first part of October to December, 1902, about three months; that he was temporarily absent for five weeks on account of an injury resulting in the loss of a finger, and returned to his work January 24th, 1903; that during his absence the steam engine which propelled the plunger pump, whose gearing he oiled, had been replaced by an electric motor and the direction of the cog wheels connected with this pump was changed so that they revolved inward towards each other instead of revolving as formerly, outward and away from each other; that no notice was given to the plaintiff of this change and he did not in fact know that it had been made. After his return he continued his work of oiling this bearing twice a day for twenty-eight

days before the accident. While engaged in his duties he was injured by being caught in the revolving cog wheels. He was at the time standing on a ladder, the lower end of which rested on the floor and the upper end upon the driving shaft. This shaft revolved the same way as the larger wheel, making its revolutions at the same time, twenty-six a minute. The direction of the revolutions of both had been reversed by the change mentioned.

The plaintiff sets out his right to recover on account of the defendant's negligence in two counts which are in substance, first, that there were no guards or protection to the machinery upon which he was required to work; and second, that the change in the direction of the revolutions of the cog wheels connected with the plunger pump made in his absence rendered the machinery more dangerous and that he received no notice from the defendant and had no knowledge of the change.

The court in sustaining the defendant's motion for a new trial, held that the plaintiff's claim to recover by reason of the defendant's omission to provide guards and protection to the machinery was untenable; that as he had been at work nearly five months oiling this identical pump and knew that no special guard had been furnished, and continued his employment, he assumed the risk incident to his work upon the machinery as it was.

In the case at bar the plaintiff relies especially upon his right to recover under the allegations of the second count. The evidence offered at the first trial upon this issue was fully considered by the court and the conclusion was reached that the plaintiff during the twenty-eight days he was engaged in oiling the bearings twice each day, must have observed that the direction of the shaft against which his ladder rested and of the comparatively slow moving large wheel had been changed; or if he failed to observe the change it must be the result of his thoughtless inattention; that he is not entitled to be compensated in damages, and that the verdict was clearly wrong. *Bryant* v. *The Great Northern Paper Company*, 100 Maine, 171.

Where upon the unquestioned facts it is apparent that the plaintiff's action cannot be maintained, it is not only competent but

proper for the presiding Justice so to declare by directing a nonsuit. It would be useless for this court to reverse its own action by sustaining the exceptions of the plaintiff unless the evidence on which the nonsuit was ordered differs materially from that introduced at the first trial, either as being of greater weight or proving new facts. *Elwell* v. *Hacker*, 86 Maine, 416; *Romeo* v. *Railroad*, 87 Maine, 540; *White* v. *Bradley*, 66 Maine, 254; *Young* v. *Chandler*, 102 Maine, 251.

No new material fact as to the conditions existing at the time of the accident is shown at the second trial, and the question whether it was error for the presiding Justice to order the involuntary nonsuit depends upon the competency and weight as evidence of the testimony of three witnesses, who did not testify at the first trial, to show that the change in the machinery rendering it more dangerous was not an obvious hazard which the plaintiff assumed as incident to his employment. The purport of their testimony is, that they worked around this pump after the change and before the accident and did not notice that the gears had been changed. Dan McDonald, who had worked in the mill for some years, had charge of this pump and saw it twice each day, and had repaired the belt that runs near the gears and looked after the repairs on the pump, and he testifies that he never noticed that the gears had been changed. D. L. McCollar, a millwright who had charge of the machinery of the company and who had worked around the pump when the plaintiff was there and repaired it frequently, testifies that he did not know that the gears were changed until he went up the ladder to see if the cup on the crank shaft was right and reached over to the sides as the oiler does and his clothing was caught; and that he discovered the change by looking for the cause of the trouble. M. H. McSwain testifies that he changed these gears under the direction of the foreman.

The standard of care which the law requires of the servant is that which a reasonably cautious and intelligent person would exercise under the same circumstances, and the hazards and risks attendant upon his employment which he assumes are those which are open and obvious, of which he has been informed, or which he

ought to have known by using reasonable care. *Cunningham* v. *Iron Works*, 92 Maine, 501.

The court decided upon the evidence introduced at the first trial, that the accident was due to the plaintiff's want of due care. The new evidence in the case at bar has little probative force in proving the contrary. The testimony of witnesses that they failed to observe that a change had been made in the direction of the motion of the crank shaft and its gears, is of doubtful admissibility. It complicates the issue because the circumstances in which the witnesses were placed though similar were not the same. Wigmore on Evidence, Vol. 1, sec. 447; *Darling* v. *Westmoreland*, 52 N. H. 401; *Temperance Hall Asso. of Trenton* v. *Giles*, 33 N. J. Law, 260; *Hubbard* v. *And. & Ken. R. R. Co.*, 39 Maine, 506; *Parker* v. *Portland Publishing Co.*, 69 Maine, 173; *Branch* v. *Libbey*, 78 Maine, 321; *Bremner* v. *Newcastle*, 83 Maine, 415. The witness whose clothing was caught in the machinery alone had occasion to remember whether he had observed a change or not. His testimony was positive while that of the others was negative not only as to the fact of change but as to its observability.

The new evidence is at least inadequate to prove that the plaintiff was not bound to know of so radical a change in the machinery in view of the fact that he had been oiling it twice a day for twenty-eight days after his return, and that while oiling the gears of this pump he stood, as he had previously, on a ladder which rested against the driving shaft and reached over the slowly revolving wheel by which he was injured.

It is not shown that the order of a nonsuit was erroneous and prejudicial to the plaintiff.

Exceptions overruled.

JOHN B. SMART *vs.* AROOSTOOK LUMBER COMPANY.

Aroostook. Opinion August 10, 1907.

Waters and Water Courses. Navigable Streams. Obstructions. Riparian Proprietors. Damages. R. S., chapter 22, section 13.

Capability of use for transportation is the criterion as to whether or not a stream is navigable and is a question of fact.

A navigable stream is subject to public use as a highway for the purpose of commerce and travel.

All streams of sufficient capacity in their natural condition to float boats, rafts or logs, are deemed public highways and as such are subject to the use of the public.

Public highways afford an equal right to each citizen to their reasonable use, and any unreasonable obstruction that prevents or hinders such use, creates a nuisance in law.

The circumstances of each case are to be considered in determining the use which individuals may make of public highways, and the same rule prevails in limiting the extent of the right over waters as over land.

Temporary obstructions are unavoidable and are incident to the legitimate purposes of travel and transportation, and if continued within reasonable limits they do not create a nuisance. But if the encroachment upon the public highway is unreasonable in extent or duration, it is unjustifiable.

A mill company has no right to obstruct unreasonably, with logs and lumber, a navigable stream when there are riparian owners who have occasion to use such stream for floating boats and transporting goods to their cottages on such streams.

The existing conditions which create the purposes of the public use of navigable streams are subject to change, and the driving and temporary storing of logs although now of principal importance may become secondary, in importance to the travel of summer residents and the large transportation of merchandise for their accommodation. In this State, recreation is assuming features and incidents as valuable to the public as trade and manufacturing.

When a plaintiff is an owner of land on a navigable stream and has a summer residence thereon, and no highway other than such stream affords him access thereto, and such stream has been unreasonably obstructed with logs and lumber by a defendant mill company, such obstruction not only obstructs the right of such plaintiff in common with others to pass up

and down such stream, but also cuts off his right of access to his private property which is a private right appurtenant to his land, and such plaintiff in a legal sense has suffered special damages and is entitled to recover therefor.

In the case at bar, *Held:* That the Presque Isle Stream above the bridge at Presque Isle Village, for a distance of thirty miles, is a navigable stream in fact, and possesses the character which brings it within the class of streams which, though in point of property are private, are subject to the easement of public highways which individuals have no right unreasonably to obstruct. Also *held* that the defendant company has unreasonably obstructed said stream with logs and lumber and that the plaintiff, a riparian owner on said stream, suffered special damages by reason of such obstruction.

On report. Judgment for plaintiff.

Action on the case brought by the plaintiff against the defendant company to recover damages for obstructing, with logs and lumber, the Presque Isle Stream, which was alleged to be a navigable stream flowing through the towns of Mapleton and Presque Isle in the County of Aroostook, and thereby preventing the plaintiff from passing up and down said stream with a boat or canoe between Presque Isle Village and a summer residence or camp on a lot of land owned by him on the bank of said stream in said Mapleton. The defendant company maintains a dam across said stream in said village, below the plaintiff's said lot and in connection with said dam owns and operates a large saw-mill for the purpose of manufacturing logs driven by it down said stream. The dead water or pond created by said dam, ponds back from said dam a distance of about five miles up said stream, said distance being about one mile above and beyond the plaintiff's said lot.

Writ dated July 24, 1905. Plea, the general issue. Tried at the December term, 1905 of the Supreme Judicial Court, Aroostook County. After all the evidence had been taken out, the case was withdrawn from the jury and reported to the Law Court "for decision upon the declaration, plea and so much of the evidence as is legally admissible" and with the further stipulations that "the Law Court is to determine the rights of the parties and render such judgment as the law and evidence require" and "if the judgment is for plaintiff, damages are to be assessed at twenty-five dollars."

The declaration in the plaintiff's writ contains two counts which are as follows: "In a plea of the case; for that at said Presque Isle, on the first day of April, 1903, and for a long time prior thereto, and ever since, a certain navigable stream of water called the Presque Isle Stream flowed and still flows through the towns of Mapleton and Presque Isle and the village of Presque Isle in said County of Aroostook, and that from time immemorial has been and still is a public navigable stream, and that all the citizens and inhabitants of this State always of right have had, and of right now have and ought at all times to have, free use of the sailing and navigation of said stream and liberty at all times of the year to go, return, pass and repass, sail and navigate up and down said stream without any let, obstruction or hinderance whatsoever; and that until the obstruction of said stream by said defendant, as hereinafter set forth, said stream had flowed down, along, and through its regular channel and from said Mapleton through said Presque Isle and Presque Isle Village, and up to the time of its obstruction, by said defendant, as hereinafter set forth had for a time whereof the memory of man is not to the contrary, always been commonly used by the public, as a public highway, at all times of the year, for the passage of boats, canoes, punts, batteaux, and other fresh water craft, for the purpose of business, convenience, and of their own free will and pleasure, and that, on said first day of April and ever since, said stream flowed and still flows under a certain public bridge and highway in said village of Presque Isle called the Bridge Street Bridge, and which said bridge has always been and still is a part of the public highway in said village.

"And the plaintiff further avers, that on said first day of April and for a long time prior thereto and ever since, he was and still is seized, possessed, and the owner of a certain piece or parcel of real estate, situate on the bank of said stream where it flows through said town of Mapleton, with a house and residence of said plaintiff thereon erected and built by said plaintiff a long time prior to said first day of April for the purpose of a residence and used by him as a place of rest and recreation and temporary home for himself and wife from time to time.

"And the plaintiff further avers that on said first day of April and for a long time prior thereto, and ever since his business and occupation has been and is that of a photographer, and his place of business during all said time has been said Presque Isle Village and during said period he has had and still has his permanent residence in said Presque Isle Village.

"And the plaintiff further avers that prior to said first day of April, he has used said stream as a public highway in going to and returning from his residence on the banks of said stream and river in said Mapleton, and in going to and returning from his said residence in said village of Presque Isle, and that on said first day of April and ever since said stream was and is the only way, passage and highway that said plaintiff had or has to use between plaintiff's said residence and to convey, carry, bring and transport his goods between said residences, together with himself and wife in passing to and returning from the same.

"And the plaintiff further avers that on said first day of April and ever since he was and still is entitled to pass and repass, go and return, travel said journey and navigate at all times of the year with boat, canoe, punt, batteau, or any other fresh water craft, on along and over the waters of said stream and in the channel thereof, both up and down said stream at any and all times, without let, hinderance, interference, detention, impediment or obstruction, both from said bridge and public highway to his aforesaid temporary residence in said Mapleton and from his said temporary residence to his said place of business and residence in said Presque Isle Village and said bridge and public highway as aforesaid, of his own free will and pleasure, and that said plaintiff during all said period had and has no other way, road or means of going to and returning from his said residence in said Mapleton without unlawfully crossing and passing over land not his own. Yet the said defendant corporation, not ignorant of the premises, but well knowing the same, and without right, and in utter disregard of the rights of him the said plaintiff, on the first day of April, 1903, by its servants and agents did put, place and deposit in said stream of water and in the channel thereof, to wit, in all that part and portion of said stream

of water and in the channel thereof lying and being between the aforesaid public bridge and the aforesaid piece or parcel of land, said part and portion being four miles or more in length, large quantities and numbers of logs and lumber, totally, wholly and completely filling all of said part and portion of said stream of water and the said channel thereof and for said entire distance of four miles or more with logs and lumber, so that passage, either up or down said part or portion of said stream of water and the channel thereof, with boats, canoes, punts, batteaux, or fresh water craft of any kind, was utterly impossible and wholly impeded, hindered and obstructed, and hath ever since said first day of April, kept and maintained said logs and lumber in all of said part and portion of said stream of water and channel thereof, and by means of said logs and lumber hath ever since said first day of April, obstructed, hindered and impeded and kept obstructed, hindered and impeded all of said part and portion of said stream of water and the channel thereof and wholly, entirely and completely prevented the passage of boats, canoes, punts, batteaux, and all other fresh water crafts, up, down and along said part and portion of said stream of water and the channel thereof, and still continue to keep said part and portion of said stream of water and the channel thereof, wholly, entirely and completely filled with logs and lumber and obstructed and impeded as aforesaid so that no passage up, down and along said part and portion of said stream of water and the channel thereof, can be had with boats, canoes, punts, batteaux, or fresh water crafts of any kind; — Whereby the said plaintiff ever since said first day of April hath been wholly prevented and hindered from passing, going, sailing and journeying with boat, canoe, punt, batteau or fresh water craft of any kind, up, down along and over said part and portion of said stream of water and the channel thereof lying and being as aforesaid between said public bridge and his aforesaid piece or parcel of land and residence thereon, and ever since said first day of April hath been wholly deprived of his right to use said part and portion of said stream of water and the channel thereof for the purpose of going and journeying with boat, canoe, punt, batteau or other fresh water craft, between said public bridge and

his aforesaid piece or parcel of land and residence thereon, and is still wholly prevented and hindered from passing, going, sailing and journeying with boat, canoe, punt, batteau or fresh water craft of any kind, up, down, along and over said part and portion of said stream of water and the channel thereof, and is still wholly deprived of his right to use said part and portion of said stream of water and the channel thereof for the purpose aforesaid, and ever since said first day of April, whenever he has visited and gone to and returned from his aforesaid piece or parcel of land and residence thereon, both alone and in company with his wife, he hath been put to great trouble and inconvenience and obliged to travel a long distance with team, to wit, a distance of four miles, and to travel a long distance on foot, to wit, a distance of one mile, and obliged to procure and obtain permission to pass over and across land not his own and put to great cost and expense to hire a team both to take and transport himself and his wife and necessary goods and chattels over and along the distance to be travelled with team as aforesaid, to wit, a cost and expense of two dollars for each and every such trip, and the value of his aforesaid piece or parcel of land and residence thereon hath been greatly lessened and reduced, and is still put to great trouble and inconvenience and to great cost and expense to hire a team for the purpose aforesaid whenever he either alone or in company with his said wife visits, goes to and returns from his aforesaid piece or parcel of land and residence thereon, and in many other ways hath been greatly damaged and put to great loss, cost and expense.

"Also, for that a certain ancient navigable stream of water called the Presque Isle Stream, flows in and through a certain channel or course, through the easterly part of the town of Mapleton, in said county, thence by said channel or course into and through said town of Presque Isle and through the village of said Presque Isle, thence into the Aroostook River, and has so flowed in and through said channel or course from the time whereof the memory of man is not to the contrary; that said stream flowing in and through said channel or course as aforesaid, flows under and connects with a certain public road or highway in said village, commonly called

Bridge Street; that said navigable stream of water and the channel in which it flows, from the time whereof the memory of man is not to the contrary hath always been commonly used by the inhabitants of the State of Maine, and others, for the passage of logs, lumber, boats, canoes, punts, batteaux and other fresh water craft, and commonly used for the purposes aforesaid as and for a public highway; that the said plaintiff is seized and possessed of a certain piece or parcel of land, situate in said Mapleton, on and along the south bank of the said channel of said stream, and joining said stream, and connecting with said stream and said channel thereof, and hath been so seized and possessed for a long time hitherto; that said piece or parcel of land is not connected with or reached by any public road, street or highway, other than said stream and channel; that he the said plaintiff has a lawful right to go, pass, travel and journey, at all times, with his boats, canoes, punts, batteaux, or any other water craft, up, down, along and over said stream in the channel thereof, and the waters of said stream in the channel thereof, and especially on, along, over, up and down all that part and portion of said stream and of the water of said stream in the channel thereof between said public road or highway in said village and his aforesaid piece or parcel of land, the same being a long distance, to wit, a distance of four miles; Yet the said defendant corporation, not ignorant of the premises, but well knowing the same, without right, and without any regard for the rights of him the said plaintiff, did, by its servants and agents, on the first day of April, 1903, put, place and deposit in all of said part and portion of said stream and of the water of said stream in said part and portion and in said channel of said part and portion of said stream, large quantities of logs and lumber and thereby completely filled, stopped up and choked all that said part and portion of said stream and all that said part and portion of the water of said stream and all of said part of said channel of said stream, and thereby wholly and completely hindering and preventing the passage of boats, canoes, punts, batteaux and all other fresh water craft, up, down and along and over said part and portion of said stream and of the channel of said part and portion of said stream and hath ever since

said first day of April, kept said part and portion of said stream, and said channel of said part and portion of said stream wholly and completely filled with logs and lumber and choked with logs and lumber, so that no passage up, down, along and over said part and portion of said stream and of the said channel thereof, with boats, canoes, punts, batteaux or other fresh water craft, could or now can be had, and still continues to keep said part and portion of said stream and said channel of said part and portion of said stream wholly and completely filled and choked with logs and lumber; whereby he the said plaintiff, from and ever since said first day of April, hath been wholly prevented from passing up and down said part and portion of said stream and the channel of said part and portion of said stream, with his boats, canoes, punts, batteaux or other fresh water craft, but in order to reach his aforesaid piece or parcel of land and return therefrom, he hath been obliged to make long and devious journeys by team and on foot, and to hire teams at great cost and expense for the purpose of making said journeys, and hath been put to great trouble and inconvenience, and obliged to procure and obtain permission to pass over and across land not his own in order to reach and return from his aforesaid piece or parcel of land, and is still obliged to make long and devious journeys by team and on foot, in order to reach his aforesaid piece or parcel of land and to return therefrom, and to hire teams at great cost and expense for the purpose of making such journeys, and the value of his said piece or parcel of land hath been greatly lessened and reduced, and that he is still hindered and prevented from passing up, down and along said part and portion of said stream and said channel of said part and portion of said stream, and in many other ways he has been greatly damaged and injured by the aforesaid unlawful acts of said defendant corporation."

The defendant company, at the Law Court, among other things, contended "that the court, without violence to the settled principles of law regarding the navigation of private floatable streams, may hold that this plaintiff has not a paramount right of passage with his canoe through defendant's mill pond; that the filling of the stream with logs to be manufactured, when it appears that a passage

through is inconsistent with profitable manufacturing, may not give him a right of action. Neither by statute law nor by ancient common law could the plaintiff claim any right to navigate with his pleasure craft in Presque Isle Stream."

The case sufficiently appears in the opinion.

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

Charles F. Daggett and Louis C. Stearns, for defendant.

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

PEABODY, J. This is an action on the case brought by the plaintiff against the defendant to recover damages for obstructing with logs and lumber, on and prior to the first day of April, 1903, the Presque Isle Stream, a navigable stream flowing through the towns of Mapleton and Presque Isle in the County of Aroostook.

The stream has its source in small lakes and numerous tributaries in a lumber region comprising three townships, and its length to the junction with the Aroostook River, a mile below Presque Isle, is about forty miles.

For many years, logs in large quantities have been floated down the main stream and its tributaries and small boats and canoes have been used in connection with the lumbering operations and by sportsmen.

Recently, the plaintiff and other persons have erected summer camps and cottages on the banks of the stream four or five miles above the village of Presque Isle. He has, with his family, regularly occupied his cottage in the summer months for recreation and health.

In 1864, one of the defendant company's predecessors in title built a dam across the stream and erected a saw-mill near the public bridge at Presque Isle Village, and for several years last past the defendant company has carried on a large lumbering business under exclusive permits of the various owners of land at the head waters of the stream, and in the spring has driven the logs to its mill in quantities of five or six millions yearly. The logs have filled the pond

formed by the dam and the still water four or five miles up the stream and have usually been held by a boom at the head of the drive.

The original channel was quite crooked but well defined for thirty miles, and was of sufficient width and depth to float logs and small boats at all times of the year, except in seasons of unusual drouth. From the dam to what is called Sheep Tail Rips above the plaintiff's cottage, a distance of five miles, the average width of the stream from bank to bank is one hundred and fifty-six feet and the average depth between three and four feet.

The logs stored by the defendant in the pond and dead water above are manufactured at the mill, and in the months September and October the stream is practically clear above the dam.

The defendant has made no effort to open a passageway for canoes and boats through its logs in the stream, although it has been requested by the plaintiff and others to make, after the drives, a sufficient channel during the summer season.

The case is reported to the Law Court for decision.

The plaintiff's right of action involves three material questions: 1. Is the Presque Isle Stream a navigable stream? 2. Has the defendant unreasonably obstructed it? 3. Has the plaintiff sustained special damages?

We retain the term "navigable stream" as indicating one which is subject to public use as a highway for the purposes of commerce and travel. The tidal test of navigability adopted by the common law has been found inapplicable to the conditions existing in the United States, and waters are generally declared navigable in a legal sense if they are in fact navigable. *The Daniel Ball*, 10 Wall. 557.

Capabilty of use for transportation is the criterion, and is a question of fact. *Brown* v. *Chadbourne*, 31 Maine, 9; *Treat* v. *Lord*, 42 Maine, 552; *Lancy* v. *Clifford et al.*, 54 Maine, 487; *The Montello*, 20 Wall. 430; *Healy* v. *Joliet etc. R. Company*, 116 U. S. 191; *Rhodes* v. *Otis*, 33 Ala. 578; *Moore* v. *Sanborne*, 2 Mich. 520; *Thunder Bay River Booming Company* v. *Speechly*, 31 Mich. 326.

The extended application of the right of the public to use navigable streams, whether tidal or non tidal, even those of inconsiderable size, as highways for transporting merchandise, rafting and driving logs and propelling boats, has made the terms "navigable" and "floatable" practically synonymous. *Knox* v. *Chaloner*, 42 Maine, 150.

In *Veazie* v. *Dwinel*, 50 Maine, on page 484, the Court say: "All streams in the state of sufficient capacity in their natural condition to float boats, rafts or logs, are deemed public highways and as such are subject to the use of the public."

The Presque Isle Stream above the bridge at Presque Isle for a distance of thirty miles is clearly shown by the evidence to be navigable in fact, and to possess the character which brings it within the class of streams which, though in point of property are private, are subject to the easement of public highways which individuals have no right unreasonably to obstruct.

Public highways afford an equal right to each citizen to their reasonable use, and any unreasonable obstruction that prevents or hinders such use, creates a nuisance in the judgment of the law.

The circumstances of each case are to be considered in determining the use which individuals may make of the public highways, and the same rule prevails in limiting the extent of the right over waters as over the land. Angell on Highways, sec. 229; *Stetson* v. *Faxon*, 19 Pick. 147, and cases cited; *Davis* v. *Winslow*, 51 Maine, 264.

Temporary obstructions are unavoidable and are incident to the legitimate purposes of travel and transportation, and if continued within reasonable limits they do not create a nuisance. But if the encroachment upon the public highway is unreasonable in extent or duration, it is unjustifiable. *Veazie* v. *Dwinel*, 50 Maine, 479; *Gerrish* v. *Brown*, 51 Maine, 256; *People* v. *Cunningham*, 1 Denio, 524.

No circumstances can be supposed which would authorize an individual to convert a navigable stream into a place of deposit for logs or other materials so as to permanently obstruct navigation. *Enos* v. *Hamilton*, 24 Wis. 658. In *McPheters* v. *Moose River*

Log Driving Company, 78 Maine, 329, the court by EMERY, J. say: "When parties deliberately and without compulsion by nature, select a portion of a river as a place for a season's storage of their logs, and thus completely block up another's entrance into the common highway, we think they are exceeding their right and are liable for damages thereby caused."

As applied to the rights of operators in lumbering enterprises, the doctrine of these cases is not questioned by the defendant, but it claims that the storing of drives of logs until they might be manufactured in the usual course of business, interferes with no one having a common right of travel and transportation, as it has monopolized the commercial business on this stream and its tributaries. If the public has in reality become merged in the defendant company, its exclusive use of the stream is justifiable. But the report shows that there are riparian proprietors, including the plaintiff, who have occasion to use the stream in the summer months for floating boats and transporting goods from the Presque Isle Bridge to their cottages, and that sportsmen were accustomed to pass up and down the stream. Their use is valuable and legitimate, differing only in degree from the defendant's use measured by necessity and convenience.

The difference in the nature and importance of the use of a public highway only bears upon the question of reasonable use and not upon the fact of the paramount right. *Woodman* v. *Pitman*, 79 Maine, 456.

The existing conditions which create the purposes of the public use of the Presque Isle Stream are subject to change, and the driving and temporary storing of logs now of principal importance, may become secondary in importance to the travel of summer residents and the transportation of merchandise for their accommodation. In this State, recreation is assuming features and incidents as valuable to the public as trade and manufacturing.

The question, whether the class represented by the plaintiff has the same rights as those distinctively engaged in business, has already been settled in other states. The Supreme Court in Massachusetts has decided that "Navigable streams are highways, and a traveler for pleasure is as fully entitled to protection in using a pub-

lic way, whether by land or by water, as a traveler for business." *Atty. Gen.* v. *Woods*, 108 Mass. 436; *West Roxbury* v. *Stoddard*, 7 Allen, 158; *Charlestown* v. *Middlesex County Coms.*, 3 Met. 202; *Murdock* v. *Stickney*, 8 Cush. 113; *Atty. Gen.* v. *Terry*, *L. R.* 9 Ch. 423; *Lamprey* v. *State*, 52 Minn. 181. In *Grand Rapids* v. *Powers*, 89 Mich. 94, it was held that "Navigability for pleasure is as sacred in the eyes of the law as navigability for any other purpose."

The duration and extent of the obstruction of the stream by the defendant company, shown by the report, must be considered unreasonable and as creating a public nuisance.

The remaining question is difficult only in the application of an entirely simple rule of law to the facts. It must be shown by the plaintiff that by the acts of the defendant he has sustained damages not suffered by the community at large. 3 Black, Com. 219; *Rose* v. *Miles*, 4 M. & S. 101; *Dudley* v. *Kennedy*, 63 Maine, 465. As generally expressed, he must prove special damages resulting from the public nuisance to entitle him to a private action, or particular damage which in cases like the one at bar may be the preferable term. *Anderson's Dictionary of Law*, 307; *Sedgwick on the Meas. of Dam.* 28, 29, 152, 153.

Instances occur in which the application of the principle is obvious as where an individual suffers physical injury, injury to his horse or carriage, or where the access to his dwelling house or place of business is directly cut off by an obstruction to the highway. But there are others where the distinction between general and special damages must be determined by the rules of reasonable inference and the authority of decided cases involving similar facts. *Quincy Canal* v. *Newcomb*, 7 Met. 276; *Rose* v. *Gross*, 5 M. & G. 613; *Stetson* v. *Faxon*, 19 Pick. 147, supra.

It is held that the particular injury is one not merely greater in degree but different in kind. *Aram* v. *Schalenbergen*, 41 Cal. 449; *Wesson* v. *Washburn Iron Company*, 13 Allen, 95; *Bullock* v. *Bullock*, 122 Mass. 3; *Brightman* v. *Fairhaven*, 7 Gray, 271. But it has also been held that a private action is not to be defeated by the fact that others suffer a similar particular injury. *Park* v.

The Chicago etc. R. Company, 43 Ia. 336; *Lansing* v. *Smith*, 4 Wend. 10; *Bigley* v. *Nunan*, 53 Cal. 403; *Seeley* v. *Bishop*, 19 Conn. 135; *Powell* v. *Bunger*, 91 Ind. 64; *Sohn* v. *Cambern*, 106 Ind. 302; *Brant* v. *Plumer*, 64 Ia. 33.

The mere fact that a person is delayed or compelled to take a circuitous route by an obstruction in the highway, does not necessarily constitute special damages. *Winterbottom* v. *Derby*, L. R. 2 Ex. 316; *Houk* v. *Wachter*, 34 Md. 265; *Holmes* v. *Corthell*, 80 Maine, 31. But where an individual suffers expensive delay or substantial pecuniary loss, in traveling or transporting goods, it may be a particular damage for which he has a right of action. *Greasely* v. *Codding*, 2 Bing. 263, cited with approval in *Norcross* v. *Thoms*, 51 Maine, 503; *Little Rock etc. R. Co.* v. *Brooks et al.*, 39 Ark. 403; *Page* v. *Mille Sac's Lumber Company*, 53 Minn. 492; *Brown* v. *Watson*, 47 Maine, 161; Angell on Watercourses, secs. 95, 96, 567, 572; 1 Hilliard on Torts, 66, 548; R. S., chap. 22, sec. 13.

The reason for the rule which denies an action to an individual for a common nuisance, is that "it would cause such a multiplicity of suits as to be itself an intolerable nuisance." *Quincy Canal* v. *Newcomb*, 7 Met. 276, supra. But with equal justice it was said by Lord Holt in *Ashly* v. *White*, Lord Raymond, 938, "If men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense."

In this case the plaintiff purchased and built a residence on land bordering on the Presque Isle Stream, a legal highway. No other highway affords him access. The obstruction of the stream not only obstructs his right in common with others to pass up and down the stream, but cuts off his right of access to his private property which is a private right appurtenant to his land, as said in *Whitmore* v. *Brown*, 102 Maine, 47.

And we think upon the authority of the cases and law writers cited that the plaintiff has, in a legal sense, clearly suffered special damages from the acts of the defendant company in obstructing the Presque Isle Stream, not because he has had occasion more than others for its use, but in a particular way as means of ingress and

egress to and from his summer cottage, a use and benefit differing from that required by the public at large. *Venard* v. *Cross*, 8 Kan. 248; R. S., chapter 22, section 13; *Whitmore* v. *Brown*, 102 Maine, 47, supra.

Judgment for plaintiff for $25, according to stipulation of the parties.

HANNAH COPP *vs.* R. A. COPP, AND CERTAIN LOGS.

Oxford. Opinion August 24, 1907.

Husband and Wife. Actions. Dismissal and Nonsuit. Log Liens. Pleadings. Declarations. Attachment. Demurrer. Costs. R. S., chapter 93, sections 91, 63.

1. A wife cannot maintain an action against her husband even for services as cook in his logging operations; and when in such action the fact of coverture appears, the action must be dismissed even though the husband does not appear and is defaulted.
2. To sustain an attachment of specific property to enforce a claim of lien thereon under R. S., chapter 93, section 61, it is not sufficient to state in the writ, outside of the declaration, that the suit is brought to enforce the lien. It must be so stated in the declaration itself.
3. The owner of property thus attached may appear and become a party to the suit, and if he does thus appear he can challenge by demurrer the sufficiency of the declaration to sustain a lien judgment against his property.
4. When a lien judgment is denied, the owner of the property, if he has appeared, is entitled to costs from the time of his appearance.

On agreed statement. Demurrer to declaration sustained. Action dismissed.

Assumpsit on account annexed brought by the plaintiff against the defendant, R. A. Copp, to recover the sum of $210 for "six months labor at $35.00." The plaintiff is the wife of the said defendant, R. A. Copp. The case shows that the plaintiff brought this suit against her said husband for her own labor in cooking for men

employed by him in cutting, hauling and piling certain spruce logs and that she claimed a lien on said logs, the suit, however, being for the benefit of one L. W. Blanchard to whom she had assigned her claim.

The writ was sued out of the Rumford Falls Municipal Court, Oxford County, April 2, 1907, and commands the officer "to attach the goods and estate of R. A. Copp of Andover and particularly and especially to attach as of lien, 750,000 of six-foot spruce timber cut by the said R. A. Copp on Beaver Brook in Byron: and now piled on the Bank of the said Beaver Brook: To answer unto Hannah Copp (for the benefit of L. W. Blanchard) who claims a lien on said timber for her labor as cook for the men employed in cutting, hauling and piling this said 750,000 feet of six-foot spruce namely for six month's labor as cook from September 18th, 1906, to March 18th, 1907, six months at thirty-five dollars per mo. $210. to the value of Three hundred dollars, and summon the said defendant, (if he may be found in your precinct) to appear before our Judge of our Rumford Falls Municipal Court at Rumford, in said County of Oxford, to be holden at the Municipal Court Room in Rumford Falls Village, on the fourth Tuesday of May A. D. 1907, then and there in our said Court to answer unto Hannah Copp for the benefit of L. W. Blanchard, Assignee of same, as appears by the assignment of the said account to him from her which assignment, or a copy thereof is to be filed in court with this writ," and contains two counts, one being "R. A. Copp to Hannah Copp, Dr. To six months labor at $35.00, $210," and the other the usual omnibus count.

The writ contains no reference to a lien or claim of lien other than that found in the command to the officer.

The officer's return on the writ shows an attachment "as of lien" of "750,000 feet of six-foot timber cut by R. A. Copp on Beaver Brook in Bryon in said county, and now piled on the west bank of the said Brook, near Pressey's camps," &c.

The other facts, as shown by the agreed statement, are as follows:

"The writ was entered at the May term, 1907, of the Rumford Falls Municipal Court, at which term Oscar W. Pressey, owner of

property attached, voluntarily appeared, and became a party to the suit. The defendant, R. A. Copp, did not appear.

"On the second day of said term, the following pleadings were filed, and pro forma, rulings made and exceptions taken as a basis of an agreed statement, to the Law Court in accordance with sec. 2, chap. 329 of the Private and Special Laws of 1903.

"First Ruling. Oscar W. Pressey, owner of property attached, filed plea in abatement. Plaintiff demurred. Demurrer sustained.

"Second Ruling. Oscar W. Pressey, owner of property attached, filed special demurrer to plaintiff's writ and declaration. Demurrer overruled.

"To both of which rulings, Oscar W. Pressey, owner of property attached, excepted, and it was agreed that the case be reported to the Law Court and that the decision of the Law Court be certified to the Judge of the said Rumford Falls Municipal Court, for such further disposition of the cases as the law requires."

The pith of the case appears in the opinion.

Gleason & Blanchard, for plaintiff.

Bisbee & Parker, for O. W. Pressey, owner of the attached logs.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, CORNISH, KING, JJ.

EMERY, C. J. By the writ in this case the officer was commanded to attach the property of the personal defendant, and also certain specific logs for the enforcement of a lien claimed by the plaintiff upon them. This was done and the writ properly returned and entered in the Rumford Falls Municipal Court. The personal defendant did not appear, but one Pressey, the owner of the logs thus attached, did appear voluntarily and became a party to the suit as he was authorized to do by R. S., chapter 93, section 63. Sundry pleadings between the plaintiff and Pressey were then filed in that court and rulings made, whereupon the whole case was reported direct to the Law Court upon agreed statement for disposition according to Sec. 2 of Ch. 239 of Private Laws of 1903 amendatory of the act establishing the Rumford Falls Municipal Court.

Mr. Pressey demurred to the declaration as insufficient for a lien judgment against his logs. While in the command to the officer to attach the logs it was stated that the plaintiff claimed a lien on them; in the declaration there was no mention of any lien claim nor of any facts constituting a lien. There were two counts only, one upon an account annexed for "six months labor at $35," and the other the usual omnibus count. In neither of them were there any words showing that the suit was brought to enforce a lien as required by the statute, R. S., chapter 93, section 61. It follows that the plaintiff cannot have judgment against the logs.

The plaintiff's claim for a lien was purely statutory and could be enforced only by compliance with the statute providing therefor. The words of that statute are "The declaration must show that the suit was brought to enforce the lien." It is not enough that it so appears in some part of the writ, outside of the declaration. It must appear in the declaration itself. *Parks* v. *Crockett*, 61 Maine, 489.

The plaintiff contended in argument that Mr. Pressey could not raise the question of the sufficiency of the declaration by demurrer but only by motion to dissolve the attachment. Pressey, however, became a party to the suit by authority of the statute and as such party could interpose any defence of law or fact that would prevent judgment against his property attached. *Parks* v. *Crockett*, supra.

It further appears from the pleadings and the agreed statement that the plaintiff and the personal defendant are husband and wife, and were such at the date of the writ. It is admitted that no judgment should be rendered against him, hence the action should be dismissed.

Demurrer to the declaration sustained. Action dismissed with costs for the owner of the logs from the time of his appearance.

LUTHER O. POLAND *vs.* ALWILDA S. DAVIS AND JAMES B. DAVIS.

Knox. Opinion August 29, 1907.

Pleading. Pleas Puis Darrein Continuance. Demurrer. Repleader.

In pleas puis darrein continuance, after the cause has been continued, great certainty is always required and it is not sufficient to say generally that after the last continuance such a thing happened, but the day of continuance must be alleged where the matter of defence arose.

The omission to state in the plea puis darrein continuance the day of the last continuance is fatal.

The plea puis darrein continuance waives all former pleadings, and if on demurrer it is adjudged bad, the judgment goes in chief unless the court allows a repleader, on terms, which it may do.

In the case at bar, the plea puis darrein continuance, did not state the day of the last continuance, and was therefore *held* to be fatally defective.

On exceptions both by plaintiff and by defendants. Plaintiff's exceptions sustained. Defendants' exceptions overruled.

Real action to recover certain real estate situate in the town of Cushing. Entered and first tried at the April term, 1904, of the Supreme Judicial Court, Knox County. Verdict for plaintiff. On the defendants' exceptions the verdict was set aside. (See *Poland* v. *Davis et al.*, 99 Maine, 345.) At the December term, 1904, of said court, the action was "referred to the court with leave to except," and was heard by the presiding Justice at the April term, 1907, of said court.

All the material facts appear in the opinion.

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

David N. Mortland, for defendants.

SITTING: WHITEHOUSE, STROUT, PEABODY, CORNISH, KING, JJ.

STROUT, J. Writ of entry, entered at April term, 1904. Plea, general issue. Case tried at that term, resulting in verdict for demandant. Exceptions to ruling of presiding Justice sustained by

the Law Court, and at the December term, 1904, case submitted to the presiding Justice with right of exceptions. The case was then continued from term to term till the April term, 1907, when defendants filed a plea puis darrein continuance that demandant pending the action had conveyed to a third party the demanded premises. To this plea plaintiff demurred. The presiding Justice overruled the demurrer, adjudged the plea good and ordered judgment for the plaintiff for his costs up to the time of filing said plea, and judgment for defendants' costs after the filing thereof. To the overruling the demurrer the plaintiff excepted, and the defendants excepted to the ruling as to costs.

In pleas puis darrein continuance, after the cause has been continued, "great certainty was always required," and it "was not sufficient to say generally that after the last continuance such a thing happened, but *the day* of the continuance must have been alleged where the matter of defence arose." Chitty's Pleading, Vol. 1, p. 660.

The omission to state in the plea the day of the last continuance is fatal. *Cummings* v. *Smith*, 50 Maine, 569; *Jewett* v. *Jewett*, 58 Maine, 234; *Augusta* v. *Moulton*, 75 Maine, 551; *Field* v. *Cappers*, 81 Maine, 36. In *Rowell* v. *Hayden*, 40 Maine, 582, this question was not raised or decided.

The plea in this case does not state the day of the last continuance, and is therefore fatally defective. It is not necessary to consider other objections to the plea.

The plea waives all former pleading, and if on demurrer it is adjudged bad, the judgment goes in chief unless the court allows a repleader, on terms, which it may do as decided in *Augusta* v. *Moulton*, supra. This result renders the defendants' exceptions unimportant, and they are overruled.

To avoid a possible injustice, a repleader will be awarded.

Plaintiff's exceptions sustained. Demurrer sustained. Plea bad. Repleader nunc pro tunc awarded on payment of costs since filing the plea.

ANNIE E. STEPHENSON

vs.

PORTLAND RAILROAD COMPANY.

Cumberland. Opinion August 29, 1907.

Harmless Errors. Misconduct of Counsel. Remittitur. New Trial.

A verdict against a defendant will not be set aside because of alleged misconduct of the plaintiff's counsel in the argument of the cause to the jury when it appears that such alleged misconduct was not prejudicial to the defendant.

When in an action on the case to recover for personal injuries it appears that the plaintiff has suffered some injury for which the defendant is clearly liable but that the damages assessed by the jury are excessive, and a remittitur is ordered, the verdict will be set aside unless remittitur be made as ordered.

On general motion and special motion by defendant. Special motion overruled. General motion sustained unless remittitur be made.

Action on the case to recover damages for alleged personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant company.

Tried to a jury at the January term, 1907, of the Supreme Judicial Court, Cumberland County. Plea the general issue. Verdict for plaintiff for $3641.66. The defendant then filed two motions to have the verdict set aside. One was a special motion alleging misconduct of the plaintiff's counsel in his argument to the jury. The other was the usual general motion alleging that the verdict was against evidence, etc., and that the damages awarded were excessive.

The case appears in the opinion.

H. & W. J. Knowlton, for plaintiff.

Libby, Robinson & Ives, for defendant.

SITTING: WHITEHOUSE, STROUT, PEABODY, CORNISH, KING, JJ.

STROUT, J. Action to recover for personal injuries. Verdict for plaintiff for $3641.66. The case is here upon a special motion by defendant to set aside the verdict on the ground of alleged misconduct of plaintiff's counsel in his argument to the jury, and upon the general motion as against evidence and for excessive damages.

Upon the special motion. In argument to the jury plaintiff's counsel said: "three of the witnesses . . . . are railroad men in the employ of this said company. I believe one of them has been discharged a few times and hired over." Defendant's counsel objected to this statement as to discharge and hiring over, as introducing facts not in evidence. Unsupported by evidence, the statement ought not to have been made. Was it injurious to the defendant? If so, it would be cause for setting aside the verdict. The witness might have been discharged for lack of work. Hiring him over indicated confidence in the man by the defendant. No fault was imputed to him. But for another reason we think the statement was harmless. While the defendant did not admit liability, it was not denied that plaintiff received some injury, and non-liability was not strenuously insisted upon, and we do not see how it could be. The real issue was the extent of that injury. The witnesses alluded to by counsel for plaintiff testified as to the fact of collision and the attendant circumstances, but gave no material testimony upon the magnitude of plaintiff's hurt; and upon that question, the real one in issue, these witnesses were unimportant. No harm to defendant, therefore, could come from the remark.

In defendant's argument to the jury counsel had made a point that the plaintiff's presence in court during the trial of three days was inconsistent with her claim as to great and permanent injury. In reply to this, counsel for plaintiff stated that he took the responsibility for that, "after having asked the doctor, inquired of him whether it would be safe." It may admit of doubt whether under the circumstances this remark was not justifiable. However that may be, plaintiff's presence in court was known to the jury, and defendant had the full benefit of his argument upon that fact. The

remark was not prejudicial to the defendant upon the question at issue. If it had any effect, it tended to strengthen defendant's argument. Being brought there by her own counsel was more significant than if her appearance had been entirely voluntary.

Upon the general motion. The plaintiff received some injury, for which defendant was clearly liable. How great was that injury? After carefully examining the evidence and considering the temperament of the plaintiff, her previous condition of health and her condition after the accident, we do not think all her troubles were caused by the collision. It would be unprofitable to review the evidence of the physicians in connection with that of the plaintiff, but the result of an examination is that the damages awarded by the jury are excessive.

The special motion is overruled.

If plaintiff within thirty days after filing the rescript in this case shall remit all of the damages in excess of two thousand dollars the entry will be: Motion overruled. Otherwise, motion sustained for excessive damages and verdict set aside.

So ordered.

F. W. BROWN, JR.

vs.

HENRY S. WEBBER.

Waldo. Opinion September 9, 1907.

Real Actions. Title. Burden of Proof. General Issue. Foreclosure. Redemption. R. S., chapter 106, section 6.

1. In a real action, under the general issue, the burden is on the plaintiff to show the title he has alleged. If he shows no title he cannot prevail, even though the defendant has none. The defendant may rebut the plaintiff's proof, by showing title in himself, or in another, or merely that the plaintiff has none, and this may all be shown under the general issue.
2. When, under a bill in equity for the redemption of a mortgage, a decree has been entered fixing the amount of the mortgage indebtedness, and the time within which the mortgagor may redeem, failing which his right to redeem is to be forever foreclosed, if the mortgagor fails to redeem within the time limited, and if there is no waiver of forfeiture, his title is lost.

On report. Judgment for defendant.

Real action to recover a certain lot or parcel of land situate in Monroe. Plea, the general issue with a brief statement alleging that the title was not in the plaintiff but was in one Sidney Webber.

Tried at the January term, 1906, of the Supreme Judicial Court, Waldo County. At the conclusion of the evidence, it was agreed to report the cause to the Law Court for decision.

The case fully appears in the opinion.

F. W. Brown, Jr., for plaintiff.

W. P. Thompson, for defendant.

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

SAVAGE, J. This is a real action, commenced March 21, 1905, in which the plaintiff claims title under a sheriff's deed dated

December 2, 1901, of the interest of one Horace C. Webber in the demanded premises, and under a quitclaim deed of the same from Webber to himself, dated May 16, 1902.

Eliza A. Webber, wife of Horace C. Webber, owned the premises from April 14, 1880 to May 4, 1891, on which last named date she conveyed her interest to her husband. On September 26, 1883, the husband and wife joined in mortgaging the premises to Eliza Crowell, the wife also releasing her right of dower. After foreclosure proceedings, to be hereafter referred to, the mortgage, on November 12, 1894, was assigned by the administrator of Crowell to the defendant, and on March 27, 1895, by the defendant to one Nickerson, and on September 29, 1900, by Nickerson to Sidney M. Webber.

It is evident from the record that at the commencement of this action the defendant had no title nor right of possession to the premises, and claimed none. Had he seasonably pleaded non tenure, or made disclaimer, he might have defended successfully on this ground. R. S., chapter 106, section 6. But since he failed to so plead within the first two days of the return term, this defence is not now tenable. *Colburn* v. *Grover*, 44 Maine, 47; *Chaplin* v. *Barker*, 53 Maine, 275.

The defendant did plead the general issue, with a brief statement that the title was not in the plaintiff but was in Sidney Webber. The brief statement added nothing to the general plea. Under the general issue the burden is on the plaintiff to show the title he has alleged. *Williams College* v. *Mallett*, 16 Maine, 84; *Bussey* v. *Grant*, 20 Maine, 281; *Rawson* v. *Taylor*, 57 Maine, 343; *Rowell* v. *Mitchell*, 68 Maine, 21. And, of course, the defendant may rebut the plaintiff's proof. He may set up title in himself; show title in another, *Rowell* v. *Mitchell*, 68 Maine, 21; or show merely that the plaintiff has none. *Bussey* v. *Grant*, 20 Maine, 281; *Chaplin* v. *Barker*, 53 Maine, 275; *Poor* v. *Larrabee*, 58 Maine, 543; *Stetson* v. *Grant*, 102 Maine, 222. In case of conflicting titles, the better one prevails. *Brann* v. *Vassalboro*, 50 Maine, 64; *Wyman* v. *Brown*, 50 Maine, 139; *Clarke* v. *Hilton*, 75 Maine, 426. In any event, the plaintiff must show some title.

He must recover, if at all, upon the strength of his own title. *Thayer* v. *McLellan*, 23 Maine, 417; *Chaplin* v. *Barker*, 53 Maine, 275; *Coffin* v. *Freeman*, 82 Maine, 577; *Day* v. *Philbrook*, 89 Maine, 462. If he shows no title he cannot prevail, even though the defendant has none. *Derby* v. *Jones*, 27 Maine, 357. And all this is determinable under the general issue.

Apylying these rules to the present case, we conclude that the plaintiff cannot maintain his action, for we think it is clear that he has no title. His title depends in the first place upon the effect of the sheriff's sale and deed of December 2, 1901. If Horace C. Webber, the judgment debtor, had no title at the time of that sale, the purchaser at the sheriff's sale took nothing by the sale, and the plaintiff claiming under him has taken no title. Again if Webber at the date of his quitclaim deed to the plaintiff, May 16, 1902, had no title, the plaintiff took none by the deed from him. And this, we think, was precisely the condition of Webber's title at the date of each of these deeds.

The case shows that in 1890 a writ of entry was brought by Eliza Crowell against Horace C. Webber and his wife, Eliza A. Webber, upon the mortgage already referred to, judgment was rendered as at common law, a writ of possession was issued, and Eliza Crowell was put in possession of the premises. In 1891, Eliza A. Webber conveyed her interest in the premises to Horace C. Webber. In 1892, Horace C. Webber brought a bill in equity against the administrator of estate of Eliza Crowell to redeem the premises from the mortgage. A final decree was entered in 1894, fixing the amount of the mortgage indebtedness, and the time within which Webber might redeem, by paying the amount of the indebtedness, failing which, his right to redeem from the mortgage should be forever foreclosed. That time elapsed long before the sheriff's sale and deed, and, therefore, long before the deed from Webber to the plaintiff, and there was no redemption. Accordingly the mortgage became absolutely foreclosed, and Webber's title was lost. Nothing passed, either by the sheriff's deed, or by Webber's deed to the plaintiff. It follows that the plaintiff has no title.

It appears indeed that while the foreclosure was running, Horace C. Webber negotiated with his brother, the defendant, to buy his equity in the place, and to buy up the mortgage and other outstanding claims and thus obtain the full title; but the trade was never completed. The defendant paid the amount due under the mortgage, and took an assignment of it, but did not buy the equity of Horace C. Webber. And it does not appear that the foreclosure was in any way waived.

Judgment for the defendant.

STATE OF MAINE *vs.* CHARLES MARTEL.

Androscoggin. Opinion September 10, 1907.

Criminal Law. Trial. Exceptions. Misconduct of Counsel. Evidence. Intoxicating Liquors. R. S., chapter 29, section 49.

The right of exception under the practice in this State is conferred by statute, and is based upon some opinion, direction or judgment on the part of the court which is erroneous, and adverse and prejudicial to the party excepting.

Counsel may employ wit, satire, invective and imaginative illustration in his arguments before the jury, both in civil and criminal trials, but in this the license is strictly confined to the domain of facts in evidence.

A violation of the rule that counsel in his argument is strictly confined to the domain of facts in evidence, may be ground for a new trial on motion of the party whose rights are prejudiced, or exceptions may lie to the action of the court in omitting or declining to interfere with the misconduct of counsel when objections are interposed.

But when counsel violates the rule that his argument must be strictly confined to the domain of facts in evidence, and objections are interposed, and the court does interfere and does what is proper to prevent any unjust influence being left on the minds of the jury from anything said by counsel not warranted by the evidence, then a new trial on the ground of misconduct of counsel must be sought by motion and not by exceptions.

In the case at bar and under the facts as shown by the case, *Held:* That exceptions to the alleged misconduct of counsel did not lie.

The defendant was indicted at the January term, 1906, of the Supreme Judicial Court, Androscoggin County, as a common seller of intoxicating liquors. At the trial of the defendant at the same term on said indictment, and against his objection, an examined copy of the record of special liquor taxes in the Internal Revenue Office at Portsmouth, N. H., showing payment of a retail liquor dealer's tax by the Tingwick Bottling Company, from July 1, 1904, to July 1, 1905, at 127 Lincoln Street, Lewiston, Maine, and further showing payment by the same company of a tax as wholesale dealers in malt liquors, for the same period, at 84 Lincoln Alley, in said Lewiston, was offered by the State and admitted in evidence. The defendant himself testified that from July 1, 1904, to February 1, 1905, he was the owner and sole occupant of the building at 127 Lincoln Street, and the owner of the building at 84 Lincoln Alley from July 1, 1904, to the date of the trial. It also appeared from the testimony of one Hudson, a witness for the State, that the defendant gave orders and exercised control in relation to large quantities of intoxicating liquors consigned to the Tingwick Bottling Company, and that the defendant was the only person with whom the witness had any talk in regard to the Bottling Company liquors. The defendant also objected to this last mentioned testimony. *Held:* (1) That the testimony of the aforesaid witness was admissible. (2) That the circumstances as shown by the case make the relevancy of the Internal Revenue records clearly apparent as evidence competent to show that the defendant if not the owner of the liquors assisted the common seller in the business.

On exceptions by defendant. Overruled.

Indictment against the defendant, as a common seller of intoxicating liquors, second offense, under the provisions of Revised Statutes, chapter 29, section 42. The time alleged in the indictment was from May 1, 1905, to the time when the indictment was found, to wit, at the January term, 1906, of the Supreme Judicial Court, Androscoggin County. On this indictment, the defendant was tried at the same term, and was found guilty.

During the trial, the defendant took exceptions to certain rulings of the presiding Justice admitting certain evidence. The defendant also excepted to certain alleged misconduct on the part of the State's attorney in his closing argument to the jury.

The case sufficiently appears in the opinion.

Ralph W. Crockett, County Attorney, for the State.

Newell & Skelton, for the defendant.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, CORNISH, KING, JJ.

PEABODY, J. This case is a criminal prosecution on an indictment found at the January term, 1906, of the Supreme Judicial Court for Androscoggin County against the defendant as a common seller of intoxicating liquors, in which a second offense is also alleged. The time which includes the offense is from May 1, 1905, to the finding of the indictment at said term.

The verdict of the jury was for the State.

The case is before the Law Court on the defendant's exceptions to the ruling of the court admitting certain testimony against seasonable objections, also to remarks made by the attorney for the State in his closing argument to the jury against the protest of the defendant's counsel.

The first exception is to the admission of an examined copy of the record of special liquor taxes in the Internal Revenue Office at Portsmouth, New Hampshire, showing payment of a Retail Liquor Dealers' tax by the Tingwick Bottling Company, from July 1, 1904, to July 1, 1905, at 127 Lincoln Street, Lewiston, Maine, and further showing payment by the same company of a tax as Wholesale Dealers in Malt Liquors, for the same period, at 84 Lincoln Alley in said Lewiston.

The admissibility of this kind of evidence has been sustained by the decisions of this court interpreting the statute now incorporated in R. S., chapter 29, section 49: *State* v. *Intoxicating Liquors*, 80 Maine, 57; *State* v. *Daniel O'Connell*, 82 Maine, 30.

The defendant himself testifies that from July 1, 1904, to February 1, 1905, he was the owner and sole occupant of the building at 127 Lincoln Street, and the owner of the building at 84 Lincoln Alley from July 1, 1904, to the date of the trial. The Internal Revenue record shows that he paid a Wholesale Liquor Dealer's tax at 127 Lincoln Street covering the period of one year from July 1, 1904. From the testimony of Mr. Hudson, a witness for the State, which is the subject of the second exception, but which we believe admissible, it appears that Martel gave orders and

exercised control in relation to large quantities of intoxicating liquors consigned to the Tingwick Bottling Company, and that he was the only person with whom the witness had any talk in regard to the Bottling Company Liquors. These circumstances make the relevancy of the Internal Revenue records clearly apparent in this case as evidence competent to show that the defendant if not the owner of the liquors assisted the common seller in the business.

The remaining exceptions relate to the alleged improper statements of the prosecuting attorney.

As is permitted to the debater in parliamentary contests the legal advocate may employ wit, satire, invective, and imaginative illustration in his arguments before the jury, both in civil and criminal trials, but in this the license is strictly confined to the domain of facts in evidence. This rule of the limitation of his privilege is so often violated by the lawyer in the excitement of trials, and by reason of the temptation to which he is exposed by the importance of the interests which he represents to become a partizan, that numerous cases have arisen which have determined what freedom of speech may be allowed. Violation of the rule may be the ground for a new trial on motion of the party whose rights are prejudiced, or exceptions may lie to the action of the court in omitting or declining to interfere with the misconduct of counsel when objections are interposed.

The statements and remarks of the prosecuting counsel shown by the bill of exceptions were promptly called to the attention of the court by the counsel for the defendant, and the presiding Justice in each instance interfered, recognizing and stating their impropriety in the presence of the jury, and in his charge he gave special instructions on the subject.

The right of exception under our practice is conferred by statute, and is based upon some opinion, direction or judgment on the part of the court which is erroneous, and adverse and prejudicial to the party excepting. *Webster* v. *Calden*, 55 Maine, 165; *Rolfe* v. *Rumford*, 66 Maine, 564.

The exceptions now under discussion do not relate to any such opinion, direction or judgment of the court nor have they any

foundation in the failure of the presiding Justice to check the counsel in his departures from legitimate argument. He did what was proper to prevent any unjust influence being left upon the minds of the jury from anything said by the attorney for the State not warranted by the evidence. The statements specified were interrupted by the defendant's counsel and his criticisms and objections were sustained by the court, and they cannot reasonably be supposed to have prejudiced the defendant's case. But if it may be assumed otherwise a new trial should have been sought by motion not by exceptions. *Rolfe* v. *Rumford*, supra, 66 Maine, 564; *Powers* v. *Mitchell*, 77 Maine, 361; *Sherman* v. *M. C. R. Co.*, 86 Maine, 422; *Heller* v. *People*, 22 Colo. 11; *Tucker* v. *Henniker*, 41 N. H. 322; *Angelo* v. *People*, 96 Ill. 209.

Exceptions overruled.

In Equity.

SAMUEL N. YORK et al. *vs.* L. D. MATHIS et als.

Penobscot. Opinion September 16, 1907.

Equity. Decrees. Liens on Buildings. Repairs. "Consent" of Owner. Corporations. Authority of Directors. R. S., chapter 93, sections 29, 30, 31, 33, 36.

The statute gives a lien to persons performing labor or furnishing materials in erecting or repairing any building "by virtue of a contract with or by consent of the owner," and provides that "if the labor or materials were not furnished by a contract with the owner," he may prevent such lien by giving written notice that he will not be responsible therefor.

A building known as the Auditorium owned by the Eastern Maine Musical Association was occupied by the defendant Mathis under a written lease providing that the premises were "to be used as a skating rink," and the plaintiffs by virtue of a contract with the tenant Mathis furnished mate-

rials and performed labor in relaying a portion of the floor which was found to be in an unsuitable condition for skating.

In a proceeding in equity to enforce their lien on the building, in which the plaintiffs contended that the work was done by them by consent of the corporation known as the Eastern Maine Musical Association, the owner of the building, it appeared that the new section of floor was laid with the intention of making it a permanent improvement to the building as well as a convenience to the tenant; that it would have been of no value for removal by Mathis during his tenancy, and was not in fact removed by him, and that the building with the floor thus repaired, continued to be used as a skating rink after he surrendered possession. It also appeared that Mr. Beal, the president of the Association, was present in the building the next day after the plaintiffs commenced the repairs, and had knowledge of the undertaking before the old boards had all been taken up and before any part of the new floor had been laid or the materials therefor had been furnished; that he made comments upon the work, but expressed no dissent or dissatisfaction, and gave no notice to the plaintiffs that the Association would not be responsible for the repairs. It further appears that in a suit brought in the name of the Association against Mathis to recover arrears of rent, Mr. Beal gave credit for $150 as an "allowance on floor."

HELD:

1. That the decree entered by a single Justice, in accordance with the advisory verdict of the jury, sustaining the plaintiffs' lien, was not shown by the appellants to be clearly erroneous, and must be affirmed.
2. That while the consent required by the statute to constitute the foundation of a lien must be something more than a mere acquiescence in the act of a tenant who for his own convenience makes temporary erections and additions which he has a right to remove during his tenancy, yet if the owner of the building has knowledge that certain repairs are necessary and makes no provision for them, but is present when they are being made by his tenant and gives no notice that he will not be responsible therefor, his consent may be inferred from his conduct considered in connection with all the circumstances of the case.
3. That it is competent for a board of directors to establish a mutual understanding that one of their number shall be the active agent of the board in the management of the property and the conduct of the business affairs of the corporation; and that it is not indispensable that such an understanding should be created by a formal vote or proved by a formal record, but that it may be inferred from the situation and conduct of the parties.
4. That it was not error on the part of the jury and the presiding Justice to draw the inference that Mr. Beal had acquired the authority to "bind the corporation by the habit of acting with the assent and acquiescence of the board of directors, and to find that the repairs were made "by consent of the owner," given through Mr. Beal its authorized agent, within the meaning of the statute.

In equity. On appeal by one defendant. Appeal dismissed. Decree below affirmed.

Bill in equity brought by the plaintiffs, "Samuel N. York of Brewer in the county of Penobscot, State of Maine and Charles F. Foster of Bangor in said County, co-partners in business under the name of Foster & York," against "L. D. Mathis of Portland in the County of Cumberland, in said State, and The Eastern Maine Musical Association, a corporation duly created by law, and having its place of business at said Bangor, and the Eastern Trust & Banking Company, a corporation duly created by law, and having its place of business at said Bangor," to enforce the plaintiffs' lien claim upon the Auditorium Building, so called, in said Bangor and the leasehold interest in the land upon which it stands, owned by the said Eastern Maine Musical Association, for materials furnished and labor performed by the plaintiffs in relaying a part of the floor in said Auditorium Building during the occupancy of the defendant Mathis who held under a written lease from the said Musical Association for the term of ten months beginning May 20, 1905, for a rental of $1500. This lease expressly provided that the premises were "to be used as a skating rink."

The Eastern Maine Musical Association, one of the defendants, duly filed its answer to the bill. The other defendants, Mathis and the Eastern Trust & Banking Company, did not answer and the bill was taken pro confesso as to Mathis and by consent was dismissed as to the Eastern Trust & Banking Company.

The cause came on for hearing at the January term, 1907, of the Supreme Judicial Court, Penobscot County. By the request of the plaintiffs, set forth in the bill, a jury trial was had as provided by Revised Statutes, chapter 93, section 36. Before proceeding with the trial, the following admissions were made:

"It is admitted that the amount due at the time the bill was filed was five hundred dollars."

"It is also admitted that the necessary preliminary steps to enforce a lien were taken."

Counsel for the Eastern Maine Musical Association also stated as follows: "The only point we make is that the property is not sub-

jected to the lien, never was any lien, but we do not propose to raise any question as to the amount due or as to the preliminary steps taken to enforce the lien and that they were seasonably filed and sufficient in form. The only question at issue is, whether the work was done with consent."

The jury returned a verdict that the plaintiffs had a lien upon the building and leasehold interest in land of the Eastern Maine Musical Association described in the bill, " as alleged by them."

The presiding Justice then made and filed the following decree:

" This cause came on to be heard at the January term, 1907, upon bill, answer, admissions of record and proof. The bill was taken pro confesso as to L. D. Mathis, and it was duly dismissed as to the Eastern Trust and Banking Company. In the bill, the plaintiffs claimed a lien upon the property described in the bill for the sum of five hundred dollars and interest thereon from the date of the bill, namely December 7, 1905, and costs. Upon request of the plaintiffs, as set forth in said bill, the Court determined the amount for which the plaintiffs have a lien upon said property described in the bill by a jury trial, as provided by Revised Statutes, by submitting to the jury the question, the form of which was duly assented to by counsel for plaintiffs and by counsel for the Eastern Maine Musical Association, as follows:

" ' Have the plaintiffs a lien upon the building and leasehold interest in land of the Eastern Maine Musical Association described in the bill, as alleged by them ? '

" To which said question the jury answered: ' Yes.'

" Therefore, upon consideration thereof, it is ordered, adjudged, and decreed as follows, viz: That the bill in this case be sustained with costs taxed at seventy dollars and seventeen cents, and that the plaintiffs recover of the said L. D. Mathis the sum of five hundred dollars, together with interest from the date of filing said bill, to wit, thirty-two dollars and fifty cents, in all amounting to five hundred and thirty-two dollars and fifty cents, together with costs amounting to seventy & 17-100 dollars and in pursuance of said finding of the jury the Court determines that the plaintiffs have

a lien upon the property described in said bill, to wit: the building known as the Auditorium building, and all the leasehold interest that said Eastern Maine Musical Association has in the land upon which the same stands, as said building and said leasehold interest in the land are particularly described in said bill for said amount of five hundred and thirty-two dollars and fifty cents, and costs amounting to seventy and 17-100 dollars, in all amounting to the sum of six hundred and two and 67-100 dollars; and the Court also decrees that all said property, to wit, said Auditorium Building, described in said bill, and all the leasehold interest that said Eastern Maine Musical Association, has in the land upon which said building stands, as said building and said leasehold interest and said land are particularly described in said bill shall be sold by public auction to the highest bidder therefor at the Law Office of Charles A. Bailey, Esq., being office No. 15 in the Columbia Building, on Columbia Street in said Bangor, in said County of Penobscot, on Thursday, the twenty-first day of March, A. D. nineteen hundred and seven, at ten o'clock in the forenoon, and said Charles A. Bailey, Esq., of said Bangor is hereby appointed an officer of this Court to make said sale, he, the said Charles A. Bailey, first giving notice of the time, place, and manner of said sale, by publishing notice thereof in the Bangor Daily Commercial, for three weeks successively previous to said sale, the first publication to be at least thirty days before said sale, the said plaintiffs to have equal privileges with other persons to be bidders at said sale, and to become purchasers thereat, the proceeds of said sale after payment of all expenses thereof, including said Charles A. Bailey's fees and commissions, shall be applied to the satisfaction of the amount of said plaintiff's claim and costs as above particularly specified; and the balance, if any remaining, shall be returned into Court for the benefit of such person or persons, party or corporation, as the Court shall determine, are legally or equitably entitled thereto, and the deed of said Charles A. Bailey in his said capacity as said officer of the Court, conveying said building and said leasehold interest in said land, to the purchaser at said auction sale, to be recorded in the Registry of Deeds in said Penobscot

County, within three months after the sale, shall convey all the title of said Eastern Maine Musical Association in said Auditorium Building and in said leasehold interest in said land. ' The said Eastern Maine Musical Association, or any other person or persons, party or corporation, who may be the owners of said property, namely, said building and said leasehold interest in said land, to have the right to redeem from said auction sale to be made by said Charles A. Bailey at any time within sixty days from the day of sale. And a commission shall duly issue out of this Court to said Charles A. Bailey giving him authority in the premises as aforedescribed; and if this decree and determination shall be appealed from, then upon final decree, if a sale shall be ordered to be made, the Court will again fix the time, place, and manner of sale, or make any other modifications in this decree that law and equity shall require."

This decree was drawn under the provisions of Revised Statutes, chapter 93, section 37. From this decree the Eastern Maine Musical Association duly appealed to the Law Court as provided by Revised Statutes, chapter 79, section 22.

All the material facts appear in the opinion.

F. A. Floyd and Matthew Laughlin, for plaintiffs.

Fred V. Matthews, for L. D. Mathis.

E. C. Ryder, for Eastern Maine Musical Association.

C. A. Bailey, for Eastern Trust & Banking Company.

SITTING: EMERY, C. J., WHITEHOUSE, PEABODY, SPEAR, CORNISH, JJ.

WHITEHOUSE, J. This is a bill in equity to enforce the plaintiff's lien claim upon the Auditorium Building in Bangor and the leasehold interest in the land upon which it stands, owned by the Eastern Maine Musical Association, for materials furnished and labor performed by the plaintiffs in relaying a part of the floor during the occupancy of the defendant Mathis, who held under a written lease from the Musical Association for the term of ten months beginning May 20, 1905, for a rental of $1500. This

lease expressly provided that the premises were "to be used as a skating rink."

The following provisions are found in chapter ninety-three of the Revised Statutes relating to mechanics' liens.

Section 29. "Whoever performs labor or furnishes labor or materials in erecting, altering, moving or repairing a house, building or appurtenances, or in constructing, altering or repairing a wharf, or pier, or any building thereon, by virtue of a contract with or by consent of the owner, has a lien thereon, and on the land on which it stands and on any interest such owner has in the same, to secure payment thereof, with costs."

Section 30. "If the labor or materials were not furnished by a contract with the owner of the property affected, the owner may prevent such lien for labor or materials not then performed or furnished by giving written notice to the person performing or furnishing the same, that he will not be responsible therefor."

Section 31, as amended by Public Laws, 1905, chapter 110. "The lien mentioned in the preceding section shall be dissolved unless the claimant within sixty days after he ceases to labor or furnish materials as aforesaid, files in the office of the clerk of the town in which such building, wharf or pier is situated, a true statement of the amount due him, with all just credits given, together with a description of the property intended to be covered by the lien, sufficiently accurate to identify it, and the names of the owners, if known; which shall be subscribed and sworn to by the person claiming the lien, or by some one in his behalf, and recorded in a book kept for that purpose."

Section 33 provides that such liens may be preserved and enforced by bill in equity against the debtor and owner of the property affected, filed within ninety days after the last of the labor is performed or labor or materials are so furnished. Section 36 reads as follows: "The court shall determine the amount for which each lienor has a lien upon the property, by jury trial, if either party so requests in bill, petition or answer; otherwise in such manner as the court shall direct. And such determination shall be conclusive

as so the fact and amount of the lien subject to appeal and exceptions according to the practice in equity."

In this proceeding, it appears that the plaintiffs contracted with the defendant Mathis to furnish the labor and materials necessary to relay a section of the floor of the Auditorium for the sum of $500, and it is not in controversy that the plaintiffs performed the contract on their part and became entitled to recover the contract price of $500. It is also unquestioned that the plaintiffs fully complied with the statutory provisions above quoted respecting the procedure for the enforcement of the lien. The plaintiffs do not claim, however, that the work was done by virtue of a contract with the owner of the building, but they insist that they have complied with the alternative requirement of the statute by proving that it was done by consent of the Musical Association, the owner of the Auditorium and of a leasehold interest in the land on which it stands. This is denied by the defendant, and thus at the trial the only issue between the parties was whether the improvement in question was made by "consent" of the owner of the property in the sense in which that term is employed in the statute. At the request of the plaintiffs this issue was submitted to the jury in accordance with the provisions of the statute above quoted, authorizing the court to determine by jury trial "the amount for which each lienor has a lien on the property." In their bill the plaintiffs claimed a lien for the contract price of $500, and the jury found that the plaintiffs had a lien upon the property described in the bill "as alleged by them." Thereupon, in consideration of this advisory verdict, and of the evidence upon which it was based, the presiding Justice entered a decree that the plaintiffs recover against the defendant Mathis, as to whom the bill was taken pro confesso, the sum of $500 with interest and costs, and have a lien therefor on the property described in the bill owned by the Eastern Maine Musical Association.

The question now presented for the determination of the Law Court is whether this decision of the presiding Justice upon the matters of fact involved in the question of the owner's consent to the repairs made by the plaintiffs at the request of the tenant, is shown

to be clearly wrong. If not, the decision should be affirmed and the appeal dismissed; and the burden of showing it to be clearly erroneous falls upon the appellant. *Herlihy* v. *Coney*, 99 Maine, 471; *Redman* v. *Hurley*, 89 Maine, 428; *Berry* v. *Berry*, 84 Maine, 544; *Jameson* v. *Emerson*, 82 Maine, 359.

In *Shaw* v. *Young*, 87 Maine, 271, the question of the proper significance and force to be given to the word "consent" in this statute was critically considered by the court in the light of the history of our legislation upon this subject in recent years. It was provided by the Statute of 1868 that such consent should not be inferred unless notice was first given to the owner that a lien would be claimed; but this requirement of notice was stricken out by the Act of 1876, and the provision for a written notice of dissent by the owner retained. Since that time the "consent" could be inferred without any notice to the owner. In the opinion the court say: "We think this change in the statute materially modifies the meaning of the word "consent" in favor of the lien claimant. It seems to be assumed by the legislature that the owner of real estate will be vigilant in caring for it either in person, or by agents;—that if he leaves it in the possession of agents, or tenants, knowing that repairs are necessary to be made from time to time, and makes no provision for them, but leaves them to be made by agents or tenants, and gives no notice of dissent, his consent may be inferred so far as the lien claimants are concerned.

We are satisfied from the facts in this case that the statute consent of the owners sufficiently appears.

This decision, however, should not be extended beyond the facts in this particular case. Consent may be inferred for ordinary preservative repairs, when it would not be inferred for alterations, remodelings, additions, or even more extensive repairs. The consent must be shown, and whether it appears in any given case will depend wholly upon the facts in that case."

In that case the repairs in question were found to be " necessary for the preservation of the building and necessary to keep up its earning powers as a hotel and keep it up to the essential modern conditions."

It is undoubtedly true that the consent required by the statute to constitute the foundation for a lien must be something more than a mere acquiescence in the act of a tenant who for his own convenience makes temporary erections and additions which he has a right to remove before the expiration of his tenancy. Jones on Liens, Sec. 1253. *Hanson* v. *News Publishing Co.*, 97 Maine, 99. In that case the question related to certain partitions erected by the Publishing Company as lessor, in a store under the Falmouth Hotel. They were so constructed that they could be removed without injury to the building and were in fact removed by the company. In the opinion the court say: "The fact that Mr. Brown knew the lessees were putting in the partitions, which were of no service to him or to the store, and to which he had no right to object consistently with the rights of the lessee, does not authorize the inference that he consented, in the sense of the statute. *Huntley* v. *Holt*, 58 Conn. 445; 9 L. R. A. 111; *Francis* v. *Sayles*, 101 Mass. 435.

In *Huntley* v. *Holt*, the court thus define the term "consent" as used in the Connecticut statute: "When the statute uses the word, 'by the consent of the owner of the land,' it means that the person rendering the service or furnishing the materials and the owner of the land on which the building stands must be of one mind in respect to it. The words 'consent of the owner,' are used in the statute as something different from an agreement with the owner; and while it may be urged that they do not require such a meeting of the minds of the parties as would be essential to the making of a contract, there must be enough of a meeting of their minds to make it fairly apparent that they intended the same thing in the same sense."

But after the analogy of implied contracts or agreements inferred from the conduct of parties and the circumstances of the case, if one furnishes labor and materials for making permanent repairs on a building, in the belief that the owner has given his consent thereto and in the expectation that he will have a lien therefor on the building and the conduct of the owner, viewed in the light of all the circumstances, justified such expectation and belief, the basis of a lien is thereby established as effectually as by a mutual under-

standing between the parties to that effect. *Saunders* v. *Saunders*, 90 Maine, 284.

If the owner of a building induces another to furnish labor and materials for such permanent improvements upon his property, by conduct and declarations which create the appearance of an unqualified consent thereto on his part, the owner is estopped to deny the existence of such consent in reality, for the reason that he has so conducted himself that it would be contrary to equity and good conscience for him to assert rights which might perhaps, have otherwise existed, as against another who has in good faith relied upon such conduct and been thereby induced to act to his detriment. And under such circumstances it would not be necessary that the original conduct creating the estoppel should be characterized by an actual intention to mislead and deceive. *Martin* v. *Maine Central R. R. Co.*, 83 Maine, 100; *Rogers* v. *Portland & Brunswick St. Ry.*, 100 Maine, 86.

In the case at bar it has been seen that the owner of the building in question is the Eastern Maine Musical Association, and the records fail to disclose any vote of that corporation or of its board of directors, expressly authorizing any officer or agent of the Association to give its consent to the repairs in controversy. Nor is there any direct evidence that any officer or agent of the Association ever expressly consented to such repairs. But it is claimed by the plaintiffs that F. O. Beal, the president of the board of directors was in fact entrusted by his associates with the entire management and control of the Auditorium and of the affairs of the Association, and that he was held out to the plaintiffs as one clothed with full authority to represent the Association; and they further contend that his conduct in the premises, considered with reference to the situation of the parties the use to which the building was to be devoted by the defendant Mathis, the condition of the floor of the building, and all the circumstances warranted the inference that he had given an unqualified consent to the repairs as a permanent improvement to the building.

The work in question was done by the plaintiffs between the 5th and the 11th of September 1905, and it does not appear that any

meeting of the Association, for the election of officers, was held after November 1903, until November 1905. But it appears that Mr. Beal had been elected a director at every meeting held for the election of officers from 1901 to 1907, that he was also elected president of the board at every election held for that purpose, that he continuously acted as president and director every year, that he appeared to be entrusted with the care and control of the affairs of the Association, and that no other officer or agent took any active part in its management. President Beal was one of the officials who executed the lease to the defendant Mathis, and personally kept the account with Mathis. He was present in the Auditorium on the second day of the work of laying the floor in question, observed the workmen, inspected the work as it progressed, and, in the presence of the plaintiff York, made comments upon it but expressed no dissent or dissatisfaction. One of the workmen also saw Mr. Beal in the Auditorium inspecting the floor on one occasion during the progress of the work.

October 31, 1905, Mathis having failed to meet his monthly payments of rent, Mr. Beal employed an attorney to commence a suit in the name of the Association to collect the amount due and after coming into the attorney's office prepared a statement of the account to be annexed to the writ, containing a credit of $450 cash, "an allowance on floor of $150" and "allowance for fair and festival $92." By virtue of this writ eight boxes of roller skates were attached in Bangor as the property of the defendant Mathis.

After Mathis surrendered possession of the building, Mr. Beal employed the same attorney to make a lease of it to another tenant who also occupied it as a skating rink during the year following. At the trial of this cause Mr. Beal was present in the court room but did not testify as a witness.

At a meeting of the directors held January 24, 1906, a vote was passed authorizing the president, Mr. Beal, to execute a bond in the sum of $400, in behalf of the Association, to indemnify the deputy sheriff for making the attachment on the writ above described in favor of the Association and against Mathis.

A corporation must act and speak through its officers and author-

ized agents and it is entirely competent for a board of directors to establish a mutual understanding that one of their number shall be the active agent of the board in the management of the property and the conduct of the business affairs of the corporation. It is not necessary that such an understanding should be created by a formal vote passed at a formal meeting or proved by a formal record. It may be inferred from the situation and conduct of the parties. A director "may acquire the power to bind the corporation by the habit of acting with the assent and acquiescence of the board," and so his unauthorized acts may be confirmed by the approbation and acquiescence of the board." It is true that in either case it is the board that acts or acquiesces and not the directors as individuals, but subsequent ratification as well as previous authority or acquiescence may be shown by circumstances and conduct. *Pierce* v. *Morse-Oliver Co.*, 94 Maine, 409, and authorities cited; *Fitch* v. *Steam Mill Co.*, 80 Maine, 34; *Murray* v. *Nelson Lumber Co.*, 143 Mass. 250. "Authority in the agent of a corporation may be inferred from the conduct of its officers, or from their knowledge and neglect to make objection, as well as in the case of individuals. R. S., ch. 47, sect. 68. *Sherman* v. *Fitch*, 98 Mass. 64.

It has been seen that though present in court at the trial, Mr. Beal did not appear as a witness to disclaim the authority ascribed to him as the active agent of the Association, and when all of the evidence relating to that branch of the case is examined in the light of the familiar principles of law above stated, it cannot be said that there was manifest error on the part of the jury and the presiding Justice in drawing the inference that Mr. Beal had acquired the authority to "bind the corporation by the habit of acting with the assent and acquiescence" of the board of directors.

It is also the opinion of the court that it cannot reasonably be deemed "clearly erroneous" to hold that the labor and materials were furnished by the plaintiffs "by consent of the owner" given through Mr. Beal, its authorized agent, within the meaning of the statute.

The owner of the Auditorium leased it to the defendant Mathis to be used as a skating rink at the large rental of $150 per month,

with a reservation of the right to use it for its annual musical festival, and the annual exhibition of the State Fair, but without the right of renewal on the part of the lessee. Under such a lease it is not unreasonable to suppose that Mathis entered into the occupancy of the building in the expectation that the floor was in a suitable condition for use as a skating rink during the term of the lease; but a brief experience in the use of it developed the fact that parts of the floor had become warped and wavy, and at the ends of the hall where the skating was across the grain of the boards the floor had soon become so rough and uneven that it was no longer suitable or safe to be used as a skating rink. Indeed it satisfactorily appears from undisputed testimony that early in August the floor was unsuitable either for skating or dancing. As neither Mathis nor Beal testified as a witness, there is no direct evidence of the arrangement between them respecting the repairs. It appears, however, that the negotiations resulting in the contract between Mathis and the plaintiffs commenced August 20, 1905, and between the 5th and 11th of September, a strip of the old floor 15 feet in width at the sides and 20 feet in width at the ends of the hall was taken up and a new floor laid in its place octagonal in form so that the roller skates would follow the grain of the boards entirely around the hall. Thus repaired, the floor was suitable either for skating or dancing. This new section of the floor was obviously laid with the intention of making it a permanent improvement to the building as well as a convenience to the occupant at that time. It would have been of no value for removal by Mathis during his tenancy. It could not legally have been removed and was not in fact removed by him, and as already noted, the building has continued to be used as a skating rink since he surrendered possession.

Again an inspection of the account for rent on which suit was brought by Mr. Beal for the Association October 31, 1905, shows that all of the cash payments made by Mathis aggregated $450, being the amount of the rent for three months ending August 20. It was not an unreasonable inference from this fact that after the contract for the new floor was made with the plaintiff, Mathis ceased to pay rent by reason of an understanding with Mr. Beal at

that time that an allowance was to be made on account of the new floor. Under the terms of the lease there was an existing arrearage of $150 of rent at the time the floor was laid. The lease had then but little more than six months to run with no right of renewal, and it is wholly improbable that under these circumstances Mathis would have assumed the burden of expending $500 in making repairs. In fact a credit of $150 was given by Mr. Beal in the account sued, as an "allowance on floor." This was $50 per month from the time the contract was made, and the probability that the whole amount was to be assumed by the Association and deducted from the rent at the rate of $50 per month, is much greater than the probability that the whole amount was to be paid by Mathis. The presence of Mr. Beal on the floor inspecting the work the next day after it began, strengthens the inference that an understanding existed between the lessor and lessee in relation to these repairs before they were made. Mr. Beal had positive knowledge of the undertaking before the old boards had all been taken up and before any part of the new floor was laid or the materials furnished, but did not seek to avail himself of the provisions of the statute above quoted authorizing him to prevent the lien by giving written notice to the plaintiffs that the Association would not be responsible for the repairs.

Furthermore Mr. Beal was present at the trial, heard all of the plaintiffs' evidence and the contention of counsel based upon it, but declined to testify as a witness in behalf of the defendant Association. All the facts relating to the controverted question of the owner's consent to the repairs were peculiarly within his knowledge and he could have supplied positive evidence of what must otherwise be left to inference. The object of the trial was to discover and declare the truth in relation to that question, and he had an opportunity to render aid of vital importance in the promotion of that object. As observed by this court in *Union Bank* v. *Stone*, 50 Maine, 599, "The defendant does not offer his own testimony. He prefers the adverse inferences which he cannot but perceive may be drawn therefrom to any statements he could truly give, or to any explanations he might make. He prefers any inference to giv-

ing his testimony. Why? Because no inferences can be more adverse than would be the testimony he would be obliged by the truth to give." See also 1 Wigmore on Evidence, sections 289, 290, and cases cited.

The plaintiffs had no information respecting the precise nature of the arrangement between the lessor and lessee in regard to these repairs, and if Mr. Beal consented to the improvement or by his conduct and declaration interpreted in the light of all the circumstances, justified the plaintiffs in believing that he had consented and they furnished the labor and materials in good faith in that belief, it is immaterial by what private agreement between Mathis and himself Beal was induced to give his consent or so to conduct himself as to indicate consent.

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

Appeal dismissed.

Decree below affirmed, with additional costs.

WALTER ROUNDY *vs.* UNITED BOX, BOARD AND PAPER COMPANY.

Somerset. Opinion September 18, 1907.

Master and Servant. Negligence.

The defendant was making repairs in the basement of its mill and workmen were engaged in taking down concrete piers by the use of drills and wedges, and dumping the pieces into a hole and leveling up. The adjoining space was used as the pump room, having a wooden floor made of two inch plank where the plaintiff and other employees had occasion to pass day and night in looking after the pump and its gearing.

In the afternoon of the day before the accident to the plaintiff hereafter mentioned, the repairing crew, in charge of the foreman, detached a fragment of one of the piers three feet by two feet in size, weighing three or four hundred pounds. It caught against a shaft and the foreman directed that it be pried off, and it dropped over into the pump room. It made a hole in the floor near where a ladder was usually put up for adjusting the belt on the shaft pulley, and was held suspended by each end and was left there when the workmen quit work in the afternoon. The foreman who had charge of the work knew that this stone had fallen and broken partially through the plank, but he allowed it to remain where it first fell without any safeguard to warn or protect workmen whose duties required them frequently to be at this identical place. Between the time when the stone first fell and the time of the accident to the plaintiff, this piece of stone fell through the floor to the ledge below, leaving a hole about its size and of the depth of from five to ten or twelve feet. The plaintiff had no knowledge of its existence or of the fact that a fragment of stone had fallen on that side of the pier, and the hole in the dim light was not plainly discernible.

About three o'clock at night, after the stone had fallen through the floor as aforesaid, while the plaintiff was in the performance of his duties as head fireman on the night force, and was attending to the belts and pulleys, his attention was called to the fact that the belt was off and he went to the usual place for setting the ladder, leaving his lantern ten or twelve feet away. In attempting to put up the ladder he fell into the hole and sustained the injuries for which this suit was brought.

Held: (1) That the condition was not such as would reasonably be anticipated by the plaintiff although he knew that the piers were being taken down in the daytime in the work of repairs.

(2) That the jury were justified in finding that no lack of due care on the part of the plaintiff contributed to his injury.

(3) That the defendant must be held liable not for negligence presumed by the principle res ipsa loquitur, but for negligence in fact proved by the evidence.

(4) That the damages assessed by the jury were not excessive.

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.

Tried at the December term, 1906, of the Supreme Judicial Court, Somerset County. Plea, the general issue. Verdict for plaintiff for $825. The defendant then filed a general motion for a new trial.

All the material facts appear in the opinion.

P. A. Smith, for plaintiff.

Harvey D. Eaton, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, CORNISH, KING, JJ.

PEABODY, J. This is an action brought by the plaintiff to recover damages of the defendant company for injuries sustained while employed in its pulp mill at Benton Falls in this State.

The verdict of the jury was for the plaintiff for $825, and the case is before the Law Court on the defendant's general motion for a new trial.

At the time of the accident, September 11, 1904, the relation of master and servant existed between the parties. The plaintiff was in the performance of his duties as head fireman on the night force and was attending to the belts and pulleys which connected the water pump with the driving shaft.

The question of contributory negligence on the part of the plaintiff though not waived is not urged in defense of the action. The issues are the negligence of the defendant in its legal duty to its servant, and the question of damages.

The facts are not essentially in conflict. The record shows that the defendant was making repairs in the basement of the southerly end of the mill. Its workmen were engaged in taking down concrete

piers by the use of drills and wedges, and dumping the pieces into a hole and leveling up. The adjoining space was used as the pump room having a wooden floor made of two inch plank, where the plaintiff and other employees had occasion to pass day and night in looking after the pump and its gearing for supplying water for the engine and boiler.

In the afternoon of Saturday before the accident, the repairing crew in charge of the day foreman detached a fragment of one of the piers three feet by two feet in size and weighing three hundred or four hundred pounds. It caught against the shaft and the foreman directed that it be pried off and it dropped over into the pump room. It made a hole in the floor near where the ladder was usually put up for adjusting the belt on the shaft pulley. It was held suspended by each end and was left there when the workmen quit work at five o'clock in the afternoon. At sometime between that hour and three o'clock at night this piece of stone fell through the floor to the ledge below leaving a hole about its size and of the depth as variously estimated by the witnesses of from five to ten or twelve feet. The attention of the plaintiff having been called to the fact that the belt was off he went, about three o'clock, to the usual place for setting the ladder leaving his kerosene lantern ten or twelve feet away.

In attempting to put up the ladder he fell into this hole and was injured. He had no knowledge of the existence of the hole or of the fact that a fragment of stone had fallen on that side of the pier, and the hole in the dim light was not plainly discernible.

The condition was not such as would reasonably be anticipated by him, although he knew that the piers were being taken down in the daytime in the work of repairs. This fragment was the only one thrown off upon this part of the floor.

The jury were justified in finding that no lack of due care on the part of the plaintiff contributed to his injury.

The defendant relies upon the common knowledge of men as to the sustaining strength of plank two inches in thickness as a just basis for the judgment of the defendant's agents that the floor would

sustain the weight of this rock until it could be at a later time removed.

The argument is plausible but we do not think it is strengthened, as is urged by the circumstance that the stone had been held up for several hours after falling a distance of eight feet. The foreman knew it had fallen from this height and had broken partially through the plank, and that the fibers of the wood had been crushed and weakened by the impact to an extent not possible to be known except by examination or by the subsequent event of its fall. He allowed it to remain where it fell without any safeguard to warn or protect workmen whose duties required them frequently to be at this identical place. He was the representative of the defendant corporation and it was therefore charged with the responsibility of anticipating the consequences to its servant by exposing him to the increased danger of the weakened flooring and of falling into the hole this stone had made.

The scientific data presented by the able counsel for the defendant interestingly illustrate his theory, but the fact that the suspended rock fell shows that the problem contained other facts not assumed which the defendant was bound to know, or which by the exercise of reasonable care he should have known. The defendant, therefore, must be held liable not for negligence presumed by the principle of res ipsa loquitur, but for negligence in fact proved by the evidence. *Patton* v. *Texas & Pr. Company*, 179 U. S. 658; 4 Thompson on Negligence, secs. 3883-3886.

A careful review of the case does not convince us that the judgment of the jury as to the amount of damages to which the plaintiff is entitled should be set aside as manifestly excessive.

Motion overruled.

CHARLES E. LANCASTER *vs.* MORRILL H. AMES.

Cumberland. Opinion September 19, 1907.

Evidence. "Reply Letters." Typewritten Signatures. Presumptions. Stock Gambling. Illegal Consideration.

1. When material and otherwise admissible, a letter which is received by due course of mail, purporting to come in answer from the person to whom a prior letter has been duly addressed and mailed, is admissible without specific proof of the genuineness of the signature. And the rule is the same, whether the signature be written or typewritten.
2. The presumption of genuineness arising when a letter, with the signature either written or typewritten, is received by due course of mail purporting to come in answer from the person to whom a prior letter has been duly addressed and mailed, may be strengthened by internal evidence in the contents of the letter itself.
3. The purchase of stocks on margins is a gambling transaction, and is illegal.
4. When money is deposited or loaned to another, for the express purpose of being used in the purchase of stocks on margins, the promise of the one, with whom it is deposited or to whom it is loaned, to repay or to be accountable for it, is based upon an illegal consideration, and cannot be enforced.
5. In the case at bar, *Held:* That the evidence shows that the plaintiff deposited his money with the defendant for the express purpose of its being used in buying stocks on margins.

On exceptions and motion by defendant. Sustained.

Action of assumpsit brought in the Superior Court, Cumberland County. The declaration in the plaintiff's writ, is as follows:

"In a plea of the case, for that the said defendant, at said Portland on the thirteenth day of July 1903, agreed with the plaintiff, that if he, the said plaintiff, would put one hundred dollars (100) into a certain investment, he Ames, would give or make him a suit of clothes for his first years profits, or he would guarantee him the value of said suit of clothes at the end of the first year as a profit; that said defendant on said date, promised to account for or return said one hundred dollars at the end of one year, if so

requested; and the said Lancaster relying upon said representations, promises and guarantee of the defendant, did then and there let the said Ames have said sum to invest; that said Ames though requested has never paid said profit to the plaintiff, nor any part thereof, neither has he accounted to said plaintiff for said one hundred dollars or any part thereof though also requested so to do." Also under the money counts in the writ the plaintiff made the following specification: "The plaintiff will prove the defendant accepted 100 on July 13th 1903 for the use of plaintiff; and that he agreed to repay on (or) account for said sum at the end of one year but has neglected so to do upon request, and that said money was accepted by the defendant to invest."

Tried at the February term, 1907, of the aforesaid Superior Court. Plea, the general issue. Verdict for plaintiff for $116. During the trial the defendant excepted to certain rulings made by the presiding Justice and also after verdict filed a general motion for a new trial.

All the material facts appear in the opinion.

Clarence E. Sawyer, for plaintiff.

Seiders, Marshall & Sturgis, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, SAVAGE, PEABODY, CORNISH, KING, JJ.

SAVAGE, J. The plaintiff in his declaration alleged, among other things, that he let the defendant have one hundred dollars to invest, and that the defendant promised to account for or return the same at the end of one year, if so requested. Also, under the money counts in his writ, the plaintiff made the following specification: — "The plaintiff will prove the defendant accepted 100 on July 13th, 1903, for use of the plaintiff; and that he agreed to repay on (or) account for said sum at the end of one year, but has neglected so to do upon request, and that said money was accepted by the defendant to invest." We can discover no substantial difference between the special count and the specification under the money counts. Although other promises are set out in the special count,

the amount of the verdict for the plaintiff, considered in the light of the evidence, makes it certain that the jury based their verdict upon the allegations which we have already stated. The plaintiff's testimony, or at least some portions of it, tended to support these allegations.

The defendant, on the other hand, denied making the alleged promise, but claimed that the plaintiff let him have the money to be sent to a concern in Boston, known as the Financial Indicator Company, to be used by that company in buying on the plaintiff's account stock in the American Sugar Refining Co. on margins. He also claimed that the sole responsibility assumed by him was the forwarding of the money to the Boston concern and that he forwarded the money as agreed. Either one of the defendant's claims, if sustained by proof, would constitute a defense. The defendant, therefore, as a part of his defense, had a right to show that he forwarded the money to the Financial Indicator Company.

It seems to be undisputed that when the plaintiff paid his money to the defendant, the latter gave him a receipt of the following tenor:

"Portland, July 13, 1903, Received of Charles E. Lancaster one hundred dollars to be invested in the Financial Indicator Co. 31 State St. Boston, Mass. This receipt to be void when he receives receipt from said Co."

The defendant testified, without objection, that he sent a check for the money to the Financial Indicator Co. by mail, the night of the 13th of July, that the check came back to him in the ordinary course of banking as paid, and bearing the endorsement of W. H. Gilman, the treasurer and manager of the Indicator Company; and that on the 15th of July he received the letter which he offered, as a reply to his remittance of the plaintiff's money. This letter bore date "Boston, July 14, 1903." Upon it was printed what appeared to be the letter head of the Financial Indicator Co. at 31 State St. Boston, together with the names of the president, and of W. H. Gilman as treasurer. The whole body of the letter, including the name of the one purporting to be the writer, was typewritten. There was no written signature.

The defendant further testified that he had before that time received letters from Gilman or the Indicator Co., having a letter head like the one in question, that usually they had been signed on the typewriter only, that he had replied to Gilman, taking up matters presented in such letters, and had received replies back from him covering the same subjects.

The letter was addressed to the defendant, and omitting the letter head and immaterial matters, was as follows:

"Dear Sir: Your letter of yesterday's date enclosing checks for $150. received, . . . I have an appointment with some prominent parties at 3.30, and I trust you will excuse the delay about sending receipts until tomorrow.

I shall send one direct to Dr. Charles E. Lancaster, Brunswick, Me. and the other directly to you for Elizabeth, W. V———.

Yours truly,

W. H. Gilman."

This letter when offered was excluded by the court, and exceptions were taken by the defendant, the verdict being against him. The correctness of this ruling we have now to consider.

The letter was excluded, not because a genuine acknowledgment of the defendant's remittance to Gilman or the Indicator Company would not have been admissible, as indeed it would be, but solely because, being wholly typewritten, it was not "authenticated in the usual way," and because "the letter itself, in the judgment of the court did not seem to possess sufficient internal evidence of its authenticity to allow it to go to the jury."

It is true as a general rule that documentary evidence, to be admissible, must be authenticated, and in case of a letter this is ordinarily done by proof of the genuineness of the signature of the writer. When the signature is typewritten this method of authentication may be difficult, if not impossible. At any rate it was not tried in this case. But there is a relaxation of this rule in the case of what are called reply letters. The rule does not apply to a letter which is received by due course of mail, purporting to come in answer from the person to whom a prior letter has been duly ad-

dressed and mailed. Proof of these facts is sufficient evidence of the genuineness of the reply to go to the jury, without specific proof of the genuineness of the signature. The genuineness is assumed, at least, until the contrary is shown. *Connecticut* v. *Bradish*, 14 Mass. 296; 3 Wigmore on Evidence, sect. 2153. The rule is recognized in *Abbott* v. *McAloon*, 70 Maine, 98. This is true when the signature is in the handwriting of some person. Logically it must be equally true when the signature is typewritten.

We think the letter before us bears internal evidence of being an answer to a prior one written by the defendant to Gilman, the treasurer of the Indicator Company. The succession of dates, the reference to checks received and to receipts to be sent to the plaintiff and one other person, taken in connection with the testimony respecting the letter written by the defendant to the Indicator Company, leave no real doubt that the letter over the name Gilman was an answer to one written the day before by the defendant in which he says he enclosed the plaintiff's money. That is certainly the purport of it. Accordingly we think that the letter should have been admitted. The defendant's exceptions must be sustained.

We think that the motion for a new trial should also be sustained.

The plaintiff denies that he knew that the money was to be sent to the Boston concern for investment, or that he understood it was to be used for stock gambling either in Boston, or by the defendant at Portland. The effect of the receipt taken by him and of some of his admissions render it extremely improbable that his present version relating to the defendant's position in the matter is the true one. But assuming that it was as he now claims, and that he thought he was dealing with the defendant alone as a principal, we think, after a careful consideration of all the evidence, that the plaintiff, notwithstanding his denials, intended that his money should be used in stock gambling. To say in the light of the evidence that he did not understand that the money was to be used in buying "sugar" stock on margins is not creditable to the intelligence of an educated professional man such as he is. We are convinced that he so understood, and that he intended the money to be so used. If so, the whole transaction was illegal. *Rumsey* v.

Berry, 65 Maine, 570; *O'Brien* v. *Luques*, 81 Maine, 46. The defendant's promise to repay or to be accountable for the money, if he made such a promise, was a part of the illegal transaction, which the court will not enforce. *Tyler* v. *Carlisle*, 79 Maine, 210. We think the verdict was clearly wrong, and that it should be set aside.

Motion and exceptions sustained.

JOSHUA HILTON,
Petitioner for Partition,

vs.

OTIS M. HILTON.

Somerset. Opinion October 1, 1907.

Parent and Child. Advancement. Estoppel. Executed Contract. Consideration Illegal in Part. R. S., chapter 77, sections 4, 5, 6.

1. By Revised Statutes, chapter 77, sections 4, 5 and 6, when a parent and child (of age) agree in writing that the transfer of certain property and property rights from the parent to the child shall be deemed an advancement equivalent to the whole amount of the child's share as heir in the parent's estate such agreement will bar the child from any share in such estate.
2. An acknowledgment by a child in writing that he receives the transfer of certain property rights and certain releases of causes of action from his parent in full of all demands he "claiming as heir or otherwise has or may have against the estate of" the parent, is an acknowledgment that he receives them as an advancement of his whole share as heir of his parent, and bars his claim to any share after the parent's death.
3. That, after the death of the parent, the other heirs for a time admitted to some extent the claims of such child to a share in the estate does not estop them from afterward denying his right to further share.
4. That among the releases to the child by the parent of causes of action was a promise not to institute criminal proceedings, does not invalidate the advancement. While illegality of part of the consideration may prevent the enforcement of an executory contract, it does not undo an executed contract.

Petition for partition. On report. Petition dismissed.

Petition for partition brought in the Supreme Judicial Court, Somerset County. The petition is as follows:

"To the Honorable Justices of the Supreme Judicial Court next to be holden at Skowhegan, within and for the County of Somerset, on the third Tuesday of September, A. D. 1906.

"Respectfully represents Joshua Hilton of Norridgewock in the County of Somerset that he, as tenant in common, is seized in fee simple of one undivided half of the following described real estate situated in Anson, said County of Somerset, and bounded and described as follows, to wit: Beginning at a point six rods west of the westerly side of the road leading from Madison Bridge over Spear Hill, so called, by the dwelling house formerly owned by John M. Hilton, said point being at the north-west corner of land of Fannie A. Sprague; thence westerly along the south line of land formerly owned by said John M. Hilton to the land formerly owned by Elijah Hilton; thence southerly to land formerly owned by Nathaniel Ingalls; thence easterly to land deeded by Joshua Hilton to school district's said land; thence east to said first mentioned road; thence northerly along said road to land of said Fannie A. Sprague; thence westerly along said Fannie A. Sprague's land to the south-west corner thereof, thence northerly six rods to the point of beginning.

"It being the same premises deeded to Joshua Hilton by Otis M. Hilton by deed dated April 10th, 1903, and recorded in volume 263, page 522, of Somerset Registry of Deeds.

"That Otis M. Hilton of Anson, said County of Somerset, is seized in fee simple of one undivided half part of said above described premises.

"That said real estate ought to be divided.

"He, therefore, prays that partition thereof be made according to the statute in such case made and provided.

"Dated at Norridgewock this 13th day of August, A. D. 1906.

"JOSHUA HILTON."

The defendant in reply to this petition filed a brief statement which, omitting formal parts, is as follows:

"And now the said Otis M. Hilton comes and defends and says that said partition ought not to be made as prayed for and as a reason therefor says that said land, on January 31, 1903, was owned by Joshua Hilton, the father of said Joshua Hilton, the petitioner, and said Otis M. Hilton, the respondent, they being the only children of said Joshua Hilton and that in consideration of certain advances made by said Joshua Hilton, the father of said Joshua Hilton, the petitioner, then known as Joshua Hilton, Junior, said petitioner, Joshua Hilton, acknowledged by his agreement in writing, dated the 31st day of January, A. D. 1903, duly sealed, a copy of which is hereto annexed, that said advances made to him by the said Joshua Hilton were in full payment and satisfaction for his share in all of his father's estate and relinquishing all his interest in the estate of his father, the said Joshua Hilton, at the time of his decease, and by said agreement barred any claim which he might otherwise have had to share in the estate of his said father; that said Otis M. Hilton is entitled to have and hold all of the real estate which the said Joshua Hilton, father of said petitioner and said Otis M. Hilton, had at the time of his decease, including the parcel described in said petition."

A counter brief statement was then filed by the plaintiff which, omitting formal parts, is as follows:

"And now the said plaintiff comes and in reply to the defendant's brief statement denies that any such advancement was so made to him said plaintiff by said Joshua Hilton, deceased, as set out in said defendant's brief statement, and also denies that he, said plaintiff, is in any way or manner debarred from his claim to his said share in said real estate set out in his said petition."

The written instrument of agreement, dated January 31, 1903, referred to in the defendant's brief statement and also in the opinion is as follows:

"This agreement made by and between Georgia M. Hilton and Joshua Hilton, Junior, both of Norridgewock in the County of

Somerset and State of Maine, parties of the first part and Joshua Hilton of Anson in said County and State, party of the second part—

"Witnesseth: Whereas certain controversies have arisen between the parties hereto, and they are desirous of affecting a full settlement of all differences and difficulties between themselves, therefore in consideration of the mutual agreements herein expressed, agree as follows—

"First—The parties of the first part hereby acknowledge full satisfaction of all demands they or either of them have against the party of the second part, his heirs and personal representatives and acknowledge receipt in full of all demands they or either of them, claiming as heir or otherwise, have or may have against the estate of Joshua Hilton.

"The parties of the first part further agree to allow the party of the second part or his agent to enter upon the premises now occupied by them in Norridgewock for the purpose of removing certain goods and chattels herein mentioned, the property of Joshua Hilton, at any time between the date hereof and the 15th of March 1903; they further agree to pay said Joshua Hilton the sum of $225.00 upon the delivery of this agreement.

"Second—Joshua Hilton, the party of the second part, upon the receipt of the $225.00 hereinbefore mentioned, acknowledges full satisfaction of all demands of whatever kind or nature he has against the parties of the first part or either of them, and hereby agrees that he will not institute, begin or prosecute any action, complaint or proceeding of any nature against the parties of the first part or either of them for any cause now existing; he further agrees to execute and deliver to Georgia M. Hilton, upon the delivery of this agreement, a deed of quitclaim of all his right, title and interest in and to the premises in Norridgewock, occupied by the parties of the first part, reserved by the party of the first part in a deed from Joshua Hilton to Joshua Hilton, Junior, dated November 9, 1881 and recorded in Somerset Registry of Deeds in Book 163, page 517.

"Said party of the second part hereby sells and conveys to the parties of the first part all his right, title and interest in and to all

personal property upon or around said premises in Norridgewock, occupied by the parties of the first part, except a picture of the late wife of Joshua Hilton, her clothing, one wheelbarrow, one grindstone and frame, one jumper or sleigh, and all dishes and crockery ware belonging to said party of the second part; all of which latter named articles were left by the party of the second part on the above mentioned premises, and it is mutually agreed that they shall be moved from said premises by the party of the second part or his agent between the date hereof and March 15, 1903.

"In witness whereof the parties have hereunto set their hands and seals this 31st day of January 1903."

This instrument was duly executed by the parties named therein.

Heard at the December term, 1906, of the Supreme Judicial Court, Somerset County. At the conclusion of the testimony, the case was reported to the Law Court "for determination upon so much of the evidence as would be legally admissible if seasonably objected to. Either party may produce for the inspection of the Law Court original papers, such party being responsible therefor."

The case is stated in the opinion.

Walton & Walton, for plaintiff.

Butler & Butler, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, CORNISH, KING, JJ.

EMERY, C. J. Joshua Hilton died intestate leaving two children only, as heirs, the petitioner and the respondent in this petition for a partition of the real estate of the deceased intestate. The respondent claims that the petitioner received from their father in his lifetime a gift and grant which the petitioner accepted and acknowledged in writing as a full advancement of all his distributive share in the real and personal estate of his father, and hence has no title to any part of the real estate sought to be divided.

In this State the whole subject matter of the devolution of the property of a deceased intestate, including advancements, is gov-

erned by statute. The statute on descent of real estate (R. S. ch. 77) provides, (in sec. 4) that gifts and grants of real or personal estate to a child or grandchild shall be deemed an advancement when so expressed therein, or acknowledged in writing to be such; (in sec. 5) that when the value of an advancement is determined by the intestate in his gift or is acknowledged in writing it (that value) shall be allowed in the distribution; and (in sec. 6) that when the advancement in real or personal estate exceeds the recipient's share in the real or personal estate, as the case may be, he shall receive so much less of the other on distribution as will make his whole share equal. These sections authorize a parent and child to fix for themselves the value of the advancement, and whenever they do so that value so fixed, large or small, is to be allowed in the distribution even if it be fixed as the equivalent of the child's whole share in both the real and personal estate. It is thus competent for a child by accepting an advancement, however small, to debar himself from all right to share in his parent's estate, however large. *Smith* v. *Smith*, 59 Maine, 214; *Nesmith* v. *Dinsmore*, 17 N. H. 515; *Simpson* v. *Simpson*, 114 Ill. 603 (4 N. E. 137); *Palmer* v. *Culbertson*, 143 N. Y. 213.

From the report in this case it appears that controversies had arisen between the petitioner and his wife on the one hand, and his father on the other. To adjust these controversies and prevent litigation over them, the parties signed and delivered each to the other a written instrument of agreement, releases and conveyances, dated Jan'y 31, 1903 and herewith printed as a part of this opinion. By this instrument the father on his part released to the petitioner and his wife all demands of whatever nature he had against either of them, also released to them his rights in certain personal property in Norridgewock, and bound himself to give them a quitclaim of certain real estate there. It is not questioned that such quitclaim was duly given as a part of the transaction. As a result the petitioner received from his father property, or property rights, presumably of some pecuniary value and which would constitute an advancement if so intended and such intention evidenced in writing as required by the statute.

By the same instrument the petitioner and his wife on their part, and in consideration of the releases, conveyances and agreements made therein by the father, acknowledged full satisfaction of all demands against him, his heirs and personal representatives, and also "receipt in full of all demands they or either of them claiming as heir or otherwise have or may have against the estate of" the father. It is urged in argument by the petitioner that this latter clause had reference only to claims as heir of the petitioner's mother, the father having received some property inherited by the petitioner from his mother. The first clause, however, that acknowledging "full satisfaction of all demands" against the father "his heirs and personal representatives," is most comprehensive, and completely covers all the petitioner's claims against his father as heir of his mother. The addition of the second clause after such a comprehensive clause, and the specification in it of "the estate" of the *father* as the estate to be freed from the petitioner's claim as heir, satisfy us that the petitioner in writing acknowledged the benefits accruing to him from the transaction to be an advancement.

The real value of the releases and property interests thus given and granted to the petitioner, is of course quite problematical, but the petitioner accepted them in writing as the full equivalent of whatever share might otherwise come to him in his father's estate, large or small. That was the value fixed by the parties and by them put in writing to satisfy the statute. The petitioner was of full age, of sound mind and so far as appears acted freely and understandingly. In view of the situation at the time, he may have deemed his chance of receiving anything from his father's estate by will or descent as very slender and with good reason have preferred the arrangement made in the writing. He was authorized by the statute to make such an arrangement in writing and we think he has done so and thereby received in his father's lifetime what he acknowledged to be his full lawful share in his father's estate.

It was contended in argument that the father afterward repented and intended to destroy or cancel the writing and restore the petitioner to his position as heir. We do not think the evidence supports the contention. True, the respondent at first seemed to have

regarded the petitioner as a co-heir. He joined with him in the petition for administration and divided with him a large part of the personal property. He may have done all this under a misapprehension of the effect of the writing. It does not bar him from now setting it up, nor does it prove that it was cancelled by his father. The writing was not destroyed nor cancelled, but came into the possession of the respondent. If the father had the intention to destroy or cancel it he did not carry such intention into effect.

It is finally urged that the arrangement itself was invalid, of no force as an advancement or otherwise, because a part of the consideration was the promise not to institute criminal proceedings against the son. If this suit were an action upon the promise contained in the written instrument the illegality of that promise might be a defense. Illegality of consideration, or even of part of the consideration, will usually prevent the enforcement of an executory contract, but we are not dealing here with an executory contract, with things to be done; we are dealing with an executed contract with things done and past, and their effect. The arrangement was consummated. The petitioner received the advancement, and in exchange parted with his expectancy of inheritance. If one actually part with property or property rights for an illegal consideration he cannot for that reason alone reclaim them. *Rich* v. *Hayes*, 99 Maine, 51; *Worcester* v. *Eaton*, 11 Mass. 368; *Sturm* v. *Boker*, 150 U. S. 312.

Petition dismissed with costs.

CONNELIUS CARL *vs.* S. LESTER YOUNG AND FREDERICK W. ROBIE.

Androscoggin. Opinion October 1, 1907.

Tenant. Negligence. Pleading.

1. The tenant of a building is not an insurer against articles being thrown from a window to the injury of persons outside. He is only bound to the exercise of ordinary care.
2. A declaration setting forth an injury received from an article thrown from a window of a building in the tenancy of the defendant, but not setting forth any facts showing negligence on his part, is not sufficient to sustain the action.

On exceptions by plaintiff. Overruled.

Tort. The declaration in the plaintiff's writ is as follows:

"In a plea of the case for that the said plaintiff on the 3rd inst. was rightfully passing along from Mechanic Row to Main Street in a passageway legally opened and subject to the rights of travellers to pass upon, in the rear of the store and place of business maintained by the defendants, and while so passing along in the rear of the store of said defendants, without any notice, the window of their place of business was raised and someone to the plaintiff unknown, from the inside, threw out a certain vessel, to wit, a spittoon, loaded with blazing benzine and other filth and upon the body of the said plaintiff covering him with filth and ruining his clothing which he then wore, causing him great fright and damage to his person as well as to his clothing and against our peace."

To this declaration the defendants filed a general demurrer which was sustained and thereupon the plaintiff excepted.

George C. Wing and George C. Wing, Jr., for plaintiff.

Tascus Atwood, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, CORNISH, KING, JJ.

EMERY, C. J. It is evident that the declaration in this case can be sustained only upon the assumption that the tenant of a building

is liable for injuries suffered by a passer-by from anything thrown by any person from a window of the building, though neither such tenant nor any of his servants were in fault. There is no allegation in the declaration that the article inflicting the injury was thrown by either of the defendants or any of their servants nor is it stated wherein they were in fault in not preventing the injury.

We think the assumption is without foundation and that in this State such tenant is not bound at his peril to prevent such injuries but only to exercise due care to prevent them. The decisions in the cases cited by the plaintiff were based upon the negligence of the defendant duly alleged and proved. In this case no negligence is even alleged and hence the declaration must be adjudged insufficient.

Exceptions overruled.

J. B. PITCHER *vs.* WALLACE E. WEBBER.

Androscoggin. Opinion October 12, 1907.

Sales. Misrepresentation. Rescission. Redelivery.

1. Material misrepresentation as to its qualities by the vendor of a chattel, made to induce the vendee to purchase, gives the vendee a right to rescind the sale within a reasonable time after the misrepresentation is discovered.
2. Such misrepresentation by a person selling the chattel for the owner also gives a right to rescind the sale.
3. To effect a rescission of a sale it is not necessary actually to redeliver the property to the vendor at the place where delivered by him, if he declares he will not accept redelivery. In such case it is enough for the vendee to offer a redelivery, and, if refused, to hold the property subject to the vendor's order.
4. To preserve a right to rescind a sale it is not necessary for the vendee to rescind immediately upon the first discovery of some material misrepresentation. He may waive that and yet rescind upon subsequent discovery of other material misrepresentations.

5. When upon notice of some material representation the vendor suggests further investigation or trial, the vendee may take a further reasonable time therefor without waiving his right to rescind the sale.
6. If the property sold is damaged while in the possession of the vendee without his fault, he is not obliged in order to rescind the sale, to repair the damage before redelivery or offer of redelivery to the vendor.

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

Assumpsit on account annexed to recover the sum of $750 for an automobile alleged to have been sold and delivered by the plaintiff to the defendant.

Plea, the general issue together with a brief statement setting up, as a defense, breach of warranty, no delivery or acceptance, the statute of frauds and rescission, the defendant also stating in his brief statement that he claimed to recoup certain sums laid out by him on the automobile, and also to recoup "whatever expense he may be put to in the defense of this action, including a reasonable amount for counsel fees and for cost of witnesses, and for such further and special damage as he may be able to prove on the trial hereof."

Tried at the April term, 1907, of the Supreme Judicial Court, Androscoggin County. Verdict for plaintiff for $526.25. During the trial the defendant excepted to certain rulings made by the presiding Justice, and also after verdict against him filed a general motion to have the verdict set aside.

The case appears in the opinion.

McGillicuddy & Morey, for plaintiff.

George C. Webber, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, SPEAR, CORNISH, JJ.

EMERY, C. J. This was an action for the price of an automobile alleged to have been sold and delivered to the defendant. Three issues of fact were raised at the trial, viz: (1), whether there was a delivery of the automobile, (2), if a delivery, whether there was such misrepresentation in the sale as authorized the defendant to rescind, and (3), if such right of rescission, whether the defendant

seasonably effected a rescission. This last issue was taken from the jury by a ruling of the presiding Justice that even if there was a right of rescission it had not been effectually exercised. The correctness of this ruling upon the evidence for the defendant is the question presented by the exceptions. That evidence was to the following effect:

The plaintiff was the owner of an automobile at Saginaw, Michigan. The defendant lived in Lewiston. Mr. Nudd, also of Lewiston, and acting for the plaintiff, in the spring of 1906 urged the defendant to purchase the automobile, and, to induce him to purchase, represented that it was a White machine of the 1904 model, was in perfect running order, had never met with an accident or been injured in any way, and was in perfect shape. The defendant thereupon agreed to buy the machine. It was shipped from Saginaw to Mr. Nudd at Lewiston and there received by him and taken to a garage, and there subsequently put in the possession of the defendant. Upon trial, the machine proved to be unworkable and imperfect and through its imperfections was damaged without any fault upon the part of the defendant. Inasmuch as the machine could not be repaired at Lewiston it was sent, with Mr. Nudd's concurrence, to the makers in Boston. Upon its arrival there the defendant received a telegram from the makers that the machine was a 1903 instead of 1904 model. This telegram was shown Mr. Nudd who declared it to be impossible, and by consent the matter was allowed to rest until the defendant should go to Boston in person, which he did a few days afterward. Arriving there the defendant found, as was the fact, that the machine was a 1903 machine and otherwise different from the representations of Mr. Nudd. He at once wrote his brother in Lewiston to tender the machine back to Mr. Nudd as not according to his representations, and had the machine shipped back to Lewiston. The brother received the letter in due course of mail and immediately went to Mr. Nudd, read the letter to him, and said in behalf of the defendant that they "were ready to deliver the machine anywhere he said," and further "to ship it anywhere he said." Mr. Nudd replied: "I have nothing whatever to do with it at all in any way." He

further said Mr. Pitcher (the plaintiff) was the man for them to deal with; that he (Nudd) had nothing to do with it, and wouldn't. The brother then said: "Then you won't accept the machine here anyway?" to which Nudd replied: "No, sir. I have nothing to do with it." Immediately after this conversation the defendant wrote to the plaintiff at Saginaw, Michigan, apprising him of the misrepresentations of Mr. Nudd and of his desire and intention on that account to return the machine, and offering to deliver it to any person and at any place the plaintiff would name. The plaintiff wrote in reply that he would not take the machine back, that he did "not propose to do anything of the sort."

The defendant did not take the machine to Mr. Nudd nor did he ship it to the plaintiff at Saginaw but allowed it to remain in his barn in Lewiston where it has since remained unused, untouched and uncalled for.

That, upon the evidence above stated, the jury might reasonably have found that the defendant had a right to rescind the contract of sale for misrepresentations is not questioned. The plaintiff, however, invoked at the trial the general rule that to effect a rescission of a sale by the vendee he must redeliver the article to the vendor at the place where the vendor delivered it to him, and contended that as no such redelivery was made in this case no rescission was effected. Such redelivery is undoubtedly the vendor's right, but it is a right he may waive; and, if upon the vendee's offer to redeliver the article by way of rescission of the sale, he plainly gives him to understand that such redelivery would be useless, that it would not be accepted, he does waive the right. The law does not require useless acts or words, and, taking the vendor at his word, it cannot matter to him where the article is left, at least until he withdraws his refusal to accept it. *Milliken* v. *Skillings*, 89 Maine, 183.

At the trial the defendant claimed that the statements of the plaintiff and Mr. Nudd, upon his offers to return the machine, justified him in assuming that an actual redelivery of the machine would be nugatory and useless and that, therefore, the rescission was effected without actual delivery back. The presiding Justice, however, ruled otherwise and instructed the jury as matter of law

that for want of actual redelivery of the machine to the plaintiff or Mr. Nudd, no rescission was effected. We think the ruling was erroneous and clearly prejudicial to the defendant. It is apparent from the evidence that the jury might reasonably have found that the plaintiff and his agent Nudd had in advance plainly refused to accept redelivery, and thus had waived it. In such case an actual redelivery would not be essential to an effective rescission. The question of waiver should have been submitted to the jury.

The whole evidence was made a part of the bill of exceptions, and the plaintiff urges that, even if there was a waiver of redelivery, no rescission was effected because of omission of other essentials as disclosed by the evidence. He claims that the effort to rescind was not made within a reasonable time. A vendee, however, is not bound to rescind upon the first discovery or supposed discovery of some one imperfection or misrepresentation. He is entitled to time for inquiries, experiments and tests. He can waive imperfections or misrepresentations first discovered and yet be afterward entitled to rescind upon the discovery of others. Suggestions from the vendor, or his agent, to make further inquiries or trials would also extend the time for rescission. In this case there was evidence that within a day or two after finally satisfying himself that, despite the assurances of the plaintiff's agent Nudd, the machine was not as represented, the defendant sought to return it. Certainly, we should not say as matter of law he was too late. *Boles* v. *Merrill*, 173 Mass. 491; *Matteson* v. *Holt*, 45 Vt. 336; *Sandwich* v. *Kelley*, 26 Ill. App. 394.

The plaintiff further claims that the machine had been damaged by the defendant, and that he could not rescind without restoring it to its former condition, that a refusal to receive it in its damaged condition should not be construed as a refusal to receive it with damages all repaired. The jury, however, upon the evidence stated might reasonably have found that the damaged condition of the machine was owing to its own imperfections and not at all to any fault of the defendant. In such case the defendant could rescind the sale by returning the machine in its damaged condition. *Smith* v. *Hale*, 158 Mass. 178.

No other omission of essentials is urged by the plaintiff, and upon the whole case we are satisfied that the exceptions must be sustained.

Exceptions sustained.

ABNER D. VALLEY *vs.* THE BOSTON & MAINE RAILROAD COMPANY.

Aroostook. Opinion October 18, 1907.

Accord and Satisfaction. Settlements. Written Receipts. Mistake of Fact. Fraud. Assurances of Adverse Party. Evidence. R. S., chapter 84, section 59.

1. By R. S., chapter 84, section 59, which is an affirmation of the common law, no action shall be maintained upon a demand settled by a creditor in full discharge thereof by the receipt of money or other consideration however small. This rule applies to actions ex-delicto as well as to actions ex-contractu.
2. Before such settlement can be avoided as made under mistake of fact, the sum received must be returned or tendered back.
3. A written discharge of all claims for injuries to person or property signed by the claimant and given for money actually received therefor however small in amount, will not be set aside for fraud unless the fraud be proved by trustworthy evidence consistent with proven circumstances.
4. Where the claimant writes upon such written discharge with his own hand that he has read it, his uncorroborated testimony that he did not read it is not sufficient to warrant a finding to that effect.
5. That the claimant accepted the money and made the settlement because of the assurances of the other party that he had no cause of action does not vitiate the settlement. He was not justified in relying upon such assurances.
6. In the case at bar, the money received in settlement was not tendered back, and the frauds alleged were not proved.

On motion by defendant. Sustained.

Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant company. The accident in which the plaintiff was injured, occurred in the Charlestown Yard, so called, of the defendant com-

pany in the City of Charlestown, Massachusetts, February 9, 1904. Writ dated August 10, 1905. Plea the general issue with brief statement as follows: "And for brief statement the defendant further says that before the purchase of the writ in the above entitled action, to wit: On the 9th day of February, 1904, at Boston, Massachusetts, the said plaintiff, by his certain writing of release, by him signed and sealed with his seal and in court reproduced, in consideration of the sum of fifteen dollars ($15) to the plaintiff in hand, paid by the Boston & Maine R. R. receipt whereof was thereby acknowledged and the further consideration of the payment of the bill of Dr. Sawin, the plaintiff did thereby release and forever discharge said Boston & Maine R. R., defendant in above entitled action, its officers, agents and servants, from any and all actions, causes of action, claims and demands for, upon, or by reason of any damage, loss, injury or cost which heretofore had been, or which thereafter might be sustained by said plaintiff on account of or in consequence of an accident at or near Boston, Massachusetts, on or about February 9th, 1904, whereby said plaintiff claimed to be injured on the Eastern Division train and the defendant avers that the accident therein referred to and from all consequences of which said plaintiff therein released the defendant is the same accident complained of in the plaintiff's writ and the sole cause of action in the present suit."

Tried at the April term, 1906, of the Supreme Judicial Court, Aroostook County. Verdict for plaintiff for $1,416.66. The defendant company then filed a general motion to have the verdict set aside.

The written release given by the plaintiff to the defendant company, mentioned in the defendant company's brief statement and which was introduced in evidence during the trial, and is discussed and considered in the opinion, is in words and figures as follows:

"Boston & Maine Railroad.

"$15.00

"I Abner Valley of Fort Fairfield, Maine, in consideration of the sum of fifteen and no-100 dollars to me in hand paid by the Boston & Maine Railroad, the receipt whereof is hereby acknowl-

edged, do hereby release and forever discharge said Boston & Maine Railroad, its Officers, Agents and Servants, from any and all actions, causes of action, claims and demands for, upon, or by reason of any damage, loss, injury or cost which heretofore has been or which hereafter may be sustained by me on account of or in consequence of an accident at or near Boston, Mass., on or about Feb'y 9, 1904, whereby I was injured while a passenger on a Eastern Div. train. Said Railroad agreeing to pay Dr. Sawin.

"I have read the above.

"In Witness Whereof, I have hereunto set my hand and seal at Boston, Mass., this 9th day of Feb'y nineteen hundred and four.

ABNER VALLEY (seal)"

"Signed and sealed in the presence of

LYDIA A. CARLETON,

R. T. DAMON."

All the material facts are stated in the opinion.

Herbert W. Trafton and Ira G. Hersey, for plaintiff.

Albert W. and John B. Madigan and Herbert T. Powers, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, SPEAR, CORNISH, JJ.

EMERY, C. J. This was an action to recover damages for personal injuries sustained by the plaintiff from the negligence of the defendant. The verdict was for the plaintiff. On this motion for a new trial the only question is whether the evidence justified the necessary finding that a written release of the cause of action given by the plaintiff to the defendant for the consideration of fifteen dollars was obtained by such misrepresentation as amounts to legal fraud.

The plaintiff had charge of some cars loaded with potatoes shipped from Fort Fairfield. While the train was at rest in the freight yard of the defendant company in Charlestown, Mass. and the plaintiff was lawfully in the caboose car in a standing position, a moving locomotive struck the rear of the train with such force that the plaintiff was thrown violently against a table and then to the

floor of the car to his injury. Getting up, he left the caboose and went along the train to one of his potato cars into which he was helped and remained from about half past three till daylight of a February morning. He then went at the suggestion of one of the train men to a physician, Dr. Sawin, not in the employ of the defendant company. He walked the distance being some five or seven minutes walk. The physician advised him that a rib was broken on the side and another parted from the back bone, and after putting on the usual bandages advised him to see the claim agent of the company, which he did, going over to his office at the Northern Station in Boston. There is sharp conflict of testimony as to the conversation in the claim agent's office, which conversation, however, resulted in the plaintiff accepting from the claim agent fifteen dollars and a giving in return therefor a written release of all causes of action against the company. This written release was prepared by the claim agent upon a printed blank form and the plaintiff not only signed it but wrote upon it with his own hand close under the words of release and next before the attestation clause, the words "I have read the above." He then delivered the writing and took his money and went away. This was February 9, 1904, and he brought no suit for a year and half afterward viz, August 10, 1905.

At the trial he testified to what he claims were two misrepresentations which he says induced him to give the release. The first was that the claim agent, on ascertaining that he was not a regular paying passenger but was on a freight train in charge of potato cars and only with the usual papers authorizing him to be there for that purpose, stated to him that he had no valid claim for damages under the circumstances but as he was a poor man he (the claim agent) would give him fifteen dollars as a present to sign the release. This misrepresentation, if there was such, was not a representation of any matter of fact but simply a statement of an opinion on a question of law. There was nothing in the situation to justify the plaintiff in relying on that opinion or that made it invalidating fraud in the claim agent to assert it. The plaintiff was about thirty-eight years old and, so far as the evidence discloses, was of average

intelligence and firmness of mind. The claim agent did not seek him. He sought the claim agent. He opened the negotiation and made his claim. He knew the claim agent represented and acted for the other and adverse party. The case on this point is fairly and fully within the principles of *Thompson* v. *Phœnix Insurance Co.*, 75 Maine, 55. In that case the plaintiff, having sustained a large loss from the destruction of his unoccupied house by fire, accepted one fourth of his claim because of his reliance upon the assurance of the company's agent that the non-occupancy of the building at the time of the fire ipso facto wholly avoided the policy. It was held by the court that whether the agent's statements were regarded as of law or fact they did not invalidate the settlement. "In either case" said the court "they were expressions of opinion from the agent of a corporation whose interests were known to be directly hostile to the plaintiff and as a prudent man he ought not to have relied upon them." See also *Mutual Life Insurance Co.* v. *Phinney*, 178 U. S. 327.

As to the other alleged misrepresentation the plaintiff's testimony was that he signed the written release without reading it or knowing its contents, and was induced to do so by the statement of the claim agent that it was merely an acknowledgment of the receipt of a present of fifteen dollars. This testimony is flatly and emphatically contradicted by that of the claim agent, is absolutely uncorroborated by any circumstance or by any other witnesses, and seems to us most improbable. The paper was a regular printed one page blank release of letter paper size with the heading of "Boston and Maine Railroad" in large prominent type of capital letters. In the printed part containing the words of release the words "Boston and Maine Railroad" appear twice in capital letters. There were only ten lines to express the purpose of the paper. After the words of release there was written in the clause, "said Railroad agreeing to pay Dr. Sawin." Under all this the plaintiff wrote with his own hand "I have read the above." At the bottom of the paper below the signature were three blank certificates of audit. The plaintiff admits he was in the office of the claim agent half an hour or so talking the matter over. Granting he was suffering considerable

pain, he does not claim he did not know what he was about nor what he was there for, or that he was at all hurried. His signature was formally attested in his presence by two witnesses and there were also a number of other persons present in the office at the time.

We think it incredible that the claim agent of so large a corporation, holding an office of such importance and requiring capacity and carefulness and a reputation for integrity, would venture in the presence of so many witnesses to pass such a paper to the plaintiff (who was in no hurry) to sign and to certify in his own handwriting that he had read it, and state to him that it was merely a receipt for a present of fifteen dollars. Granting that he might be dishonest enough to do so, less than common prudence would have prevented. The real contents of the paper were too conspicuous. The merest glance at it would have exposed the falsehood.

Nor do we think it credible that the plaintiff, unhurried as he was, having under his eyes a paper so brief and with its contents so conspicuous, would have signed it and written upon its face with his own hand that he had read it, without noting its purport. That he was asked to write upon it in his own hand a statement that he had read it must have directed his attention to its contents. For him, then, not to read it or note its purport would be incomprehensible. His handwriting and testimony show him to be a man of full average intelligence and quickness of mind. Granting his bodily pains, there is no evidence that his mind was clouded. He was able to walk, climb stairs, talk, negotiate and write understandingly. His long delay of a year and a half in bringing suit, though advised to do so by different lawyers, tends to show he was conscious of some obstacle.

True, we must assume that the jury found the plaintiff's testimony on this point to be true and did so after seeing him and hearing him testify, but the personal presence of the plaintiff, the oral reciting of his sufferings and losses, and the small amount for which he settled, not unlikely excited so much sympathy that the jury failed to realize the improbability, the unreasonableness of his story. Studying the evidence apart from such influences we are satisfied the verdict is wrong and must be set aside.

While fraud, when proved, vitiates any contract or settlement, it is not to be lightly assumed to exist but must be proved by trustworthy evidence consistent with undisputed circumstances. Settlements are favored by the law, but if they are to be set aside upon the uncorroborated testimony of the claimant though made in writing and signed by him, there will be little use in making settlements.

Motion sustained.
Verdict set aside.

ELI H. PINKHAM *vs.* CLINTON C. HAYNES et al.

Penobscot. Opinion October 23, 1907.

Contracts. Sales. Non-delivery. Vendee's Option. "On or before." Construction.

On the 30th day of September, 1905, the defendants agreed to deliver to the plaintiff one thousand bushels of potatoes on board cars either at South Winn or North Lincoln Station, on or before November 1, 1905, and on the same day received the sum of $50 on account of same. Two hundred bushels of the potatoes were then stored in a barn four miles distant from North Lincoln and eight hundred bushels were three miles distant. The cars on board of which the potatoes were to be delivered under the terms of the contract, were to be furnished by the plaintiff, but no car was in fact furnished by the plaintiff until the night of October 31, and the defendants were not informed of the arrival of this car at North Lincoln until eleven o'clock in the forenoon of November 1. It would have required five days to move the potatoes to North Lincoln with the two teams ordinarily used by the defendants in their business and the only teams which would have been available for their use on November 1, after receiving plaintiff's notice. The defendants themselves had once furnished a car and offered to perform the contract.

Held: (1) That as the cars were to be furnished by the plaintiff it was his right to determine the time when the potatoes should be delivered within the limitation prescribed by the contract.

(2) That under the natural and ordinary interpretation of the phrase "on or before" used in the contract, and in accordance with the intention of the parties at the time the contract was made, the defendants were entitled to such seasonable notice of the arrival of the plaintiff's cars as would enable them by the use of reasonable diligence to complete the transportation and delivery on the first day of November.

(3) That the contract was an entire one for the delivery of one thousand bushels of potatoes on or before November 1, and as a reasonable opportunity was not afforded the defendants to perform the contract by a delivery of all, they were under no legal obligation to deliver a part of the potatoes on November 1.

(4) That the defendants did not intentionally relinquish any rights secured to them by the contract or agree to any modification of its terms respecting the time for delivery, and that the contract failed of performance not by reason of any fault of the defendants, who had themselves once furnished a car and offered to perform it, but by reason of the negligent omission of the plaintiff to give the defendants a reasonable opportunity to complete the performance on or before November 1.

On report. Judgment for defendants.

Action of assumpsit to recover damages for an alleged breach on the part of the defendants of a contract for the sale and delivery of one thousand bushels of potatoes. Plea, the general issue.

Tried at the October term, 1906, of the Supreme Judicial Court, Penobscot County. At the conclusion of the testimony, it was agreed to report the case to the Law Court, "to settle the whole question of law and fact upon so much of the testimony as is legally admissible."

The case appears in the opinion.

Taber D. Bailey, for plaintiff.

P. H. Gillin and Artemus Weatherbee, for defendants.

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

WHITEHOUSE, J. This is an action of assumpsit to recover damages for an alleged breach on the part of the defendants of the following contract for the sale and delivery of potatoes, viz:

"Lincoln, Maine, Sep. 30, 1905.

"This day sold to E. H. Pinkham 1000 bu. Potatoes to be Green Mountains and good merchantable stock well assorted and

to be delivered on board cars either at South Winn or North Lincoln Station on or before Nov. 1, 1905.

"Rec'd this day on account of above potatoes fifty dollars said potatoes to be paid for at forty cents per bushel.

"C. C. HAYNES,
"B. F. WYMAN."

"I hereby agree to take said potatoes if they freeze in the barn after being stored before Nov. 1st, at the said within price.

"E. H. PINKHAM."

The last clause, signed by the plaintiff, expressly agreeing to accept, under the contract, potatoes that might "freeze in the barn after being stored before November 1," appears to have been indorsed on the contract October 7, as a result of a conversation between the parties at that time, when the defendants expressed a fear that the potatoes would freeze in the barn.

The plaintiff avers in his declaration that he was ready to receive the potatoes on the first day of November at North Lincoln and had cars there ready to receive them and requested the defendants to load them, but he alleges that the defendants refused to deliver them. The potatoes were never in fact delivered to the plaintiff, but were sold and delivered to other parties on the second day of November.

It was not in controversy that the cars on board of which the potatoes were to be delivered under the terms of the contract, were to be furnished by the plaintiff, and that it was consequently the right of the plaintiff to determine the time when the potatoes should be delivered within the limitation prescribed by the contract. The defendants state that they acquiesced in the proposition made by the plaintiff Sept. 30, the time the contract was signed, that he "couldn't take the potatoes that day, but would take them as soon as the price advanced so that he could do so at a profit;" and although according to the testimony of the plaintiff himself, the market price of potatoes at Lincoln had so advanced that for at least a week prior to November 1, it was 65 cents a bushel loaded on the cars, there is no evidence that the plaintiff made any effort to obtain cars, or if so, he failed to obtain any, until October 28. He then informed

the defendants, through his agent that "he had ordered the car and that he would let them know when it got there." The car did not arrive until the night of October 31. Howard Pinkham, the plaintiff's brother, testifies that he was "sent by the plaintiff to the defendant Haynes" and that he arrived at Haynes's house "about ten o'clock" the first day of November, the next day after the car arrived. He thus describes the interview between Mr. Haynes and himself: "I told him the car was there and ready for potatoes and I says, "Haven't you got a canvas you can throw right over your load?" We didn't make much talk. I says, "Pretty hard day to haul potatoes," says I. "What time will you be there tomorrow with a load?" He didn't say much. I says, "Probably about nine o'clock?" And he thought it would take until nine o'clock to get there—had to load up. That was all the talk I had with him and came back."

The suggestion of the witness that a canvas might be thrown over the load obviously had reference to the heavy rain that was falling that day. Two hundred bushels of the potatoes were stored in a barn four miles distant from North Lincoln, and eight hundred bushels were three miles distant. It satisfactorily appears from the testimony of the defendants that it was between eleven and twelve o'clock when the interview between Howard Pinkham and Haynes actually took place on November first. It is shown by undisputed evidence that it would have required at least ten well equipped teams to move all of those potatoes before nine o'clock that night, that it was practically impossible to procure so many teams that day, and that it would have required five days to move them with the two teams which it may be inferred from the testimony, were the only ones ordinarily used by them in their business and the only ones which would have been available for their use that afternoon.

The defendant Haynes's testimony in regard to this interview of November 1, does not differ very materially from the plaintiff's. According to his version of it, the plaintiff came to his house about twelve o'clock and told him he had a car, "but it was raining so I couldn't haul the potatoes, but could haul the next day if it didn't rain." He denies that he said he would be ready and commence

hauling the next morning at nine o'clock or that he said in reply to the plaintiff that "that was about as early as he could get around." But in answer to a further inquiry he says: "We couldn't have delivered them on the first of November. We should have started in though, if he had said so, but it would have been impossible."

It appears, however, that Howard Pinkham understood that the defendants would commence hauling on the morning of November 2, and was on the road to North Lincoln at eight o'clock that morning for the purpose of being present to weigh out the potatoes, when the defendant Haynes met him and informed that "they were not going to load the potatoes because the contract had expired."

It is contended in behalf of the plaintiff, that under a reasonable construction of the contract the plaintiff had the privilege of furnishing cars any time up to and including November 1, and if furnished on November 1, the defendants were required to commence hauling and to continue hauling and loading on that and succeeding days until all the potatoes were delivered on board the car.

It is the opinion of the court that such a construction of the contract in this case would neither be in harmony with the natural and ordinary interpretation of the phrase "on or before" used in the contract, nor with the legal rights of the defendants under a contract which must be deemed an entirety, nor consistent with the intention of the parties at the time the contract was made.

With respect to the ordinary signification of the words "on or before," this court has said; "within" a certain period "on or before" a day named, and "at or before" a certain day, are equivalent terms and the rules of construction apply alike to each." *Leader* v. *Plante*, 95 Maine, 341. In New Jersey a question arose in regard to the proper interpretation of these words, in the return of the surveyors fixing the time when a road should be opened, and the court say; "The road cannot be opened in a day; the time for opening it may with propriety, be extended in some cases to many days. . . . . In the present case the words of the return are that the road shall be opened on or before the first day of September next. The natural, legal and correct construction of

these words is that the surveyor shall open the road between the day of the return and the first day of September." Matter of Public Road in M. & M. Counties, 4 N. J. L. 329, *290.

So in the case at bar the defendants were entitled to notice of the arrival of the cars furnished by the plaintiff and of his readiness to receive the potatoes in season to enable them to complete the delivery of all the potatoes before the close of the first day of November. They had been ready and willing to deliver them long before that time. It satisfactorily appears that on the seventh day of October, when the indorsement in regard to freezing was made on the contract, the defendants informed the plaintiff that there happened to be an extra car at their disposal at South Winn and they would prefer to deliver the potatoes at that time and place. But the plaintiff, while not objecting to the delivery at South Winn "said he couldn't take the potatoes then because he had his store-house full in Portland and couldn't handle them, but would take them the last of next week or the first week after." As already stated they heard nothing further from him until October 28, and received no notice of the arrival of a car until about 12 o'clock on the first day of November. Even this notice was not accompanied with a distinct request that the delivery of the potatoes should be commenced that day. It is quite evident that the plaintiff did not desire a delivery of any part of the potatoes on that inclement day, but hoped and perhaps expected that the defendants would not insist upon the terms of the contract respecting the time of delivery, but would commence to haul the next morning. The defendants, it is true, state that they should have commenced hauling the afternoon of November 1st, if the plaintiff "had said so." But the plaintiff did not request it, and it is not shown that the plaintiff was induced by any evasive answer or by the silence of the defendant Haynes at the interview of November 1, to take any course to his detriment which he would not otherwise have taken. He knew that it was not possible for the defendants to deliver all of the potatoes that afternoon and he did not ask them to deliver any of them. As indicated by their testimony the defendants may have understood that if requested it would have been their

duty, under the contract to deliver such part of the potatoes as it was practicable for them to haul that afternoon; and while it is a sufficient answer that in fact they were not requested to deliver any part of them that day, it is proper to observe that this was an entire contract, for the delivery of 1000 bushels, and if a reasonable opportunity was not afforded them to perform the contract by a delivery of all, the defendants were under no legal obligation to deliver a part of the potatoes. Benj. on Sales, sect. 689.

In view of the advance in the price of potatoes the last of October, it is undoubtedly true that the defendants took vigilant note of the plaintiff's procrastination in furnishing cars and in making a request for a delivery, and that they were willing and anxious to be relieved of their obligation under the contract; but they did not intentionally relinquish any rights secured to them by it, or agree to any modification of its terms respecting the time for delivery. That the contract failed of performance was not the fault of the defendants who had themselves once furnished a car and offered to perform it, but of the plaintiff who declined that offer, and negligently omitted to give them a reasonable opportunity to perform it thereafter. See *Frommel* v. *Foss*, 102 Maine, 176.

The entry must accordingly be,

Judgment for defendants.

MELVIN J. GOOGIN vs. CITY OF LEWISTON.

Androscoggin. Opinion October 28, 1907.

Municipal Corporations. Drains and Sewers. Law relating to Sewers in City of Lewiston. Liability of Lewiston in relation to Sewers. Sewer termini. Sufficiently definite, when. Parol evidence admissible to show termini. Concurrent action of the two Boards of Lewiston City Council. How same may be shown. Board of Public Works for City of Lewiston. Power of, relating to Sewers. Private and Special Laws, 1864, chapter 398; 1873, chapter 387; 1903, chapter 263. Statute, 1901, chapter 268. R. S., chapter 21, sections 2, 18.

1. When the municipal authorities in the process of repairing a public sewer stop up the pipe of one who has lawfully connected with it so that it fills and bursts, the municipality is liable for the damage occasioned thereby.
2. The power and duty to lay out, make, maintain and repair common sewers in the City of Lewiston is vested by statute in the city council.
3. The special statute governing the construction of sewers in Lewiston does not require a petition as a prerequisite to the laying out of a sewer. The city council can act of its own motion.
4. The city ordinance to the effect that the mayor and aldermen shall in no case proceed to construct a sewer until an appropriation therefor shall have been made by the city council is not applicable in the case of a sewer constructed by the city council itself.
5. The similar provision in R. S., chapter 21, section 2, is not applicable in the case of a sewer constructed many years before its enactment, as was the one in question in this case.
6. An order of the city council "that the sewer on Bates Street be continued to Walnut Street" is sufficiently definite as to the termini, one end being the point where the sewer then existing on Bates Street ended, and the other being Walnut Street.
7. Parol evidence is admissible to locate on the face of the earth the termini which were fixed by the record, and to show that the sewer constructed under such an order is the one now complained of.
8. Record evidence of the concurrent action of the two boards of the city council of Lewiston is essential in showing the laying out of a sewer. But

the separate record of the common council is not indispensable in showing the concurrent action of that board. When the city records, kept by the city clerk, who is also the recording officer of the board of aldermen, show that the order for the construction of a sewer was passed by the board of aldermen and "sent down," and later, that the order "came up, passed in concurrence" it is sufficient. The city clerk's record is admissible to show the concurrent action of the common council.

9. Under chapter 263 of the Private and Special Laws of 1903, the Board of Public Works for the city of Lewiston has all the powers and is charged with all the duties relative to the construction, maintenance, care and control of sewers in that city, which were previously conferred or imposed upon the city council.

Held: That the city is answerable in damages for injuries caused by the want of proper maintenance or repair of the public sewers by the Board of Public Works, the same as it would be if the city council, or any other municipal agency, was charged with the duty of their maintenance and repair.

On report. Judgment for plaintiff.

Action on the case to recover damages sustained by the plaintiff and caused by the alleged failure of the defendant city to maintain and keep in repair a certain public drain in the defendant city. (See Revised Statutes, chapter 21, section 18.) Plea, the general issue.

Tried at the January term, 1907, of the Supreme Judicial Court, Androscoggin County. At the conclusion of the testimony, and by agreement of the parties, the case was reported to the Law Court for determination upon the legally admissible evidence.

The case fully appears in the opinion.

Newell & Skelton, for plaintiff.

Louis J. Brann, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, SAVAGE, SPEAR, CORNISH, KING, JJ.

SAVAGE, J. The plaintiff complains that the defendant city failed in July, 1906, to maintain and keep in repair its public sewer on Bates Street, so as to afford sufficient and suitable flow for all drainage entitled to pass through it, in this, that in repairing a break in said sewer, and in flushing the same afterwards, the city's proper agents and servants caused the pipe leading from the cellar on plain-

tiff's premises on Bates Street to the main sewer "to be stopped, filled and plugged with gravel, earth and stones, at the connection of the pipe with the sewer," so that the water and sewage from plaintiff's premises accumulated in the pipe and burst the same, letting the sewage flow back into the cellar. And to recover for the injuries occasioned thereby he brings this suit.

We think the evidence fairly justifies the following statement of facts. Several days prior to the injuries complained of, the Bates Street sewer, which was built of brick, fell in at a point about twenty or twenty-five feet above the point where the plaintiff's pipe connected with it. After the place of the break had been cleaned out preparatory to the re-building of the sewer, or the replacement of it at that place by sewer pipe, a heavy rain fell, and stones, gravel and mud were washed down into the trench, filling it to the depth of two or three feet. Later it was found that the main sewer was partly or wholly clogged, and the city authorities sought to remove this difficulty by flushing the sewer with a powerful hydrant stream. This stream evidently forced some of the stones, gravel and mud into the plaintiff's pipe, completely plugging it for the distance of ten feet from its connection with the sewer. And the water and sewage from plaintiff's premises accumulated, burst the pipe, and did the damage complained of. It is admitted that the plaintiff had received and paid for a proper sewer permit, and had lawfully connected with the sewer.

It is provided by R. S., ch. 21, sect. 18, that "after a public drain has been constructed and any person has paid for connecting with it, it shall be constantly maintained and kept in repair by the town, so as to afford sufficient and suitable flow for all drainage entitled to pass through it. . . . . If such town does not so maintain and keep it in repair, any person entitled to drainage through it may have an action against the town for his damages thereby sustained." Is this statute broad enough to reach a case where the want of repair complained of consists, not in the condition of the structure of the public sewer itself at the time of the injury, but rather in the fact that the city authorities in the process of repairing the public sewer stopped up the pipe of one who has law-

fully connected with the sewer? We think it is. It would be a narrow construction indeed, and one not consonant with the wise purpose of the statute, to say that while the city must keep the main sewer open, it may, in doing so, destroy at the point of junction the connection with an abutter's pipe and thereby render the sewer itself of no use to him. That is not keeping it "so as to afford a sufficient and suitable flow for all drainage entitled to pass through it."

Therefore, if the Bates Street sewer was a public sewer which the defendant city was bound by law to maintain and keep in repair, it must be held responsible in this action.

The general authority for the construction of sewers is found in R. S., ch. 21, sect. 2, namely:—"The municipal officers of a town . . . . may at the expense of the town construct public drains or sewers along or across any public way therein." And in the exercise of this power it has been held that municipal officers constitute a special governmental tribunal for the exercise of a special governmental function, and that for their doings, their mistakes, their lack of good judgment in laying out and constructing a sewer, their town is not responsible. *Gilpatrick* v. *Biddeford*, 86 Maine, 534, and many other cases. But in some instances the power delegated ordinarily to municipal officers is delegated to some other tribunal. And in this case, we find, by the Private and Special Laws of 1864, ch. 398, as amended by Private and Special Laws of 1873, ch. 387, that in the case of the City of Lewiston,—"the city council of said city may lay out, make, maintain and repair all main drains and common sewers in said city." But the rule as to municipal non-liability is the same as under the general statute. *Keeley* v. *Portland*, 100 Maine, 260.

Since the city is not liable for the want of repair of any sewers except such as are legally laid out, it is incumbent on the plaintiff to show that the Bates Street sewer in question was legally laid out and constructed by the city council of Lewiston. If so, the duty of keeping in repair follows.

The records of the city, kept by the city clerk, show the following:

"In Board of Mayor and Aldermen, Mon. Eve., June 30, 1873.

"The following order was passed: —

"An order for building a sewer on Bates Street to Walnut Street, and on Franklin Street to Main Street sewer, was read, passed and sent down."

"Tues. Eve., July 1, 1873.

"Board of Mayor and Aldermen.

"The order that the sewer on Bates Street be continued to Walnut Street, and that a sewer be built on Franklin Street from Pine Street to Main Street sewer, which passed the board of Aldermen, and was sent down June 30, and was referred to committee on sewers at the same meeting, came up, passed in concurrence."

To the sufficiency of this record, the defendant interposes several objections. In the first place it says that "there is no evidence of the presentation of a petition signed as required by statute," and it cites the following language from the head note in *Kidson* v. *Bangor*, 99 Maine, 139: — "The presentation to the board of municipal officers of a petition as required by statute is a jurisdictional fact which must be made to appear in order to show a proper and legal laying out of a sewer." It is a sufficient answer to say that the special statutes, above cited, empowering the city council of Lewiston to lay out and construct sewers does not require any petition. The city council can act of its own motion.

Again it is objected that there is no evidence of the making of an appropriation made for the purpose of the construction of the sewer. It is claimed that the making of such an appropriation is a preliminary jurisdictional matter, and that without it the laying out of a sewer is illegal. In support of this proposition, the defendant cites, R. S., ch. 21, sect. 2, to the effect that the municipal officers shall not construct any public sewer until the same has been authorized by vote of the town, and an appropriation is made for the purpose. But this statutory provision was not enacted until chapter 268 of the Laws of 1901, long after the Bates Street sewer was constructed. The defendant also cites from the Revised Ordinances of the city to the effect that "the mayor and aldermen shall in no case proceed to construct a common sewer or main drain until an appropriation to defray the cost of the same shall have been made by the city council." It does not appear that this ordinance was in force in 1873, but assuming that it was, and assuming that a compliance

with the ordinance was a jurisdictional requirement, it applied only to the construction of a sewer by the mayor and aldermen, and not to such construction by the city council.

Again, it is claimed that the city record is incomplete and indefinite in that it does not designate from what point on Bates Street the sewer was to be "continued," and hence, also, that it does not appear from the record that the sewer or part of a sewer thus ordered to be constructed is the sewer in front of the plaintiff's premises, and with which he is connected. It is true that the record unaided does not indicate the point on the face of the earth from which the sewer was to be continued. It is also true, as stated in *Kidson* v. *Bangor*, supra, that the record must show the full proceedings, and that the acts of the city council cannot be shown, and the record cannot be extended or modified, by parol evidence. We think, however, that parol evidence is admissible to locate on the face of the earth a point definitely stated in the record. Suppose the record had stated that the sewer was to begin at Oak Street, parol evidence would surely be admissible to show where Oak Street was. Suppose it had stated that the sewer was to begin at the south west corner of A's lot on Bates Street, surely it would be permissible to show by parol where on the face of the earth that corner was. This record shows that the sewer on Bates Street was to be "continued to Walnut Street." Continued from what point? Can it mean anything else than continued from the point where the then existing Bates Street sewer ended? We think not. The use of the word "continued" in that connection implied as clearly as if it had been written in words, that there was then a Bates Street sewer, which was to be continued from the point where it ended to Walnut Street. The record then stated a definite point on the face of the earth from which the sewer was to be extended. Where that point was could properly be shown by parol evidence. And it is shown by the testimony of the plaintiff in this case that the sewer mentioned in the record is the one now complained of.

Again, the defendant says that the record is not sufficient to show concurrent action by the two boards constituting the city council, that the record introduced is simply that of the mayor and alder-

men, and that there is no record evidence of the action of the common council. Of course record evidence of concurrent action by the two boards is necessary. The action of the common council could have been shown by its separate records, but we do not think that is indispensable. This record shows that the order was passed by the board of aldermen and "sent down," meaning of course, to the common council. It also shows that it "came up," that is, from the common council, "passed in concurrence," by the common council. The record is complete and sufficient if the city clerk was authorized to record officially that the order had been "passed in concurrence." We think he was. The city clerk was the recording officer of the mayor and aldermen, but he was more, he was the recording officer of the city government. The records of the city clerk show, or should show, the final action had by each branch of the city council. It is common knowledge that he makes his record of the action of the common council from official filings or memoranda "sent up" by the common council. These are "sent up" because he is the official custodian of all orders and resolves after they have been passed by the city council. We have no hesitation in saying that the city clerk's record in this case is admissible to show the concurrent action of the common council.

The defendant offers still another defense. Chapter 263 of the Private and Special Laws of 1903 provided for the establishment of a board of public works for the city of Lewiston which should "have and exercise all the powers and be charged with all the duties relative to the construction, maintenance, care and control of the streets, highways, bridges, dams and sewers in said city, which are now conferred or imposed upon the city council, municipal officers and commissioners of streets by the charter and ordinances of said city, and the general laws of the State." The board consists of seven members, one of whom is the mayor ex-officio, and the others are chosen by the city council annually, one each year, for the term of six years. The board is required to elect a superintendent of streets and sewers, who shall have executive charge of work under the direction and control of the board. The compensation of the superintendent is fixed by the board. The board

submits annually to the city council for its guidance in making appropriations a statement of work proposed to be done, with an estimate of its cost, and is required to give the city council such other information respecting its work as the council may require. It is forbidden to make expenditures in excess of the amount appropriated for its use by the city council. It is required annually to make a full and detailed report to the city council of its receipts and expenditures and of work done.

The city now earnestly contends that by the creation of this board it has been relieved from all responsibility respecting sewers, and we add, for the purpose of showing the far reaching consequences of the proposition, that if this be so, it is also relieved from all responsibility for the want of repair of its roads and streets. It is claimed that the State has created an independent administrative agency, to whose judgment and discretion are confided all matters relating to the maintenance and repair of sewers, that the city has no power to direct or control the work, or select the men who shall perform it, and hence it is claimed that the relation of principal and agent does not exist between the city and the board of public works. From these premises it is argued that the city cannot be held responsible for the acts or omissions of an entirely independent body of men acting with exclusive powers under the provisions of a special statute.

It may readily be conceded that the relationship of principal and agent does not exist, but we think that does not decide the question. For it is competent for the legislature to regulate municipal administration in such way as it sees fit. It may provide for municipal government by a commissioner, or a commission emanating from the people, or it may provide for government by a city council with legislative as well as administrative powers. It may subdivide powers and duties, and assign a portion to one municipal agency and a portion to another, as for instance it may delegate the power of laying out and constructing sewers to one agency, the mayor and aldermen, and the maintenance and repair of them to another, the city council. Or it may leave the administration of municipal affairs according to law to be regulated by the voters en masse in meeting assembled.

It is also competent for the legislature to create municipal responsibilities, and to declare that the people in their municipal corporate capacity shall be responsible to those who may be injured for the misconduct or lack of care or good judgment of any of the administrative agencies which it may create. It may make a town responsible for the want of repair of sewers, when it conducts its business by town meeting. So it may make a city responsible when it has a city council or other municipal agency. It might make it the duty of the aldermen alone, or of the common council alone, to make necessary repairs, and make the city responsible for their failure. As already stated, unless it is otherwise specially provided, the law makes the mayor and aldermen the board to lay out and construct sewers, and it might have made the city answerable in damages for their acts, to those injured thereby, but it has not. The statute, however, is positive that towns and cities shall be answerable in damages for injuries caused by the want of proper maintenance or repair of public sewers. There is no limitation of liability in the statute. They are liable whether, as towns, the people administer their affairs for themselves, or whether as cities, they elect a city council to act for them. And we are unable to perceive any valid reason why they should not be liable, when the care and maintenance of sewers are entrusted by law to a board elected by the city council, which is itself elected by the people.

As we have said, the law of liability is positive and universal. There is nothing in the act creating the board of public works which leads us to think that the legislature intended to relieve Lewiston from that law of liability. We hold that the city is not relieved. Though the municipal agency has been changed, the liability has not been.

The amount of the plaintiff's damages were agreed upon at nisi prius, and for that sum, with interest, the plaintiff is entitled to judgment.

Judgment for plaintiff for $129.94 and interest from the date of the writ.

DAVID D. STEWART AND JOSIAH C. TOWLE

vs.

ABIAL E. LEONARD.

Somerset. Opinion November 2, 1907.

Waiver. Officer. Execution. Failure to Arrest. Liability of Officer. Referee's Report. Conclusiveness of Same. Estoppel. R. S., chapter 117, section 5.

A waiver is the voluntary relinquishment of some known right, benefit, or advantage, and which, except for such waiver, the party otherwise would have enjoyed.

Although a waiver is essentially a matter of intention, yet such intention need not necessarily be proved by express declarations, but it may be inferred from the acts and conduct of the party.

That part of section 5, chapter 117, Revised Statutes, reading "and no officer is required to arrest a debtor on execution, unless a written direction to do so, signed by the creditor or his attorney, is endorsed thereon, and a reasonable sum for such fees is paid or secured to him, for which he shall account to the creditor as for money collected on execution," provides a right for the officer's benefit, but this right the officer may waive and proceed to enforce the execution as if there were no such statutory provision.

In the case at bar, which was an action against the defendant, a deputy sheriff, for failure to serve an execution by arrest of the judgment debtor therein named, the referee, to whom the cause was duly referred, among other things, reported as follows: "I overrule all the other excuses of the defendant and find the defendant is liable for not serving the execution, unless the fact that the written direction for arrest contained in the letter was not indorsed upon the execution itself, is a legal excuse under the following circumstances, viz.: The defendant did not return the execution to the plaintiffs or their attorney for such indorsement, nor did he apprise any of them of the lack of such indorsement, nor did he give any other reason for not serving it other than that the debtor claimed the judgment was wrong. He retained the execution as already stated till September 18, after the debtor had left the State. The plaintiffs' attorney supposed the debtor had been arrested as ordered. . . . . I submit to the court the question of the defendant's liability upon the foregoing facts."

Held: (1) That the only question before the court under the referee's report is whether the defendant is legally excused from liability for not arresting the execution debtor because there were no written directions to arrest indorsed upon the execution itself.

(2) That the question whether the facts found by the referee supported the plaintiffs' declaration is not open before this court, having been passed upon by the referee whose determination thereon is final, in the absence of fraud, prejudice or mistake.

(3) That the defendant waived his right to have the directions to arrest indorsed on the execution and is estopped from claiming the benefit of that right in defense of his liability for not serving the execution by arrest.

On exceptions by plaintiffs. Sustained.

Action against the defendant, a deputy sheriff, for failure to serve an execution running against the body by arrest of the judgment debtor.

The action was brought in the Supreme Judicial Court, Somerset County, and by agreement of the parties and by rule of court duly issued, was referred "to the determination of Judge Lucilius A. Emery to be heard on legal principles; the report of whom to be made as soon as may be; judgment thereon to be final. And if either party neglect to appear before the Referee, after due notice given, then the said Referee to proceed exparte."

A hearing was had before the referee who duly filed his report. (The report is stated in full in the opinion.) Upon this report, at the March Term, 1907, of said Supreme Judicial Court, the presiding Justice ordered judgment for the defendant. Thereupon the plaintiffs took exceptions.

The case appears in the opinion.

D. D. Stewart, for plaintiffs.

Joseph B. Peaks and Walton & Walton, for defendant.

SITTING: WHITEHOUSE, STROUT, PEABODY, CORNISH, KING, JJ.

KING, J. Action against a deputy sheriff for failure to serve an execution by arrest of the debtor.

The referee, to whom the cause was referred by agreement and by rule of court, made the following report:

"(Referee's Report.)

"Pursuant to the foregoing rule I gave the parties due notice of the time and place fixed for hearing the said cause, at which time and place the parties and their counsel appeared before me and I

fully heard their evidence and arguments and have maturely considered the same and now make the following report and award.

"I find facts as follows:—Sept. 1, 1900, the plaintiffs, through their attorney, Mr. Brown, sent by mail to the defendant, then a deputy sheriff at Milo in Piscataquis County, an execution, running against the body of one Parker, then a resident of another state, but commorant in said Milo, issued from the Supreme Judicial Court for Somerset County on a judgment recovered in said Court. No direction to arrest the debtor nor any other direction was indorsed on the execution itself, but in a letter sent with the execution in the same envelope, Mr. Brown as attorney for the plaintiffs gave explicit written directions to the defendant to arrest the debtor at once. The defendant received the execution and the letter the same day. The next day he went to the debtor and showed him the execution and the order to arrest, and asked him to pay the amount. The debtor claimed that the judgment could not be valid as he had been duly discharged in insolvency. After some conversation they went to the office of Mr. Durgin, the attorney of the debtor. Mr. Durgin also claimed there had been a discharge in insolvency barring the debt. They, the debtor and Mr. Durgin, desired the defendant to delay serving the execution and allow them a reasonable time in which to obtain evidence of the discharge, or a supersedeas, before making the arrest. To this the defendant consented and made no arrest. The debtor some two weeks afterward left the State leaving no property in the State. Learning of this the defendant, having retained the execution till then, handed it back to Mr. Brown, Sept. 18.

"No supersedeas was obtained nor was any petition for review brought, the attorney concluding there was no ground for it. The judgment and execution were valid and I overrule all the other excuses of the defendant and find the defendant is liable for not serving the execution, unless the fact that the written direction for arrest contained in the letter was not indorsed upon the execution itself, is a legal excuse under the following circumstances, viz:

"The defendant did not return the execution to the plaintiffs or their attorney for such indorsement, nor did he apprise any of them

of the lack of such indorsement, nor did he give any other reason for not serving it other than that the debtor claimed the judgment was wrong. He retained the execution as already stated till Sept. 18, after the debtor had left the State. The plaintiffs' attorney supposed the debtor had been arrested as ordered.

"It was conceded at the hearing, and I find, that the debtor had sufficient means, and that if the defendant is liable upon the foregoing facts for not serving the execution as directed in the letter, the damages are the amount of the judgment and interest.

"I submit to the court the question of the defendant's liability upon the foregoing facts. If he is liable, judgment is to be for the plaintiffs for the sum of one hundred and seventeen dollars and fourteen cents with interest thereon from October 3, A. D. 1889 and for costs of reference taxed at five dollars and costs of Court to be taxed by the Court. If he is not liable under the facts stated, then judgment is to be for the defendant for costs of reference taxed at five dollars, and costs of Court to be taxed by the Court."

"Dec. 27, 1905."

Upon the report of the referee the court below ordered judgment for the defendant. The case is before the Law Court on plaintiffs' exceptions.

Defendant's counsel has urged upon us the consideration that the facts found by the referee do not support the declaration. That question, however, is not before us. The referee has passed upon that, and all other defenses, save only the one which he has submitted to the court. He says:

"The judgment and execution were valid and I overrule all the other excuses of the defendant and find the defendant is liable for not serving the execution, unless the fact that the written direction for arrest contained in the letter was not indorsed upon the execution itself is a legal excuse under the following circumstances, viz:"

It is well settled that a referee under such a reference has full power to decide all questions arising, both of law and of fact, and and in the absence of fraud, prejudice or mistake, his decision is final. *Savings Bank* v. *Herrick*, 100 Maine, 494, and cases cited.

The only question before the court, as expressly limited in the

report of the referee, is whether the defendant is legally excused from liability for not arresting the execution debtor because there were no written directions to arrest indorsed upon the execution itself.

By sect. 5, chap. 117, R. S., it is provided: "and no officer is required to arrest a debtor on execution, unless a written direction to do so, signed by the creditor or his attorney, is indorsed thereon, and a reasonable sum for such fees is paid or secured to him, for which he shall account to the creditor as for money collected on execution."

Under this statute an officer is not "required" to arrest unless the statute is complied with; but his authority to do so under the execution is unchanged. The statute provides a right for the officer's benefit; he may, if he choose, waive that right, and proceed to enforce the execution as if there were no such statutory provision.

Did the defendant, in the case at bar, waive his right to have the direction to arrest the debtor indorsed on the execution?

A waiver is the voluntary relinquishment of some known right, benefit or advantage, and which, except for such waiver, the party otherwise would have enjoyed. *Peabody* v. *Maguire*, 79 Maine, page 585.

Although a waiver is essentially a matter of intention, yet such intention need not necessarily be proved by express declarations, it may be inferred from the acts and conduct of the party. In *Farlow* v. *Ellis et al*, 15 Gray, page 231, Shaw, C. J., defines waiver and the species of proof by which it may be established in these words: "Waiver is a voluntary relinquishment or renunciation of some right, a foregoing or giving up of some benefit or advantage, which, but for such waiver, he would have enjoyed. It may be proved by express declaration; or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or by a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was his intention and purpose to waive."

Bishop in his work on Contracts, says, at section 792:

"Waiver is where one in possession of any right, whether con-

ferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it. Thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterwards."

Let us apply these rules in the present case. The defendant is presumed to have known that he was entitled by law to have the directions to arrest indorsed on the execution. On receipt of the execution, without such indorsement, he did not return it to the plaintiffs, or their attorney, or apprise them of the want of such indorsement, which good faith, at least, required him to do, if he did not intend to enforce it for that reason. On the other hand he went to the debtor at once, "showed him the execution and the order to arrest," thereby informing the debtor of the intention of the creditor to have the execution enforced against him,—an act on the part of the defendant, an officer of experience, utterly inconsistent and irreconcilable with an intent and purpose not to enforce the execution. He gave the debtor to understand that he intended to arrest him then and there. The report states that: "They, the debtor and Mr. Durgin, desired the defendant *to delay serving the execution* and allow them a reasonable time in which to obtain evidence of the discharge, or a supersedeas, *before making the arrest.* To this the defendant consented and made no arrest." The defendant kept the execution for eighteen days, until after the debtor left the state, and gave no reason for not serving it except that the debtor claimed the judgment was wrong.

The conduct and acts of the defendant, as shown by the report, are so inconsistent with an intention on his part to claim his privilege not to enforce the execution as directed in the letter because the direction was not indorsed thereon, and they so clearly manifest an intent and purpose on his part not to claim that privilege, but to dispense with it, and act upon the directions contained in the letter, that we are induced to believe that he waived his right and privilege to insist upon having the direction to arrest indorsed on the execution.

Having waived his right to have the statute complied with he is

estopped from claiming the benefit of it in defense of his liability for not serving the execution by arrest.

See *Perkins* v. *Pitman*, 34 N. H. 261; *Carlisle* v. *Soule*, 44 Vt. 265.

It follows that the judgment of the court below should be reversed, and the entry must be,

Exceptions sustained. Judgment to be entered in the court below for the plaintiffs in accordance with the stipulation in the referee's report.

HERBERT C. CLARK, Treasurer, *vs.* JOHN W. ANDERSON.

Knox. Opinion November 2, 1907.

Replevin. Plaintiff. Amendments. R. S., chapter 84, section 11; chapter 98, section 8.

A person who has neither title to the property, general or special, nor the right to possession, cannot maintain replevin.

The statutes of this State providing for amendments as to plaintiffs do not allow an amendment the effect of which would be to strike out the sole plaintiff in the writ and substitute in his place a new plaintiff.

In the case at bar, which is an action of replevin, the defendant was summoned "to answer unto Herbert C. Clark, Treasurer of said City of Rockland, for said City of Rockland, and duly authorized and empowered thereto by a vote of the City Council of said City of Rockland," and the principal in the replevin bond was described therein as, "I, Herbert C. Clark, Treasurer of the City of Rockland as principal."

Held: That Herbert C. Clark, Treasurer of the City of Rockland, is the plaintiff in the action and that the writ cannot be amended by making the City of Rockland the plaintiff in name.

That part of Revised Statutes, chapter 84, section 11, providing that "in all civil actions the writ may be amended by inserting additional plaintiffs" applies only where a party is to be added to, joined with, the existing plaintiff, or plaintiffs, with a bona fide intention that the action is to be

prosecuted by all the plaintiffs, the original as well as the additional ones. It does not apply where the bringing in of a new party plaintiff would make a misjoinder.

On report. Plaintiff nonsuit.

Replevin for a horse alleged to belong to the City of Rockland. The action was brought in the name of "Herbert C. Clark, Treasurer of said City of Rockland, for said City of Rockland, and duly authorized and empowered thereto by a vote of the City Council of said City of Rockland."

The cause came on for trial at the April term, 1907, of the Supreme Judicial Court, Knox County, and after agreeing upon certain facts the case was reported to the Law Court for decision.

The case fully appears in the opinion.

Edward B. Burpee, for plaintiff.

Arthur S. Littlefield, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, CORNISH, KING, JJ.

KING, J. Action of replevin for a horse. The defendant was summoned "to answer unto Herbert C. Clark, Treasurer of said City of Rockland, for said City of Rockland, and duly authorized and empowered thereto by a vote of the City Council of said City of Rockland, in a plea of replevin for that the said John W. Anderson, on the sixteenth day of April, 1906, at said Rockland, unlawfully, and without any justifiable cause, took the goods and chattels of the said City of Rockland as aforesaid, and them unlawfully detained to this day, to the damage of the said City of Rockland as he says, the sum of three hundred dollars."

The principal in the replevin bond is described therein as, "I, Herbert C. Clark, Treasurer of the City of Rockland, ... for said City of Rockland, ... as principal." The conditions of the bond are, to prosecute the suit to final judgment, return and restore the property, in case such shall be the final judgment, "and pay such costs and damages as the said John W. Anderson shall recover against him."

The case comes before the Law Court upon report in which it is stipulated:

"The evidence for the plaintiff would show the horse replevied to be the property of the City of Rockland, and not of Herbert C. Clark, Treasurer, but that the Treasurer, the plaintiff, was authorized by the City to bring this action. The plaintiff moves to amend the writ by making the City of Rockland the plaintiff in name.

"If upon the above evidence the action can be maintained in its present form, or if the amendment asked for can be allowed, the action is to stand for trial with or without amendment as the Court may decide; otherwise the plaintiff is to be nonsuit with judgment for return."

1. The action is brought in the name of Herbert C. Clark, Treasurer of the City of Rockland, for the City of Rockland. Herbert C. Clark, Treasurer of the City of Rockland, is the plaintiff. The language of the writ and replevin bond admits of no other construction.

The report shows that the plaintiff in the action, Herbert C. Clark, Treasurer, had no title to the property replevied, and there is no evidence or suggestion that he had the right to the possession of it.

The action of replevin of goods is authorized, by our statutes, to be brought by "the owner or person entitled to the possession thereof." R. S., chap. 98, sect. 8.

It is also an elementary principle that one who has neither title to the property, general or special, nor the right to possession, cannot maintain replevin. 1 Chitty Pl. 238; *Wyman* v. *Dorr*, 3 Maine, 183; *Marson* v. *Plummer*, 64 Maine, 315; *Webber* v. *Read*, 65 Maine, 564; Am. & Eng. Encyl. Law (2d Ed.) 24, page 483, and cases cited.

The action in its present form cannot be maintained because the plaintiff therein had neither title, nor the right of possession, to the property replevied.

2. The plaintiff moves to amend the writ by making the City of Rockland the plaintiff in name.

It is suggested in behalf of the plaintiff that the writ may be amended by striking out the words, "Herbert C. Clark, Treasurer of, ... for said city of Rockland, and duly authorized and empowered thereto by a vote of the City Council of said City of Rockland," as surplusage, leaving "said City of Rockland" as the plaintiff in name. The infirmity of this suggestion is that the words asked to be struck out are not surplusage, and can not be treated as such. They are material. By them alone is the plaintiff in the writ described. Strike them out and the writ would be materially changed; it would then describe a different plaintiff, and would become in effect another writ.

Again it is suggested that the name of the City of Rockland may be incorporated into the writ by amendment as a plaintiff, either with the existing plaintiff, or as the sole plaintiff.

The only power conferred upon the court to allow amendments as to plaintiffs is found in R. S., chap. 84, sec. 11, which provides:

"In all civil actions the writ may be amended by inserting additional plaintiffs, or by striking out one or more plaintiffs, when there are two or more, and the court may impose reasonable terms."

The application of this statute, as to inserting plaintiffs, is apparent from the expression used, "additional plaintiffs."

It applies only where a party is to be added to, joined with, the existing plaintiff, or plaintiffs, with a bona fide intention that the action is to be prosecuted by all the plaintiffs, the original as well as the additional ones.

Hence, the statute does not apply where the bringing in of a new party plaintiff would make a misjoinder. In the case at bar if the City of Rockland should be inserted as an additional plaintiff, within the proper meaning of this statute, then there would be a misjoinder of plaintiffs, because the action cannot be maintained by the existing plaintiff.

But the real purpose of the amendment is, and its effect would be, to strike out the sole plaintiff in the writ and substitute in his place the City of Rockland.

Such an amendment is not permissible. The statute does not authorize it. This court has expressly so decided in the recent case

of *Fleming* v. *Courtenay*, 98 Maine, 401. In the opinion in that case (page 413) it is said:

"Our statutes in relation to amendments are very liberal and allow the summoning in of additional defendants, or the coming in of additional plaintiffs, and even the striking out of one or more plaintiffs, when there are two or more, but they do not allow the substitution of one party plaintiff or defendant for another."

Lastly. Were the amendment permissible it could not be justly allowed. The action is replevin. The bond required by statute was given by the existing plaintiff in the writ, with conditions applicable only to the writ in its present form. With the amendment allowed the bond would be a nullity, and the defendant would be thereby deprived of the protection which he now has, and which the statute has expressly provided shall be secured to a defendant in replevin.

In *Wendell* v. *Mugridge*, 19 N. H. 109, it is said: "Amendments are not to be made if injustice would thereby be done to any one." In *Hayford* v. *Everett*, 68 Maine, page 508, it is said: "It is quite universally declared in the cases that an amendment is to be allowed or disallowed according as it is or is not 'in the furtherance of justice.' There can be no other rule."

It is the decision of the court that the action can not be maintained in its present form, neither can the amendment asked for be allowed, and in accordance with the stipulation of the report the entry must be,

Plaintiff nonsuit.
Judgment for return.

FRANK BRYANT *vs.* HERBERT E. KNAPP & House and Land.

Piscataquis. Opinion November 4, 1907.

Real Estate Attachment. How made. Officer's Return of Attachment.

An attachment of real estate is not made by any acts on the land itself, but solely by the officer writing a return on the writ that he has attached the real estate.

This must be followed by filing in the registry of deeds an attested copy of the return of attachment, etc., as provided by statute, but the attachment is made when the return is written. The return is the attachment and the only attachment.

It is undoubtedly true that the officer's return must state affirmatively that he has attached, but no particular set of words or phrases are required to be employed to accomplish this result. If the affirmative appears from a fair construction of the whole return, it is sufficient.

In the case at bar, the action was against the personal defendant, and also against a "certain dwelling house and the land on which it stands" described in the writ and owned by one Sherburne, who was not a party to the writ, and was brought to enforce the plaintiff's statutory lien on said dwelling house and land. The officer's return on the writ, so far as it related to an attachment of real estate, was as follows:

"Piscataquis, ss: February 8, A. D. 1906. By virtue of this writ, I have attached as the property of the within named defendant, Herbert E. Knapp, all the real estate he owns also all the right title and interest he has to all real estate in said county of Piscataquis and also *to attach* the dwelling house and land on which it stands, owned by Edgar A. Sherburne of said Milo, situated in said Milo Village on the westerly side of a street running southerly from Spring Street (so called) being on the next lot south of the lot owned by C. F. Stanchfield, in Milo Village, and on which said Stanchfield has built a dwelling house; and within five days thereafter have filed an attested copy of my return on this writ so far as relates to the attachment, in the office of the Register of Deeds, for this county, together with the names of the parties in this writ, with the value of the defendants property, which I am hereby commanded to attach, the date of said writ, and the court to which the same is returnable."

"ABIAL E. LEONARD, Deputy Sheriff."

Held: That this return constituted a valid attachment of the Sherburne dwelling house and land as real estate.

On exceptions by plaintiff. Sustained.

Assumpsit on account annexed to recover for building materials furnished by the plaintiff to the defendant, for the erection of a dwelling house built by the defendant, under a contract with one Edgar A. Sherburne, and for which said materials the plaintiff alleged and claimed a lien on said house and the land on which it stands.

Heard at the September term, 1906, of the Supreme Judicial Court, Piscataquis County, at which hearing the presiding Justice ruled as hereinafter stated and the plaintiff excepted as hereinafter stated and his exceptions were allowed.

The case, as stated by the bill of exceptions, is as follows:

"Plaintiff in his writ directed the officer to attach goods or estate of the defendant and also to attach the dwelling house and land on which it stands; owned by Edgar A. Sherburne of said Milo, situated in said Milo Village on the Westerly side of a Street running southerly from Spring Street (so called) being on the next lot south of the lot owned by C. F. Stanchfield in Milo Village and on which said Stanchfield has built a dwelling house.

"The officer returned on said writ

" 'Piscataquis ss: February 8, A. D. 1906. By virtue of this writ, I have attached as the property of the within named defendant, Herbert E. Knapp, all the real estate he owns also all the right title and interest he has to all real estate in said county of Piscataquis and also to attach the dwelling house and land on which it stands, owned by Edgar A. Sherburne of said Milo, situated in said Milo Village on the westerly side of a street running southerly from Spring Street (so called) being on the next lot south of the lot owned by C. F. Stanchfield, in Milo Village, and on which said Stanchfield has built a dwelling house; and within five days thereafter have filed an attested copy of my return on this writ so far as relates to the attachment, in the office of the Register of Deeds, for this county, together with the names of the parties in this writ, with the value of the defendants property, which I am hereby commanded to attach, the date of said writ, and the court to which the same is returnable.

'ABIAL E. LEONARD, Deputy Sheriff.'

"The officer also returned

" ' County of Piscataquis Feb. 8, 1906 10 o'clock A. M.

' By virtue of the within writ, I attached the dwelling house, built by Edgar A. Sherburne of said Milo; situated in said Milo Village, on the westerly side of a Street running southerly from Spring Street (so called) being on the next lot south of the lot owned by C. F. Stanchfield, in Milo Village and on which said Stanchfield has built a dwelling house, same house in which said Sherburne now resides; to the value of three hundred dollars ($300) under a lien for material furnished in the erection of said house; by Bryant & Co., under a contract with Herbert E. Knapp within named.

" 'And within five days of said attachment, to wit on the 8th day of Feb. A. D. 1906, I filed in the office of the Clerk of the town of Milo an attested copy of so much of my return on this writ as relates to the above named attachment, with the value of the defendant's property, which I am within commanded to attach, the names of the parties, the date of the writ, that this attachment is for a lien for materials furnished in the erection of said house, and the court to which the same is returnable.

' ABIAL E. LEONARD, Deputy Sheriff.'

"The owner of said house and land at the time of the attachment, Edgar A. Sherburne, voluntarily appeared at the return term and became a party to the suit. At the second term he claimed no valid attachment of said building and land was made within ninety days after the last of the materials sued for were furnished as set forth in the writ. The presiding Justice held that the officer's return on the writ showed no valid attachment of the house and the land on which said house stands as real estate, to which ruling plaintiff excepts and prays that his exceptions may be allowed."

Geo. W. Howe, for plaintiff.

W. A. Johnson, for Edgar A. Sherburne owner of house and land.

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

SPEAR, J. The writ in this action was against the personal defendant Knapp, and also against a certain "dwelling house and the land upon which it stands" described in the writ and owned by one Sherburne, who is not a party to the writ. The action was brought to enforce a statutory lien on the dwelling house and land of Sherburne. The question is whether the officer's return upon the writ shows, or rather constitutes, a valid attachment of the Sherburne dwelling house and land as real estate, since any attempt to attach the dwelling house as personal property was and would be nugatory. *Skillin* v. *Moore*, 79 Maine, 554.

An attachment of real estate is not made by any acts on the land itself, but solely by the officer writing a return on the writ that he has attached the real estate. *Perrin* v. *Leverett*, 13 Mass. 128; *Crosby* v. *Allyn*, 5 Maine, 453. Of course this must be followed by filing in the registry of deeds an attested copy of the return of attachment, etc., as provided by statute, but the attachment is made when the return is written. The return is the attachment and the only attachment. *Carleton* v. *Ryerson*, 59 Maine, 438; *Bessey* v. *Vose*, 73 Maine, 217.

Under these rules of law, it is contended that since the return of the officer that he has attached and that return only, constitutes an attachment, it follows that if he omits to state affirmatively in the return that he has attached, there is no attachment, whatever else he may state.

It seems to us, however, that this contention runs counter to the spirit and the expressed declaration of the law upon this subject as found in our decisions. We think by the return "the intention is sufficiently disclosed by the language used to be clearly discernible." This was all that was required in *Hathaway* v. *Larrabee*, 27 Maine, 451, to render an officer's return, though informally made, effectual.

It is further claimed, however, that the question is not one of intention. We hardly think this rule to be absolute. The case

above cited and the other cases referred to, say otherwise, The intention, to be sure, must be disclosed by the *language used.* It must appear from the return itself. If the language used does not disclose the intention, then of course, we look no further,—we do not go behind the return. But we do have a right to examine every corner of the return to discover its meaning. If by such examination the intention is "clearly discernible" the return is sufficient.

It is also said that the return must state affirmatively that he has attached. This is undoubtedly true, but no particular set of words or phrases are required to be employed to accomplish this result. If the affirmative appears from a fair construction of the whole return it ought to be sufficient, That it was the intention of the officer to attach and that it affirmatively so appears, seems to be "clearly discernible," from the wording of the return itself.

No other purpose can be inferred from the language. No other subject matter was involved. It would seem, therefore, that the words "to attach" are surplusage, if relied upon to defeat the very object and purpose of the return, and should be so regarded in construing it. They are not words that create any uncertainty as to the parties, as in 27 Maine, supra, or as to the property attached. They do not negative an attachment. They fail to be apt words, when taken alone, to affirmatively express one. But they are not to be read alone. They must be construed in the light of the rest of the return. When so read they should be stricken out as surplusage. Strike them out and the return is clearly correct. We are unable at present to discover how any other inference can be drawn from the use of this language than that of an intended attachment of the dwelling house. Our court have not only said that if the intention is sufficiently disclosed by the language the return is good but that "technical accuracy or the most appropriate phraseology is not to be expected in such returns. They will be sufficient if the purpose is clearly made known by the language used." *Lambard* v. *Pike*, 33 Maine, 142. Also that "it is not easy to imagine a case in which there would be less reason or more

danger in considering language to be used with technical accuracy, than in an officer's return upon a writ. The very idea of doing so almost deprives it of a sober consideration." *Roberts* v. *Bourne*, 23 Maine, 168.

Exceptions sustained.

STATE OF MAINE *vs.* EDWARD SIDDALL.

Oxford. Opinion November 4, 1907.

Criminal Law. Pleas. Nolo Contendere. Withdrawal of Plea. Discretion of Presiding Justice.

The plea of nolo contendere when accepted by the court is, in its effect upon the case, equivalent to the plea of guilty. The judgment of conviction follows upon such a plea as well as upon a plea of guilty, and such a plea if accepted, cannot be withdrawn and a plea of not guilty entered except by leave of court.

When a respondent has pleaded nolo contendere and the plea has been accepted by the court, and the respondent afterwards desires to withdraw such plea and have a plea of not guilty entered, the whole matter is in the sound discretion of the presiding Justice and the Law Court will not interfere except in a case of abuse of that discretion.

In the case at bar, *Held:* That no such abuse has been shown.

On exceptions by defendant. Overruled.

Two indictments for single sales of intoxicating liquors were found against the defendant. The alleged sales were made at the same time and were parts of one and the same transaction.

On one these indictments, No. 32, the defendant first pleaded not guilty, but subsequently he withdrew his plea of not guilty and pleaded nolo contendere. This plea was accepted by the court.

On the other indictment, No. 33, the defendant pleaded not guilty, and was placed on trial. The jury returned a verdict of not guilty, and the defendant was duly discharged on this indictment.

After the verdict of not guilty in No. 33, the defendant moved to be allowed to retract his plea of nolo contendere in No. 32 and be permitted to plead not guilty.

This motion was denied and the defendant was duly sentenced. Thereupon the defendant took exceptions to the ruling denying his motion.

The case appears in the opinion.

Charles P. Barnes, County Attorney, for the State.

Matthew McCarthy, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, SPEAR, CORNISH, KING, JJ.

SPEAR, J. At the March term of the Supreme Judicial Court for Oxford County, 1906, Edward Siddall was indicted for selling "one glass of whiskey of intoxicating liquors to one Joseph Cameron." At the March term, 1907, the respondent entered a plea of not guilty. Subsequently he withdrew the plea of not guilty and pleaded nolo contendere.

The defendant was also indicted for a single sale to one Edwin G. Wiggett. To this indictment he entered a plea of not guilty, was tried and acquitted. It seems that the alleged sales were made to Cameron and Wiggett at the same time and were parts of one and the same transaction.

"On the trial of the latter case, Joseph Cameron, to whom in this indictment it is alleged the sale of intoxicating liquor was made, testified that on the 17th day of January 1906, at Rumford Falls, in a place called the Siddall Beer Shop, one Edwin G. Wiggett bought two glasses of whiskey, from a party not the respondent, and whose name, to said Cameron was unknown, and that he, Cameron, at the same time, bought two glasses of whiskey from the same person. And the said Cameron further testified, on cross examination, that he had no knowledge of who were the proprietors of the place." It also appeared in evidence, that the term "Siddall Beer Shop," was a general term, used to designate the place, regardless of the name of the proprietors."

Counsel for respondent thereupon moved that the respondent be allowed to retract his plea of nolo contendere and plead not guilty. This motion was overruled by the court and the respondent sentenced. To this ruling exceptions were taken.

"A plea of nolo contendere when accepted by the court, is, in its effect upon the case, equivalent to the plea of guilty. . . . . The judgment of conviction follows upon such a plea as well as upon a plea of guilty, and such a plea if accepted, cannot be withdrawn and a plea of not guilty entered except by leave of court." *Commonwealth* v. *Ingersoll*, 145 Mass. 381.

The whole matter was in the sound discretion of the Justice presiding, and this court will not interfere except in a case of abuse of discretion. In the case at bar, the facts rehearsed in the exceptions have no tendency to indicate such abuse. A verdict of not guilty is by no means always conclusive or even satisfactory evidence to a presiding Justice that the party acquitted is innocent.

But in this particular case the respondent who had the best possible knowledge of the truth, entered a plea which admitted that he was guilty, but when the jury in another case involving the same state of facts, found that he was not guilty, he then seemed to have been persuaded by the verdict of the jury that he might have been mistaken, and wished to retract his plea of nolo and plead not guilty. But we think the presiding Justice was clearly justified in placing greater confidence in the voluntary and apparently honest declaration of the respondent as to his guilt, than in the finding of the jury in the other case.

Under all the circumstances, the court are of the opinion that the presiding Justice did not err in giving full credence to the first impression of the respondent.

Exceptions overruled.

STATE OF MAINE *vs.* C. H. LIBBY et al.

Kennebec. Opinion November 5, 1907.

Criminal Law. Indictment. Name of Defendant. Initials.

1. The defendant was indicted by the name of C. H. Libby for violation of the law against the sale of intoxicating liquors. He filed a plea in abatement in proper form, averring that his name was Cyrille H. Libby and not C. H. Libby as in the indictment alleged. The State filed a replication to the effect that the defendant was as well known by the name of C. H. Libby as by that of Cyrille H. Libby. The defendant then demurred to the replication and demurrer was joined. The demurrer was overruled and the replication adjudged good. The defendant then excepted.
2. The demurrer admitted all the facts stated in the replication, and the only question therefore presented was whether a person who is as well known by the initials C. H. as by the name Cyrille H. can be properly indicted in the name of the initials. *Held:* That such an indictment is good.

On exceptions by the defendant Libby. Overruled.

Five indictments, Numbers 264, 265, 266, 279 and 280, found by the grand jury at the September term, 1905, of the Superior Court, Kennebec County, all against the defendant Libby, and presumably all against both defendants, for the alleged illegal sale of intoxicating liquors.

One of these indictments, as shown by the case as sent to the Law Court, is as follows:

"STATE OF MAINE.

" Kennebec, ss.

" At the Superior Court, begun and holden at Augusta, within and for the County of Kennebec, on the first Tuesday of September in the year of our Lord one thousand nine hundred and five.

" The jurors for said State, upon their oath present, that Andrew Peterson and C. H. Libby, of Waterville in said County of Kennebec, at Waterville in said County of Kennebec, on the first day of May in the year of our Lord one thousand nine hundred and five

and on divers other days between said day and the day of the finding of this indictment, without any lawful authority, license or permission, was a common seller of intoxicating liquors.

" Against the peace of the State and contrary to the form of the statute in such case made and provided.

" A true bill,

" JASPER S. GRAY, Foreman."

" THOS. LEIGH,
"County Attorney."

To this indictment the defendant Libby filed a plea in abatement as follows:

"STATE OF MAINE.

"Kennebec, ss.

"Superior Court for the County of Kennebec and State of Maine, at the September Term thereof, in the year of our Lord one thousand nine hundred and five. Number 265.

"State of Maine, by indictment against C. H. Libby. And on the thirteenth day of September in the year of our Lord one thousand nine hundred and five.

"And now comes Cyrille H. Libby, in his own proper person, into said Court, and having heard the said indictment against him read, saith, that the said State of Maine ought not to further prosecute the said indictment against him, the said Cyrille H. Libby, because he saith he now is and always was called and known by the name of Cyrille H. Libby and not C. H. Libby, as by the indictment in this prosecution is alleged, and this he is ready to verify.

"Wherefore the said Cyrille H. Libby prays judgment of said indictment and that the same be quashed.

"CYRILLE H. LIBBY."

"STATE OF MAINE.

"Kennebec, ss. Superior Court for the County of Kennebec, and State of Maine, and at the September term thereof, in the year of our Lord one thousand nine hundred and five.

"State of Maine by indictment against C. H. Libby.

"Personally appeared this thirteenth day of September in the year of our Lord one thousand nine hundred and five, the before named Cyrille H. Libby, who is alleged as respondent in said indictment, and made oath that the foregoing plea by him subscribed is true in substance and in fact.

"Before me,

"C. W. JONES,

"Justice of the Peace."

To this plea in abatement the State, by the County Attorney, filed a replication as follows:

"And the said State of Maine by Thomas Leigh, County Attorney, says, that by anything above alleged, the said indictment ought not to be quashed, because, he says, that the said Cyrille H. Libby who appears to said indictment is the same person against whom said indictment was presented, and is, and at the time of the finding of said indictment was, called and known as well by the name of C. H. Libby as by the name of Cyrille H. Libby; and this he prays may be inquired of by the country.

"THOS. LEIGH,

"County Attorney."

To this replication the defendant Libby demurred as follows:

" Kennebec, ss. Superior Court, September Term 1905.

" Nos. 264, 265, 266, 279 and 280.

" State of Maine *v.* C. H. Libby.

" And now the said alleged respondent comes and says that the replication in said causes is bad in substance and insufficient in law, wherefore he prays judgment and that he may be discharged."

"By F. W. CLAIR, his attorney."

The County Attorney then joined the demurrer as follows:

" And the undersigned County Attorney, who prosecuted for the State, says that said replication is sufficient in law.

" Wherefore he prays judgment and that said respondent may be convicted of the offense alleged in said indictment.

"THOS. LEIGH, County Attorney."

Upon hearing, the demurrer was overruled and the replication adjudged good. To these rulings, the defendant Libby took exceptions.

By a statement contained in the brief of counsel for the defendant Libby, it appears that it was agreed that the aforesaid pleadings were to apply to all of the aforesaid indictments.

Thomas Leigh, County Attorney, for the State.

F. W. Clair, for defendant Libby.

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

SPEAR, J. Numbers 264-265-266-279 and 280, all against the above named respondent, come from the Superior Court for Kennebec County, September term, 1905, on exceptions.

These are all indictments found against C. H. Libby for a violation of the law against the sale of intoxicating liquors. The respondent seasonably filed a plea in abatement in proper form and averred that his name was Cyrille H. Libby and not C. H. Libby, as in the indictment alleged. The State by the County Attorney filed a replication that "The said Cyrille H. Libby who appears to said indictment, is the same person against whom said indictment, was presented and is, and at the time of finding said indictment was, called and known as well by the name of C. H. Libby, as by the name of Cyrille H. Libby; and this he prays may be inquired of by the country." To this replication the defendant demurred and the County Attorney for the State joined the demurrer. The demurrer was overruled and the replication adjudged good. The demurrer admitted all the facts stated in the replication. The only question therefore presented by the exceptions is, if a person is as well known by the initials C. H. as by the name Cyrille H., can he be properly indicted in the name of the initials?

In *Robbins* v. *Swift*, 86 Maine, 197, it was held: "Letters of the alphabet, consonants as well as vowels, may be names sufficient to distinguish different persons of the same surname." If, therefore, the letters of the alphabet or initials may be used to distinguish different persons of the same surname, and the respondent admits

that he is as well known by the letters of the alphabet or the initials as by his full Christian name, we can discover no logical reason why the indictment is not sufficient. Certainty is the object aimed at in requiring the insertion of correct names in an indictment, and we know of no way in which greater certainty could be attained than by the admissions of the respondent, himself, as disclosed by the pleadings in this case.

Exceptions overruled.

H. L. STEINFIELD *vs.* HENRY GIRRARD, Appellant.

Oxford. Opinion November 8, 1907.

Husband and Wife. Support and Maintenance. Presumption of Agency. Authority of Wife to pledge Husband's credit for Necessaries. Desertion of Wife, effect of. Evidence.

1. If there is any presumption of agency on the part of the wife to pledge her husband's credit for necessaries, arising from the marriage contract, independent of the conjugal relation and cohabitation, it is rebuttable and may be disproved by the husband.
2. The authority of a wife to pledge her husband's credit for necessaries, arising from the marital relation alone, is co-existent and co-extensive with her necessity occasioned by his failure to fulfill his duty in this respect. If his duty has been performed, or no longer continues, then no necessity can legally arise which would entitle the wife to such authority.
3. When a wife deserts her husband without his fault, she forfeits all right to support and maintenance from him and in such case carries with her no authority to use his credit even for necessaries.
4. In an action to recover for goods furnished to the defendant's wife his testimony to the effect that he was always willing and prepared to provide a home, and all necessaries, for his wife, and that she was living apart from him, on the date of the purchase of the goods sued for, without fault on his part, was competent and should have been admitted irrespective of the plaintiff's lack of knowledge of the separation.

On exceptions by defendant. Sustained.

Assumpsit to recover the price of certain merchandise "in the nature of necessaries of life" furnished by the plaintiff to the wife of

the defendant. The wife has not been living with her husband for some months prior to the purchase, and the plaintiff did not know at the time he furnished the merchandise to the wife that she and her husband had separated. The action seems to have originated in some lower court, not disclosed by the case as sent up, and brought to the Supreme Judicial Court on appeal by the defendant.

Tried at the May term, 1907, of the Supreme Judicial Court, Oxford County. Verdict for plaintiff for $18.08. During the trial, the defendant excepted to certain rulings made by the presiding Justice.

The case appears in the opinion.

Gleason & Blanchard, for plaintiff.

Matthew McCarthy, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, CORNISH, KING, JJ.

KING, J. Action of assumpsit to recover the price of certain merchandise furnished to the wife of defendant.

Verdict for plaintiff. The case is before the Law Court on defendant's exceptions to the exclusion of testimony and certain instructions of the presiding Justice.

It appeared in evidence that the wife had never before bought any goods of plaintiff on defendant's credit; that she had not been living with her husband for some few months prior to the purchase, but that the plaintiff was ignorant of the separation.

The defendant offered his own testimony to the effect that he was always willing and prepared to provide a home, and all necessaries, for his wife, and that she was living apart from him on the date of the purchase of the goods sued for, without fault on his part.

This testimony was excluded for the reason, as stated by the presiding Justice, that unless the plaintiff knew of the separation the testimony offered would be immaterial. To that ruling the defendant excepted. We think that the exception must be sustained.

It was incumbent upon the plaintiff to establish the authority of the wife to bind the husband by the purchase of the goods. The only evidence relied upon for this purpose was the fact of marriage.

It may be doubtful if there is any presumption of agency on the part of the wife to pledge her husband's credit for necessaries, arising from the marriage contract alone, independent of the conjugal relation, and cohabitation; but if there is any such presumption it is rebuttable, and may be disproved by the husband. *Baker* v. *Carter*, 83 Maine, 132.

The authority of a wife to pledge her husband's credit for necessaries, arising from the marital relation alone, is only co-existent and co-extensive with her necessity occasioned by his failure to fulfill his duty in this respect. If his duty has been performed, or no longer continues, then no necessity can legally arise which would entitle the wife to such authority.

When a wife deserts her husband, without his fault, she forfeits all right to support and maintenance from him, and, a fortiori, in such case, she carries with her no authority to use his credit even for necessaries. *Peaks* v. *Mayhew*, 94 Maine, 571.

The testimony offered in the case at bar was to the effect that the wife had in fact forfeited her right to support from the defendant by a wilful violation of marital duty, a separation from him without his fault, and that he was willing and prepared to provide a home and all necessaries for her. If true, it would have established affirmatively a complete defense to the action. The defendant had a right to make this defense irrespective of the plaintiff's lack of knowledge of the separation.

The testimony offered should have been admitted. Its exclusion was prejudicial to the defendant, depriving him of the right to present facts which would disprove any liability on his part under the action. For this reason this exception must be sustained and a new trial granted.

The conclusion which we have reached that a new trial must be granted on account of the exclusion of the testimony offered by the defendant renders unnecessary a consideration of the other exceptions.

Exceptions sustained.

HERBERT L. CLEAVES *vs.* DWIGHT BRAMAN.

SAME *vs.* CURTIS MOON.

SAME *vs.* GILBERT FARNSWORTH.

SAME *vs.* WATSON JOY.

Hancock. Opinion November 11, 1907.

Right of Way. Obstruction of Same. Construction of Grant. Damages. Evidence.

In the case at bar the plaintiff acquired title to certain lots of land at Sullivan Harbor, Maine, lying north of the county road, comprising what is known as the Hotel Cleaves Lot, and also as appurtenant to these lots "a right of way for all purposes of a way over a piece of land forty feet wide in every part, lying easterly of and adjoining said lots and extending from the northeast corner of the last described lot to the county road." The plaintiff's house is situated about thirty feet from the dividing line between his lot and the forty feet strip. The fee of this forty feet strip of land known as the avenue or boulevard, is in the defendant Braman, subject to the easement above described in favor of the plaintiff. The Braman property known as the Manor Inn, is situated at the northerly end of this forty feet strip at a distance of about 160 feet from the county road. The defendants built a fence within the limits of this forty feet strip and on either side of it and at the southerly end near the line of the county road, erected two stone pillars about fourteen feet apart with two short sections of fence connecting each of them at an angle with the southerly end of the fence on either side of the avenue. A passageway fourteen feet in width is thus afforded from the county road northerly over the avenue.

In an action to recover damages for the obstruction of the plaintiff's right of way, caused by the erection of these fences and stone pillars.

Held: (1) That the plaintiff acquired by his deed, not merely a personal right of way available for his own use, but a right of way appurtenant to his house and lot available for the use of himself, his family and his guests, but that he is not entitled to use the whole forty feet strip unless reasonably necessary for the purposes of a way.

(2) That in the use and enjoyment of his easement, the plaintiff was not limited to a single passage way back and forth over his land to this forty feet avenue, but that he had a right to pass onto that forty feet strip over his land, at all feasible points from the north end of his east line to the south end of it down to the county road; and that after passing from the county road onto the forty feet avenue, he had a right to go onto his own land at all feasible points in the east line thereof.

(3) That the declarations of the guests at the plaintiff's hotel made at the

time of leaving and tending to show that they left on account of the fence were admissible in evidence as expressive of the motive and reason for their action.

(4) That upon the evidence showing that the obstruction had existed but twelve days prior to the commencement of these actions, the damages assessed by the jury must be deemed excessive, but if the plaintiff shall remit all of the verdict above $50 the motion for a new trial is overruled. In that event the plaintiff would be entitled to judgment for $50 and interest against each defendant, but would be entitled to only one satisfaction.

On exceptions and motion by defendants. Exceptions overruled. Motion sustained unless remittitur be made.

Four actions on the case for obstructing the plaintiff's right of way. Dwight Braman, the defendant in the first above entitled action, is the real defendant in all the other actions, the acts complained of in those actions having been committed under his direction and by his orders. By agreement the four actions were tried together.

At the time these actions were brought, the plaintiff owned certain lots of land comprising his hotel lot, and also as appurtenant to these lots and his hotel lot, "a right of way for all purposes of a way over a piece of land forty feet wide in every part, lying easterly of and adjoining said lots and extending from the northeasterly corner of the last described lot to the county road," and the act complained of in each of these actions was the obstruction of this right of way by the defendants. Plea, the general issue together with the following brief statement: "And by the way of brief statement the defendant says that he has in no way interfered with or obstructed the plaintiff's reasonable use of said right of way in, over and upon said strip of land to be used as a way and described in the plaintiff's deed."

Tried at the January term, 1907, of the Supreme Judicial Court, Hancock County. Verdict for plaintiff for $142.25 in each action. The defendants took exceptions to certain rulings made by the presiding Justice during the trial, and also filed a general motion for a new trial.

The case fully appears in the opinion.

Deasy & Lyman, for plaintiff.

Bird & Bradley, B. E. Clark and P. H. Gillin, for defendants.

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

WHITEHOUSE, J. These are actions on the case for obstructing the plaintiff's right of way. Dwight Braman the defendant in the action first named is the real defendant in all the other actions, the acts complained of in those cases having been committed under his direction. By agreement the four cases were tried together.

Some years prior to the commencement of these actions, the plaintiff had acquired title to certain lots of land at Sullivan Harbor, Maine, lying north of the county road, comprising what was known as the Hotel Bristol Lot or the Hotel Cleaves Lot, and also as appurtenant to these lots "A right of way for all purposes of a way over a piece of land forty feet wide in every part lying easterly of and adjoining said lots and extending from the northeasterly corner of the last described lot to the country road." Thus the plaintiff's property is bounded on the south by the county road and on the east by the piece of land in question forty feet in width on which he has a right of way. His house is situated about thirty feet from the dividing line between his lot and the forty feet strip.

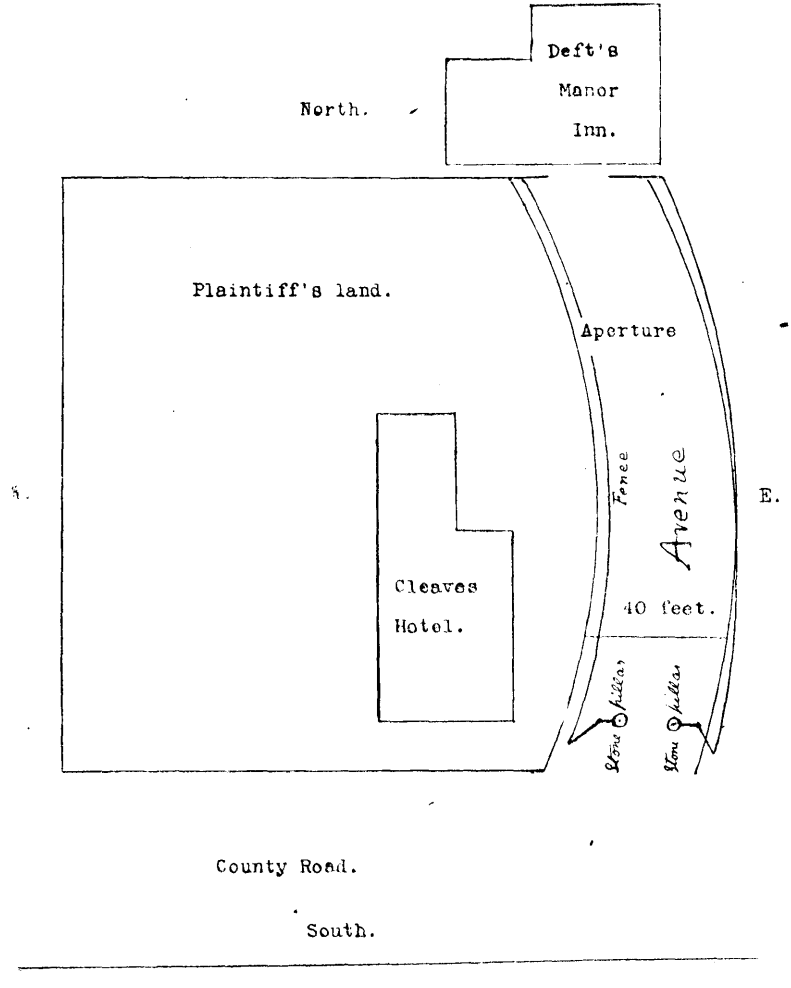
The fee of this forty feet strip of land known as "the avenue" or "the boulevard" was then and has since continued to be in the defendant Braman subject to the easement above described in favor of the plaintiff. The defendant Braman's property known as the Manor Inn, is situated at the northerly end of this forty feet strip at a distance of about 160 feet from the county road.

August 13, 1906, Braman and the other defendants erected within the limits of this forty feet avenue and on either side of it a fence of woven wire attached to cedar posts four feet in height with a top rail of cedar poles. On the westerly side this fence is continuous along the entire front of the plaintiff's property with the exception of an opening therein about fourteen feet in width nearly opposite the rear end of the plaintiff's lot.

At the southerly end of the forty feet avenue near the line of the county road are two stone pillars about fourteen feet apart with two short sections of fence connecting each of them at "an angle"

with the southerly end of the fence on either side of the forty feet avenue. A passageway fourteen feet in width is thus afforded from the highway northerly over the avenue.

The erection of this fence on the westerly side of the forty feet strip is the act of obstruction complained of in these suits. The situation may be approximately represented by the following diagram :



At the trial the defendant contended that he was bound only to leave a convenient way for the plaintiff to pass in from and out upon the county road; also that he was bound only to leave a convenient way for the plaintiff to pass back and forth from his own land to or from the forty feet strip.

Upon the latter point the presiding Justice instructed the jury as follows: "But in this case, Mr. Cleaves owns the land on the side of the forty foot strip, not at the end, and the forty foot strip is right next to his land; they are coterminous; they come right together; so that Mr. Cleaves not only has the county road on one side of his lot, but he has a right of way on the forty foot strip on the east side of his lot. Therefore, I rule to you, and instruct you, that Mr. Cleaves, had a right of access to this forty foot strip from his land and a right of access to his land from the forty foot strip for the whole length of his eastern line north and south; that is, he could get on to that forty foot strip from whatever part of his eastern line he saw fit, and he could leave that forty foot strip to get on to his land over the eastern line at any point where he saw fit, and where it was possible to do so. If there was any place along there where it was not possible to do that in the state of nature, then his right would not extend to that part. If by reason of some ravine or some ledge on the line he could not get across the ravine or over the ledge, he could not claim a right to pass on to the forty foot strip over such ledge or ravine, but must content himself with where it was feasible. So, then, wherever feasible, from the north end of his eastern line to the south end of it, down to the county road, Mr. Cleaves had a right to pass on to that forty foot strip, and, in going on the forty foot strip from the county road, he had a right to pass on to his own land wherever feasible and he saw fit."

At the trial the plaintiff testified as follows in reply to questions by his counsel:

Q. What use do you make of your house? Is it simply a dwelling or do you use it for some other purpose?

A. No sir, we run it as a summer hotel, a public hotel, a boarding house; keep summer people there; transient people.

Q. Did people leave your hotel on account of the fence?

A. Yes, I think there was.

Q. Whether when they left, at the time of leaving, they stated that they were leaving on account of the fence.

A. Yes, sir.

The jury returned a verdict in favor of the plaintiff in each case and the cases come to the Law Court on exceptions to the admission of the testimony above stated and to the foregoing instructions to the jury. The defendant also presents a motion to set aside the verdicts as against evidence.

The exceptions.

1. In that part of the charge to which exceptions were taken, the Justice presiding instructed the jury that the plaintiff "had a right of access to the forty foot strip from his land, and a right of access to his land from the forty foot strip for the whole length of his eastern line north and south; that is he could get on to that forty foot strip from whatever part of his eastern line he saw fit . . . . and where it was possible to do so: . . . wherever feasible and he saw fit."

It appears from the copy of the entire charge, which is made a part of the bill of exceptions, that the jury had been previously instructed as follows: "He has a right of way over that strip; not merely a personal right of way that he himself can use, and nobody else, but a right of way as appurtenant to his hotel lot, his property there, his house; and that gives him the right that this right of way may be used by himself, his family, his servants, or his guests at the house, it being appurtenant to his property. Where his property goes that right goes with it. He is not entitled to use the whole strip unless necessary for the purposes of a way. If Mr. Dwight Braman leaves him a reasonable right of way within his rights, he cannot complain because other parts of that forty foot strip are used by other people or used in some other way. If Mr. Cleaves owned the Manor Inn at the north, at the end of this forty foot strip, and the right of way was appurtenant to the Manor Inn, then all that Mr. Cleaves would have would be a right of passage from the Manor Inn down through this forty foot strip to the coun-

ty road; not a right of way forty feet wide, but a reasonable width for proper, reasonable use as a way. It might be ten feet wide, it might be twenty feet wide, according to the purposes for which he desired to use it. If it was only for foot passengers, perhaps a way five or ten feet wide would be sufficient; if for heavy teaming, why wider. Then, if that were the case, and you should find that after all that had been done by Mr. Dwight Braman or anybody else, the Manor Inn man coming down there would have left a right of way sufficient, and that the width between those two stone piers was sufficient for a right of way, then, no matter what had been done outside of that reasonable right of way on that strip, the gentleman owning the right of way would not be interfered with."

It is the opinion of the court that these instructions, considered together, clearly and correctly stated the law applicable to the controversy between the parties respecting the plaintiff's right of way on and over the forty feet strip in question. This avenue appears to have been specially wrought and adapted for use as a private way in 1888, immediately after the grant, and it was undisputed that it has been used for that purpose and for no other since that time. If the plaintiff had been the owner of Manor Inn, and as appurtenant to that property had acquired a right of way over the avenue in question, an essentially different problem would have been presented in regard to the alleged obstruction. Whether in that event the reference to the width of the land should be deemed a definite limitation of the width of the way, or only a description of the land over which the grantee would be entitled to such a way as might be reasonably necessary, would be a question involving little or no difficulty; and in all such cases the question must be determined with reference to the purposes for which the land granted might properly and conveniently be used and enjoyed, the situation of the respective estates and all the circumstances under which the grant was made tending to show what portion of the servient estate described it would be necessary to keep open and unobstructed in order to afford a way reasonably convenient and sufficient to accomplish the purpose. *Johnson* v. *Kinnicutt*, 2 Cush. 153; 14 Cyc. 1202. If the width of the way is not fixed by the

deed nor determined by the parties, it will be held to be a way of convenient width for all the ordinary uses of free passage. *George* v. *Cox*, 114 Mass. 382. And if the plaintiff at bar, in the case supposed, had acquired only a right of way along the avenue in question from Manor Inn to the county road, it might reasonably have been contended that a way fourteen feet in width, the distance between the stone pillars at the county road, would have been reasonably sufficient for all the uses of the plaintiff. But in fact the relative situation of the estates was entirely different. The plaintiff's property was not located at the end of this forty foot strip or avenue, but on the westerly side of it. It adjoined it throughout the whole length of 160 feet. The plaintiff's right of way was not acquired for the purpose of securing the privilege of traveling along this avenue from the county road to the Manor Inn. He had no occasion to use the way for that purpose. The grant was obviously obtained for the purpose of having a free and convenient passage from every feasible point on his lot to the forty feet avenue, and thence to the county road. Instead of this the plaintiff found himself limited by the act of the defendant to the right of access at a single point through an aperture in the fence near the northerly end of the lot. If it had been the intention of the parties to give the plaintiff such a restricted privilege, it is inconceivable that the grant would have been made in the general and comprehensive terms found in the deed. It described the right of way "as appurtenant to the above described lots and said hotel lot." If the plaintiff had divided his land into several house lots facing the forty feet avenue, the terms of the deed granting the right of way would undoubtedly have given to each lot as appurtenant to it, a separate passage way to the forty feet avenue and thence to the county road. There should be no more doubt that without such division of the lots, the plaintiff had a right of way at every point where the convenient enjoyment of his property made it necessary for him to pass. Any other interpretation of the language of the grant would defeat the purpose of it and be wholly inadmissible. See analogous cases *Rotch* v. *Livingston*, 91 Maine, 461 and *O'Brien* v. *Murphy*, 189 Mass. 353.

2. The exceptions to the admissibility of the declarations of the guests at the plaintiff's hotel made at the time of leaving and tending to show that they left on account of the fence, are not insisted upon by the defendants and are not mentioned in their argument. The ruling admitting this testimony was obviously correct. It was in accordance with elementary principles of evidence and is supported by a substantially uniform current of authority. 3 Wigmore on Evidence, sec. 1724. "Statements of motive as a reason for action" and sec. 1772 "Utterances constituting a verbal part of an act," and cases cited. "When the ascertainment of the motive with which an act is done becomes material, the declaration of the actor made at the time the act was done and expressive of its character and object, are regarded as verbal acts expressing a present purpose and intention and are admissible in evidence." 1 Green on Ev. 15th Ed. p. 161. "Such declarations made with no apparent motive for misstatement may be better evidence of the maker's state of mind at the time than the subsequent testimony of the same persons. Starkie on Ev. 10 Am. Ed. 80; Taylor on Ev. Vol. 2, p. 391-4. See also *Charley* v. *Potthoff*, Wis. 95 N. W; 124; *Elmer* v. *Fessenden*, 151 Mass. 359; *Peirson* v. *Boston El. Ry.*, 191 Mass. 223; *Etna* v. *Brewer*, 78 Maine, 377.

It appears from the charge that the rights of the defendants were carefully guarded by appropriate instructions respecting the legitimate tendency and proper force and effect of this testimony as proof in the case, and it is the opinion of the court that the defendants were not aggrieved by its admission.

The motion.

In considering the defendants' exceptions, all the material facts have been stated showing the nature and extent of the obstruction of which the plaintiff complains. The fence had been standing twelve days before the commencement of these actions, and it still existed at the time of the trial. At the time it was erected the plaintiff had eighteen regular guests who were paying from twelve to fifteen dollars per week.

It was claimed that the fence was an obstruction which violated the plaintiff's rights; that it was not only a source of great incon-

venience to him and his guests, but that it subjected him to substantial damage by causing guests to leave his house.

After a careful consideration of all the evidence in the case, it is the opinion of the court that the finding of the jury cannot be deemed erroneous respecting the defendant's liability, but the assessment of damages at $142.25 was not justified by the evidence, and must be declared excessive. If the plaintiff shall remit all of the verdict above fifty dollars within thirty days from the receipt of the certificate of this decision by the clerk of the Supreme Judicial Court for the county of Hancock, the motion for a new trial is overruled. In that event the plaintiff would be entitled to judgment for fifty dollars and interest against each defendant, but he would be entitled to only one satisfaction. The payment of one judgment would be a discharge of all.

If the plaintiff does not so remit, the entry must be,

Motion sustained.
New trial granted.

C. F. MITCHELL *vs.* CHARLES H. ELWELL.

Waldo. Opinion November 11, 1907.

Real Actions. Mortgages. Assignments. Estoppel. Foreclosure. Conditional Judgment. R. S., chapter 92, sections 5, 9.

In a writ of entry brought by the assignee of a first mortgage to recover possession of certain premises, it appeared that both parties derived title from one Oscar E. Perry, who on Jan. 9, 1897, gave a first mortgage thereof to Charles E. Sherman, to secure the payment of $250. Eight months later, he gave a second mortgage to his father Isaac B. Perry conditioned for the latter's support during his life. June 16, 1900, he gave a third mortgage of the same premises to the plaintiff Mitchell, and Dec. 20, 1906, the plaintiff obtained from Charles E. Sherman, an assignment to himself of the first mortgage given to Sherman. Prior to this assignment of the Sherman mortgage to the plaintiff, however, the defendant had obtained from Sherman a written agreement to assign the mortgage to him, the defendant, in consideration of $250, $175 of which the defendant paid to Sherman. But before the assignment to the plaintiff, this agreement between Sherman and the defendant was rescinded and cancelled by a written agreement signed by the parties, and the sum of $175 paid by defendant was refunded to him by Sherman. *Held:*

(1) That Sherman was fully authorized to execute the assignment in question to the plaintiff; that the defendant is now precluded by his conduct from asserting any claim to the premises by virtue of the Sherman mortgage, and that all of the rights set up by the defendant in the premises, are subject to the plaintiff's claim as assignee of the first mortgage.

(2) That inasmuch as there had been a breach of the condition of the mortgage for non-payment of the debt and the plaintiff had begun foreclosure thereof by publication before the commencement of this action, the court was not required to award a conditional judgment on motion of the defendant, but that the plaintiff was entitled to judgment for possession as at common law.

On exceptions by defendant. Overruled.

Real action to recover the possession of certain land situate in Burnham. Plea, the general issue with a brief statement which is stated in the opinion.

Tried at the April term, 1907, of the Supreme Judicial Court, Waldo County. After the plaintiff's direct evidence had been

introduced, the defendant moved for a nonsuit which motion was denied. At the conclusion of all the evidence the presiding Justice ordered the jury to return a verdict for the plaintiff and a verdict was so returned. The defendant also moved for conditional judgment as provided by Revised Statutes, chapter 92, section 9, which motion was also denied. To all the aforesaid rulings the defendant then excepted and prayed "that the verdict be set aside and a new trial granted or that conditional judgment on the Sherman mortgage be given."

The case fully appears in the opinion.

John W. Manson and Harry R. Coolidge, for plaintiff.

Wayland Knowlton, for defendant.

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

WHITEHOUSE, J. This is a writ of entry to recover possession of certain premises described in the declaration, situated in Burnham in the county of Waldo. The defendant pleaded the general issue with the following brief statement, namely, " the defendant further says, that he bargained for said premises and took possession of the same by the consent and direction of O. E. Perry, grantor of the plaintiff and said grantor died before the deed was made; that he continued said possession under the consent of his wife who is an heir to the demanded premises; that he is also in possession under the consent and direction of Ulysses S. Perry, who is adminstrator of said estate who obtained a writ of possession of said premises, and further he is in possession of said premises by virtue of his wife who is an heir of the aforesaid premises and by virtue of a deed of said premises from Ulysses S. Perry, Elmer I. Perry and Eva A. Jones, who also are heirs to said premises."

Both parties derive title from Oscar E. Perry, who held under a warranty deed from one Crawford dated January 9, and recorded January 14, 1897. On the same day Oscar E. Perry gave to Charles E. Sherman a mortgage of the premises in the usual form, to secure the payment of $250 which was also recorded January 14, 1897. On September 3rd, 1897, nearly eight months later, Oscar

E. Perry gave a second mortgage of the premises to his father Isaac B. Perry, conditioned for the support of the latter during his natural life. June 16, 1900, Oscar E. Perry gave a third mortgage of the premises to C. F. Mitchell, the plaintiff in this action, and Dec. 20, 1906, the first mortgage given to Charles E. Sherman Jan. 9, 1897, was assigned to the plaintiff Mitchell. The plaintiff accordingly seeks to enforce the right of possession which pertains to the mortgagee of the first mortgage which contains no stipulation to the contrary.

The defendant's claim that he is entitled to retain possession of the premises is based upon the grounds suggested in his brief statement. The history of his alleged sources of title is as follows: Isaac B. Perry the father of Oscar who held the second mortgage of the premises, conditioned for his support, died in 1900, and Ulysses S. Perry was appointed administrator of his estate. As such administrator, he claimed that there was a breach of the condition of the mortgage given for the support of Isaac B. Perry, and in 1906, recovered judgment by default against the heirs of Oscar E. Perry, and a writ of possession was issued. The defendant Elwell was thereupon put in possession as tenant of Ulysses S. Perry, administrator.

In May, 1906, the heirs of Isaac B. Perry gave a quitclaim deed of the premises to the defendant, and Ulysses S. Perry, as administrator, made an agreement with the defendant that he would release his interest in the premises if the defendant would pay certain bills against the estate of Isaac B. Perry.

All of the rights thus asserted in behalf of the defendant are obviously subject to the plaintiff's claim as assignee of the first mortgage to Sherman. The defendant's counsel, apparently recognizing the unassailable position of the plaintiff upon this state of the evidence, makes his principal assault upon the validity and effect of the assignment of the Sherman mortgage to the plaintiff. He claims that there was in fact a prior assignment of the Sherman mortgage to the defendant; that the defendant never re-assigned to Sherman and hence that Sherman had no interest which he could assign to the plaintiff. On the 12th of June, 1906, the defendant

appears to have been in the possession of the premises by virtue of the agreements and the conveyance to him above described, and on that date, an instrument under seal was executed by and between the defendant and Charles E. Sherman, the owner of the first mortgage. It was not endorsed on the mortgage, but the first part of it purports to be an absolute assignment of the mortgage for the sum of $250 and interest, and the latter part of it is an agreement reciting the fact that the defendant had paid $175, and that he agrees to pay the balance of $75 and interest the following September or October. This instrument was duly acknowledged but was never recorded. Neither the mortgage nor the mortgage notes were delivered by Sherman to the defendant, and the parties appear to have regarded the instrument as an agreement to assign the mortgage rather than an actual assignment. In his testimony the defendant says that Sherman gave him a bond for the next payment and "that he should have the place at such a time" when he paid it; that he offered Sherman the balance due and wanted him to assign it, but Sherman wanted to see the lawyers at Pittsfield before he assigned it to anyone, but they would not agree for him to assign it to him, the defendant, and Sherman assigned it to Mr. Mitchell.

It further appears from the testimony of Mr. Coolidge that the parties met at Pittsfield and on being informed that the plaintiff as the holder of the subsequent mortgage, would have a right, in any event, to redeem from the Sherman mortgage, the defendant said, "perhaps it would be just as well for him to give up his rights, as Mr. Sherman was willing to pay him back all the money he had received." Thereupon Mr. Sherman returned to Mr. Elwell the $175 which he had received, and a writing was drawn up and signed by the parties, cancelling and discharging the former agreement for an assignment. The mortgage was then duly assigned to the plaintiff in consideration of $279, and together with the notes, duly delivered to the plaintiff. This assignment to the plaintiff was duly recorded.

At the trial, the Sherman mortgage with the assignment to the plaintiff duly endorsed upon it, was introduced in evidence by the plaintiff. The notes accompanying the mortgage were then in the

possession of the plaintiff, and upon the demand of the defendant's attorney, were produced by the plaintiff and put in evidence by the defendant. At the close of the evidence, the presiding Justice ordered a verdict for the plaintiff, and refused to grant the defendant's motion for a conditional judgment. The case comes to the Law Court on the defendant's exceptions to these rulings of the presiding Justice.

It is the opinion of the court that the ruling of the presiding Justice ordering a verdict for the plaintiff was correct. The plaintiff had a valid assignment of the first mortgage to Sherman and was entitled, in the absence of any stipulation to the contrary, to possession under that mortgage. The prior instrument executed by and between Sherman and the defendant, whether regarded as an assignment or only an agreement for an assignment, was rescinded and cancelled by mutual consent and the amount paid by the defendant fully restored to him. Sherman was then fully authorized to execute the assignment to the plaintiff which was duly recorded. The defendant is now precluded by his conduct from asserting any claim to the premises by virtue of the Sherman mortgage. The amount of his mortgage debt had been paid to him and he had received all that he would ever have been entitled to receive under an assignment of the mortgage.

In *Howe* v. *Wilder*, 11 Gray, 267, it was held that a mortgagee who has assigned the mortgage and endorsed the mortgage note, may upon the endorsement of the note back to him, and the cancellation of the assignment before it has been recorded, maintain a writ of entry to foreclose the mortgage. In the opinion the court say: "After the indorsement of the note and the assignment of the mortgage to Hastings, and while he was entitled to all the rights conferred upon him by those conveyances, for a full and valuable consideration he sold and transferred the note to the plaintiff, and at the same time delivered to him the mortgage deed, having first effaced and cancelled the deed of assignment, which had never been recorded. The parties supposed that this cancellation would be equivalent to a reassignment; and it was their intent and purpose in this way to restore to the plaintiff all the rights which he originally acquired and

held as mortgagee. In the mean time no other person had in any way become interested in the estate or in the title to it, which was held by any parties to these transactions. And by the sale and transfer of the note, if not by the cancellation of the assignment, Hastings then put it out of his power by any future deed to invest a third person with a title which he could effectually assert against the right of the mortgagor to remain in possession of the estate.

If the plaintiff, after the cancellation of the unrecorded deed of assignment to Hastings, had made a second assignment to another party in good faith and for a valuable consideration, it cannot be denied that his right against Hastings would have been perfect and complete." *Trull* v. *Skinner*, 17 Pick. 213; *Lawrence* v. *Stratton*, 6 Cush. 163. See also *Day* v. *Philbrook*, 85 Maine, 90; *Morse* v. *Stafford*, 95 Maine, 31; *Matthews* v. *Light*, 40 Maine, 394; *Chase* v. *Hinckley*, 74 Maine, 181; *Patterson* v. *Yeaton*, 47 Maine, 308.

The ruling of the presiding Justice refusing a conditional judgment, was also correct. It is provided by Revised Statutes, section 9, chapter 92, that "the court shall, on motion of either party, award the conditional judgment, unless it appears . . . that the owner of the mortgage proceeded for foreclosure conformably to sections five and seven before the suit was commenced, the plaintiff not consenting to such judgment; and unless such judgment is awarded, judgment shall be entered as at common law."

It appears from the evidence in this case that there had been a breach of the condition of the mortgage in question for non-payment of the mortgage debt, and that the plaintiff had begun foreclosure of the mortgage by publication as provided in section five, chapter 92, Revised Statutes, before the commencement of this action. The notice of foreclosure was dated Dec. 26, 1906, and it was last published and recorded January 17, 1907. This action was commenced February 9, 1907. Judgment must therefore, be entered as at common law.

Exceptions overruled.

In Equity.

TABER D. BAILEY, Trustee,

vs.

GEORGE H. WORSTER, Administrator, et als.

Penobscot. Opinion November 19, 1907.

Equity Pleadings. Bill and Answers. Trusts. Trustee. Beneficiary. Chancery Rule XXVII.

1. When a cause in equity is heard on bill and answers, the court is limited to the consideration of such facts as are properly charged, and are admitted.
2. When a complainant in a bill in equity merely states that he "is informed and believes" that certain facts are true, the form of charging is fatally defective.
3. When a defendant answering says that "he has no information as to the correctness of the complainant's statements," and makes no other denial, it is not a sufficient traverse of an allegation well charged.
4. Statements of facts in a bill, under information and belief merely are not to be taken as true under Chancery Rule XXVII, though not traversed by a sufficient answer.
5. Although the court will, under proper circumstances, execute a trust which the trustee has neglected or improperly failed to execute it will not interfere to execute a trust which could have been executed in the lifetime of the beneficiary, but which was not so executed, and which under the circumstances it was not then the duty of the trustee to execute.
6. When it appears that the trustee was ready and willing to do his duty, but that the beneficiary objected and prevented his doing so, the court will not execute the trust after the death of the beneficiary.
7. A trustee cannot compel a beneficiary to receive the benefits of the trust, and it is not his duty to execute it against the will of a beneficiary, who is sui juris.
8. In the case at bar the trustee is advised that he has no authority to sell the trust estate for the purpose of paying the claims of the defendants, Witham and Williams, or any other similar claims.

In equity. On report. Bill sustained and decree to be entered as stated in the opinion.

Bill in equity brought by "Taber D. Bailey of Bangor, in the County of Penobscot, State of Maine, Trustee under the last will and testament of Albion K. P. Leighton, late of said Bangor, deceased," and "against George H. Worster of said Bangor, Administrator with the will annexed of the estate of Mary C. Leighton, late of said Bangor, deceased, and the following named persons, being the only persons now interested as legatees and devisees, or otherwise, under the will of Albion K. P. Leighton of said Bangor deceased, namely: John W. Leighton of Columbia Falls in the County of Washington, in said State of Maine, Miss Hattie Crowell of Stoughton, in the Commonwealth of Massachusetts, Mrs. Walter B. Goodenow of Stoughton, in the Commonwealth of Massachusetts, George Crowell of New Haven, in the State of Connecticut, Harvey Leighton of said Columbia Falls, and Clifford Leighton of Addison in said County of Washington, in said State of Maine; and Abbie K. Witham of said Bangor and Mary P. Williams of said Bangor, persons who assisted in furnishing necessary support, care and maintenance of said Mary C. Leighton in her last sickness," and praying for a construction of said will of said Albion K. P. Leighton, and for instructions.

At the April term, 1907, of the Supreme Judicial Court, Penobscot County, "this cause came on for hearing upon bill and answers and it appearing that there were questions of law involved of sufficient importance to justify the same and the parties consenting thereto and requesting that the case should be reported," the case was "reported to the Law Court for that court to pass upon and decide all questions involved."

All the material facts appear in the opinion.

Taber D. Bailey, for himself.

George H. Worster, for himself.

Matthew Laughlin, for Mary P. Williams and Abbie K. Witham.

Martin & Cook, for Hattie Crowell, Mrs. Walter B. Goodenow, George Crowell and Clifford Leighton.

C. A. Bailey, for John W. Leighton and Harvey Leighton.

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

SAVAGE, J. This bill in equity is brought by the trustee under the will of Albion K. P. Leighton, praying for a construction of the will, and for instructions.

By the will one undivided half of the testator's estate was given to his wife, Mary C. Leighton, absolutely. The other half was given in trust for the benefit of his wife. The terms and provisions of the trust were as follows: "Said trustee is to pay the net income of all the property held by him by virtue hereof, promptly, as soon as realized, to my wife, Mary C. Leighton, during her natural life. If my said wife shall at any time desire to sell any piece of property of which she owns half under the provisions of this will, the said trustee shall, if requested by her, join with her in the sale, conveying the half held in trust, and shall receive and hold in trust the proceeds of said half. If the necessities or comfort of my said wife require means beyond the net income of the half of the property taken by her under this will, and beyond also the income of the property held in trust, so that it becomes necessary for her comfort to realize from the principal fund or estate, then I desire that such amount as she may require shall be taken equally from the half taken by her under this will and the half held by the trustee, said trustee making such sales or other arrangements as may be necessary to carry out the intention hereof, which is, that in the event of the income of the entire estate not sufficing for her wants, the two halves of the estate shall be diminished equally, so that, at the time of her death, the half held by the trustee which then goes to my heirs, and the half held by her, which will go at her death according to her desires, shall be equal. For the purposes mentioned in this will said trustee shall have full power to sell and convey any and all property so held in trust; and I do not desire my wife to be limited to funds merely sufficient for absolute necessities, but that she may live in comfort and ease, though this should necessitate the expenditure of the entire trust estate."

The will also provided for the distribution of what might remain of the trust estate after the death of the wife.

Albion K. P. Leighton died in 1892, and Mrs. Leighton, his widow, in 1906. It is admitted that practically all of the estate except the homestead, both that which was given to her directly and that which was given in trust was used by her, in her lifetime, and that at her death there remained only the homestead valued at about $3,200, one-half of which was her own, and the other half belonged to the trust estate.

The complainant alleges that he "is informed and believes" that the income of the estate, together with the personal estate or proceeds thereof which belonged to Mrs. Leighton's estate, and the proceeds of sales of real estate made by Mrs. Leighton and the trustee were not sufficient comfortably to support and maintain Mrs. Leighton as provided in the will of her husband, and that in order for her comfortably to support and maintain herself in the homestead, for many years prior to her death, "it became absolutely necessary that some person or persons should either support and maintain her or furnish the means whereby she might obtain support and maintenance; and that he "is informed and believes" "that during the last six or seven years, more or less, of the life of the said Mary C. Leighton, she was a confirmed invalid," and had to be nursed and taken care of in the homestead, and that Abbie K. Witham, a niece, nursed and took care of her, and that Mary P. Williams, another niece, loaned and advanced money which was used for the express purpose of assisting in furnishing the necessary care, support and maintenance for Mrs. Leighton during the last years of her life; also that he "is informed and believes" that these nieces made these provisions "in favor of their said aunt, not gratuitously, and not as mere volunteers, but with the expectation that they would be renumerated for the same out of the entire estate which passed in any manner under the will of Mr. Leighton." The complainant then alleges directly a demand by these nieces that the trust estate be used conjointly with the proceeds of the estate of Mrs. Leighton to pay them for their said services and loans.

It is admitted that the estate of Mrs. Leighton has been repre-

sented insolvent, and the Witham and Williams claims, for these services and the loan, have been allowed in the Probate Court, for about $3,500, in the aggregate.

The real purpose of this bill is to ascertain whether these claims can be paid in part out of the trust estate. To enforce the right of the claimants to such payment, the existence of certain material facts must be alleged in the bill, and they must either be admitted or proved.

The case comes before us on bill and answers, and we are limited to the consideration of such facts as are properly charged, and are admitted. The phraseology of the bill and the tenor of some of the answers are such that it is not easy to say what has been sufficiently alleged and what admitted. As to many important charges the complainant merely states that he "is informed and believes." Such a form of charging is fatally defective. Whitehouse's Equity Practice, sect. 208. On the other hand, as to several important matters, some of the defendants answering say that "they have no information as to the correctness of the complainant's statements," and make no other denial. This is not a sufficient traverse of an allegation. Whitehouse's Equity Practice, sect. 373.

Chancery Rule XXVII provides that " all allegations of fact well pleaded in bill, answer or plea, when not traversed, shall be taken as true." The difficulty, however, is that the allegations to which these defective answers were made were not well pleaded. The complainant did not allege facts, but only that he was informed and believed certain allegations. In such cases Chancery Rule XXVII does not apply.

It is admitted, however, as charged, that Mrs. Leighton in order comfortably to support herself in sickness and in health had consumed practically all of the original estate except the homestead, and in addition had contracted debts for her support.

It is admitted that Abbie K. Witham and Mary P. Williams are creditors of the estate of Mrs. Leighton for nursing and care, and for money loaned and advanced for the care, support and maintenance of Mrs. Leighton during the last years of her life.

It is admitted that the net income of both halves of the estate

were not sufficient for the necessities and comfort of Mrs. Leighton.

It is not admitted by all the defendants that the services and loan represented by the Witham and Williams claims were not gratuitous, nor that these parties did the work and loaned the money with the expectation that they would be remunerated for the same out of the entire estate. Whether admitted or denied, however, the result will not be affected. That which is admitted shows that during the later years of Mrs. Leighton's life it became "necessary for her comfort to realize from the principal fund or estate," within the meaning of the will, and that the trustee did not make the sale provided for in the will. The question to be decided is, can the court properly direct the trustee to sell the trust estate and with the proceeds pay these claims, conjointly with the estate of Mrs. Leighton, or otherwise.

It may be conceded that the power and trust created by the will in favor of Mrs. Leighton were imperative and not discretionary. See *Cutter* v. *Burroughs*, 100 Maine, 379, and cases cited. In case of such an imperative trust it is the duty of the trustee to execute it when the necessity arises. And when the execution has failed for want of a trustee, or when the trustee has improperly failed to execute it, the court will cause it to be executed, if it can be done. It will even act retrospectively, after the immediate occasion for the execution has passed. If the trustee is deceased, it will hold that the legal title which has passed to his heirs, or to the devisees of the testator, is charged with the trust. It will do what the trustee ought to have done. If the beneficiary has deceased, it will, in a proper case, enforce the trust by subrogation in favor of those who furnished the support which the trustee ought to have furnished. *Cutter* v. *Burroughs*, supra.

We have no occasion to inquire whether the Witham and Williams claims are of such a character as ordinarily should be protected by the enforcement in their favor of a trust created for the benefit of one to whom they have furnished the means of comfort and support which the trust estate was intended to furnish. For if it were to be assumed that they are such, and not mere creditors' claims, the relief sought cannot be granted.

As the court will, under proper circumstances, execute a trust which the trustee has neglected or improperly failed to execute, so, on the other hand, we think the court should not interfere to execute a trust which could have been executed in the lifetime of the beneficiary, but which under the circumstances it was not then the duty of the trustee to execute.

The complainant alleges, and it is admitted, that one of the principal reasons why the trust was not executed in the lifetime of the beneficiary, and the homestead sold under the terms of the will, and for the purposes therein stated, was that the beneficiary "made her home there, and was desirous of retaining it and ending her days in her old home, where she had constantly resided for a period of thirty or forty years before her death; that he at various times suggested to her the propriety of the homestead being sold and conveyed under the terms of the will for the purposes therein mentioned, as a necessity for such sale had evidently then arisen, and she objected to it for the reasons above stated."

The trustee, then, it seems, was ready and willing to perform his duty, but the beneficiary objected, for reasons which to her were good and sufficient.

Her objection created a practical difficulty in the way of the trustee. The trustee's estate in the homestead was held in common and undivided with the beneficiary's own estate which she took under the will. The will contemplated that the trustee's half should be sold in connection with the beneficiary's half. The amount necessary to be realized was to be "taken equally from the half taken by her under this will, and the half held by the trustee." It was the clearly expressed intention of the testator "that the two halves of the estate should be diminished equally." It was not the duty of the trustee to furnish support from his half alone. That would have been in entire disregard of the testator's purpose. The devise of one-half to the beneficiary gave her an absolute fee. Her title could not be affected by the later provisions in the will respecting the administration of the trust half. What it would be the duty of the trustee to do with that half would depend in great measure at least upon what the beneficiary should voluntarily do with her own

half. She was not compelled by the will to sell her half for the purposes of comfort and support. The trustee could not compel her to sell it. Her objection to selling her own half, therefore, stood in the way of the trustee's execution of his trust.

Had she a right to object to the sale of the trust estate? We think she had. She is presumed to have been sui juris. She could not be forced to take the benefits of the trust estate. To be sure it was the duty of the trustee to execute the trust in her favor, but not, we think, against her will. If she chose to forego the benefits of the trust, for the sake of continuing to live in her old home, had she not a right to do so? If she chose to obtain her support by incurring an indebtedness which would be a charge against her estate, could she not do so? Could she not do what she liked with her own? Could she not, if she liked, impose the burden of her support entirely upon her own half? Undoubtedly she could. She could have compelled the trustee to execute the trust but he could not compel her to receive the benefits of the trust. And if she objected to receiving the benefits of the trust, can it be said that it was the duty of the trustee to sell the trust estate to provide those benefits? We think not.

If the beneficiary waived the benefits provided for her by her husband's will, as we hold she did, and if the trustee was guilty of no breach of duty to her by not selling the estate, upon what principle in equity can the court do now what it was not the duty of the trustee to do then? And to what right of the beneficiary are the claimants entitled to be subrogated? The very ground work of the equitable jurisdiction of the court in such a case as this is claimed to be is, we think, the failure of the trustee to do what he ought to have done in the lifetime of the beneficiary.

The trust provision was not made for the benefit of creditors of the beneficiary, but in favor of the beneficiary alone. And when she prevented its execution in her lifetime, as in this case, no one, after her death, claiming under her right, can enforce its execution.

Under the circumstances of this case we think the trustee must be advised that he has no authority to sell the trust estate for the

purpose of paying, in part, the claims of Abbie K. Witham and Mary P. Williams, or any other similar claims.

The trustee was amply justified by the situation in applying to the court for instructions. It is a case where it is proper that the estates involved should bear the expense of the litigation. Taxable costs will be allowed to all the parties who have pleaded. The plaintiff will be allowed a solicitor's fee of twenty-five dollars, and Mr. Laughlin, the only one of counsel who has argued, will be allowed a fee of fifty dollars. One-half of these costs and expenses shall be paid by the administrator of the estate of Mrs. Leighton, and charged by him in his account, and the other half shall be paid by the trustee, and be a charge upon the trust estate in his hands.

So ordered.

HATTIE HERON *vs.* A. FRANK WEBBER & Trustee.

Kennebec. Opinion November 16, 1907.

Assumpsit. Express Contracts. Actions. Board. Boarder. Table Board.

Where a plaintiff in an action on an alleged express contract to pay room rent, recovers a verdict and it appears that the action arose in temper and not in contract, the verdict will be set aside.

Where a plaintiff alleges that the defendant made an express contract to pay room rent and it appears that no charge for room rent would have been made if harmonious relations between the plaintiff and the defendant had continued, such alleged contract will be closely scrutinized as claims of this kind are not viewed with favor by the court.

The word board in the ordinary acceptation of the term, covers both room rent and table board. A boarder is ordinarily one who has food and lodging in another's house or family for a stipulated price. If it has the narrower meaning, it is usually designated table board.

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

Assumpsit upon an account annexed to recover for 156 weeks' room rent at $1.50 per week, brought in the Superior Court, Kennebec County. Plea, the general issue. Tried at the November term, 1906, of said Superior Court. Verdict for plaintiff for $116.51. The defendant took exceptions to the refusal of the presiding Justice to give certain requested rulings, and also filed a general motion for a new trial.

The plaintiff based her action upon an alleged express contract made between her and the defendant April 4, 1904, whereby, as she alleged, the defendant agreed to pay her $5.50 per week for board and room rent from that date.

The case fully appears in the opinion.

C. W. Hussey, for plaintiff.

Harvey D. Eaton, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, CORNISH, KING, JJ.

CORNISH, J. This was an action of assumpsit upon an account annexed for 156 weeks' room rent at $1.50 per week, amounting to $234. The case comes to the Law Court on motion and exceptions by the defendant.

We think the motion should be sustained.

The plaintiff bases her action upon an alleged express contract made between the parties on April 4, 1904, whereby the defendant agreed to pay the plaintiff $5.50 per week for board and room rent from that date. She admits that he has regularly paid her the sum of $3.50 per week, but she claims that that sum covered simply the table board, and that the room rent at $2.00 per week for two years and two months, remains unpaid.

The plaintiff is mother-in-law of the defendant. The defendant boarded with the plaintiff for a few months prior to his marriage to her daughter, which occurred in April, 1901, and after their marriage, the defendant and his wife remained in the plaintiff's boarding house under an agreement by which the defendant was to pay $3,50 per week. Apparently no charge was ever made for

the wife's board and this sum of $3.50 included both board and room rent for the husband.

The defendant paid the agreed price regularly from April, 1901 to April, 1904, and no claim is made for any balance due for room rent for that period. On April 4, 1904, a boarder vacated a room on the ground floor and the plaintiff claims that the defendant promised that if he could have the vacated room he would pay the same price as the other boarder, $5.50 per week. The defendant admits that he and his wife changed their room but denies any agreement for increase in price. The evidence overwhelmingly sustains the defendant's contention. The testimony of the plaintiff is both unsatisfactory and unreliable. Her bill as sued is for 156 weeks' room rent at $1.50 per week, while her claim as testified to by her is for 112 weeks at $2.00 per week. At the beginning of the trial, she fixed the date of the new contract as the 4th of April, 1904, because she said, she "had it down in black and white" in her ledger, on which she claimed were also entered dates when the defendant came and left, and nearly all the payments made by him; but when the book was afterwards produced at defendant's request, it contained no running account with the defendant, no charge for room rent, no date of coming or leaving, nothing whatever to substantiate her account as sued, but simply a few memoranda of payments made by the defendant at different times "for board." It was so meagre that she herself denied that earlier in the trial she had said she could prove the date by her book.

On the other hand, the defendant not only denies the making of any contract for an increase from $3.50 to $5.50 per week, but he produced twelve receipts given by the plaintiff to the defendant at various times between January 16, 1905, and May 16, 1906, and all within the time covered by the writ. Some of these are "for board in full to date," while those of January 16, 1905 and April 8, 1905, are "in full to date." This last one was given one year after this alleged new contract was made, and yet it is admitted that during all that time, the defendant had paid the same price of $3.50 per week, the plaintiff had accepted it and had given these receipts in full. Moreover, the other receipts, coming down to the

last one of May 16, 1906, which was immediately prior to the defendant's leaving, have substantially the same effect. They are "in full for board to date," and it is too strained a construction to hold that these were intended to include merely table board and that a balance of $2.00 per week for room rent was all the time accumulating against the defendant. The word board in the ordinary acceptation of the term, covers both room rent and table board. A boarder is ordinarily one who has food and lodging in another's house or family for a stipulated price. If it has the narrower meaning, it is usually designated table board. In fact the plaintiff herself, when off her guard, employed the term in the same sense for she spoke of the defendant as boarding with her for $3.50 per week prior to April, 1904, and at that time she made no separate charge or claim for room rent.

Significant too, is the fact that during the two years covered by the writ, the defendant paid exactly $3.50 per week, and the plaintiff admits that her claim for table board was settled as it went along. Board, including both meals and room rent, was fixed at a given sum. There was no separation into $3.50 for meals and $2.00 for room rent. Previously $3.50 had covered both, and the plaintiff's testimony is that the defendant when he moved, agreed to pay the same as the party who had moved out, namely, $5.50 per week. There is no pretense that the previous occupant was paying one sum for meals and another for room, but one lump sum for both.

The fact that the payments made by the defendant were not irregular in amount, some weeks three dollars and other weeks four dollars on account, but were all at the regular rate of $3.50 per week and that the plaintiff receipted for them as she did, is also strong and convincing proof of the groundlessness of the plaintiff's claim. In short, the conduct of the parties at the time is entirely inconsistent with the plaintiff's present contention.

The jury must have taken something of the same view for she was entitled to either the full amount of $224, or nothing, and yet the verdict was for $116.51.

The explanation of this action is simple. It arose in temper and not in contract. There was trouble in the family. The defendant

and his wife quarrelled, and the defendant left in June, 1906. This suit was brought July 2, 1906, and divorce proceedings followed.

This is one of those cases where if harmonious relations had continued, no such charge as is here claimed would have been made. Such claims, in the case of implied contracts, are not viewed with favor by this court. *LaFontain* v. *Hayhurst*, 89 Maine, 388; *Clary* v. *Clary*, 93 Maine, 220. Express contracts of a similar nature should be as closely scrutinized. It was clearly not in the contemplation of the parties in the case at bar that the defendant should pay a separate sum of $2.00 per week for room rent in addition to the $3.50 per week for board. The family quarrel suggested the possibility of creating and enforcing the claim, but the evidence falls so far short of maintaining it and the verdict is so manifestly wrong that it should not be allowed to stand.

The conclusion of the court upon the motion renders consideration of the exceptions unnecessary.

Motion sustained.

PERXEDE LIBERTY *vs.* HOWARD P. HAINES, Administrator.

York. Opinion November 18, 1907.

Contracts. Evidence. Burden of Proof. Preponderance of Evidence.

While any consideration, however small, may be regarded as sufficient to support a contract, yet the effect of a consideration when proved or admitted, and the effect of the evidence offered to prove such contract are entirely different propositions.

The phrase "burden of proof" like the phrase "ordinary care" is a relative term and must be considered, not only in the light of the conflict of evidence, but also with reference to the subject matter to which the burden of proof relates. And with respect to ordinary merchandise accounts and payments thereof, and of cases involving simple issues of fact, the rule is well established that where a substantial conflict of testimony appears, the verdict will not be disturbed.

But there is a class of cases, however, such as proving the existence and contents of a lost will, or proving an agreement to bequeath by will, or mutual mistakes sufficient to justify the reformation of an instrument, where in order to sustain the burden of proof the rule is that the evidence must be clear, convincing, conclusive, and such as to satisfy the mind of the court. And this requirement does not militate against the rule that in civil suits a preponderance of the evidence is all that is required.

In this class of cases, the rule which obtains in the ordinary case is so varied in every common law jurisdiction, at least, that although all the while it only requires a preponderance of the evidence, yet to establish a preponderance, the proof must be clear, convincing and satisfactory.

Where it is sought to establish an ante mortem contract that results in a post mortem disposition of an estate, the evidence required to establish such contract must come within the rule governing the quality of proof required to establish the reformation of an instrument, to prove the contents of a lost will, or a deed, or an agreement to bequeath by will.

There is no class of cases in which a higher kind of proof should be demanded than that which seeks to establish oral contracts calculated to subvert the muniments of title and divert the descent of intestate property from its legal channel. No class of cases is more susceptible to the temptation of fraud and none in which it can be more easily practiced. And in this class of cases the contention of any plaintiff must disclose motives of good faith, a claim consistent with the circumstances and probabilities of the situation and be supported by clear, positive and convincing proof.

The case at bar was an action of assumpsit brought by the plaintiff to recover against the estate of the decedent the sum of $13,720, upon an account annexed for services performed, and also to recover $20,000 upon an alleged special promise on the part of the decedent in his lifetime to pay said sum to the plaintiff. The alleged contract for the payment of said sum of $20,000 was oral.

The facts as claimed by the plaintiff upon which she sought to recover are as follows: (1) That she engaged in the employment of the decedent from October 1, 1889 to February 22, 1903, as set out in her claim, as an ordinary servant, for the agreed price of $20 per week; (2) That the decedent in his lifetime and for many years prior to his death was afflicted with a loathsome and highly contagious disease, so noxious in its character that it was fraught with great danger to his attendant, and required unusual and special care; (3) That later after the plaintiff had discovered the nature of the disease with which the decedent was afflicted and had expressed her intention of at once declining to give him further care and attention and of leaving the house, he expressly agreed in consideration that she would remain and continue her services to pay her in addition to the wages before alleged to have been agreed upon, the additional sum of $20,000 and the house. At the trial of this case the plaintiff recovered a verdict for $26,266.17.

Held: That the plaintiff has failed to sustain her alleged contract for $20,000, but is entitled to judgment for $6,266.17 the amount found by the jury in payment for the time she was unquestionably a servant of the decedent.

On exceptions and motion by defendant. Exceptions not considered. Motion sustained unless remititur be made.

Assumpsit on account annexed brought by the plaintiff to recover against the estate of Samuel Haines, late of Saco, York County, deceased intestate, the sum of $13,720 for services alleged to have been performed by the plaintiff for the decedent in his lifetime, and also to recover the sum of $20,000 upon an alleged special contract on the part of said decedent in his lifetime to pay the plaintiff said sum of $20,000.

The alleged special contract to pay the aforesaid sum of $20,000 was not in writing.

The account annexed was as follows:

"Estate of Samuel Haines to Perxede Liberty, Dr.

"To 698 weeks' services as housekeeper and assistant, and for care of clothing, washing, ironing, mending, food furnished to be taken away, and meals furnished said Haines during his lifetime, all between Oct. 1 1899 and Feb. 22, 1903, at $20 per week, $13,960.00

CREDIT.

"By divers small payments each year, not exceeding $20. in any year, $240.00

"Balance, $13,720.00"

The writ also contained counts as follows:

"Also for that the said plaintiff, heretofore to wit, on the first day of October, A. D., 1889, began to perform certain valuable services for the said Samuel Haines, to wit, acted as his housekeeper and assistant in a house furnished by and belonging to said Samuel Haines, cared for his clothing, did his washing, ironing, mending, performed the same services last named for various of his employees, furnished cooked food for said Samuel Haines to take away from said house, furnished meals for said Samuel Haines at said house,

and from that time continuously each day until the twenty-second day of February A. D. 1903, this plaintiff continued to perform said services for said Samuel Haines, with his knowledge, at his special instance and request, and with an expectation upon the part of this plaintiff to be paid and upon the part of said Samuel Haines to pay for said services. And the plaintiff avers that during each of said years, said Samuel Haines paid as part payment for said services a sum not exceeding twenty dollars in any year; that upon said twenty-second day of February, A. D. 1903, said Samuel Haines died; that thereafterwards, to wit, upon the first Tuesday of April A. D. 1903, this defendant was appointed the administrator of the goods and estate that were of said Samuel Haines. And the plaintiff avers that on the twenty-ninth day of June, A. D. 1904, she filed in Probate Court for said County of York her said claim in writing against the estate of said Samuel Haines, supported by her affidavit, and that the same was done before or within eighteen months after affidavit was filed in the Probate Court that notice had been given by said Howard P. Haines, as administrator, of his appointment as such, and that the same was done at least thirty days before the commencement of this suit, and that payment thereof was at the same time demanded of said Howard P. Haines in his said capacity; 'By reason of all which said Samuel Haines, in his lifetime, promised the plaintiff to pay her so much as her said services were fairly and reasonably worth, yet neither the said deceased, in his lifetime, nor since his decease has the said administrator ever paid the same, to the damage of the plaintiff, as she says, in the sum of forty thousand dollars.

"Also for that the said plaintiff, heretofore, to wit, upon the first day of October, A. D. 1889, at the special instance and request of said Samuel Haines, in his lifetime, promised and agreed with said Samuel Haines that she would come to said Saco, and in the house to be furnished by said Samuel Haines, would act as his housekeeper and assistant, care for his personal needs and comfort, attend to his washing, ironing, mending, furnish him with food to be eaten by him at said home and in her company, and also furnish him with food to be taken from said home elsewhere, would allow

him to have his office for the transaction of business and as a repository for his valuable and private papers and documents at said house, would assist him in the care of his business and contribute to his personal happiness and comfort, all during such time as said Samuel Haines might live or until such time as he saw fit to make other arrangements. And the said Samuel Haines then and there in consideration of all the foregoing, promised the plaintiff that at the termination of said services upon her part he would pay to her the sum of twenty thousand dollars in money, and in addition thereto would convey to her by warranty deed the aforementioned house or home. And the plaintiff avers that in accordance with said contract and agreement, she did, heretofore to wit, upon the first day of October, A. D. 1889, come to Saco, go to the house furnished by said Samuel Haines, and there begun to perform and continued to perform all the services before mentioned, and so performed said services from said time up to the twenty-second day of February, A. D. 1903, when said Samuel Haines died. And this plaintiff avers that she has performed all and singular the stipulations and agreements in her said contract with said Samuel Haines, but that said Samuel Haines in his lifetime never paid said money or made conveyance to her of said real estate, and that this defendant in his said administrative capacity, since the decease of said Samuel Haines, though requested, has never paid the same, but refuses and neglects so to do. And the plaintiff avers that on the twenty-ninth day of June, A. D. 1904, she filed in Probate Court for said County of York, her said claim in writing against the estate of said Samuel Haines, supported by her affidavit, and that the same was done before or within eighteen months after affidavit was filed in the Probate Court that notice had been given by said Howard P. Haines, as administrator, of his appointment as such, and that the same was done at least thirty days before the commencement of this suit and that payment thereof was at the same time demanded of said Howard P. Haines in his said capacity; yet neither the said deceased, in his lifetime, nor since his decease has the said administrator ever paid the same; by reason of all which, an action has accrued to the plaintiff to have and recover, as she says, the sum of forty thousand dollars."

The next and last count was the usual omnibus count with the following specifications:

"The plaintiff gives notice that under the foregoing omnibus count she will offer evidence tending to prove the performance of services for said Samuel Haines in his lifetime during the period of time between October 1, 1889, and Feb. 22, 1903, said services consisting of care of his house, washing, ironing, mending, cooking food for him to be eaten upon the premises and to be taken elsewhere, assistance to him in the carrying on of his business, and administering to his personal happiness and physical comfort, being for services and claims made in the previous counts in this writ, and which claims have been filed in the Probate Court for said County of York in writing against the estate of Samuel Haines, supported by her affidavit, which was done before or within eighteen months after affidavit was filed in the Probate Court that notice had been given by said Howard P. Haines, as administrator of his appointment as such, and that the same was done at least thirty days before the commencement of this suit and that payment thereof was at the same time demanded of said Howard P. Haines, in his said capacity; yet neither the said deceased, in his lifetime, nor since his decease has the said administrator ever paid the same."

Plea, the general issue with a brief statement interposing the statute of frauds and the statute of limitations.

The plaintiff's claim as filed by her in the Probate Court, previous to bringing suit thereon, was as follows:

"Estate of Samuel Haines to Perxede Liberty, Dr.

"To 698 weeks services as housekeeper and assistant and for care of clothing, washing, ironing, mending, food furnished to be taken away, and meals furnished said Haines during said time, all between Oct. 1, 1889, and Feb. 22, 1903, at $20. per week. $13,960.00

"Also to amount due by contract with said Haines in his lifetime to deed to said Liberty house and lot in Saco, and to pay her $20,000.00 in consideration of said Liberty moving into said house and caring for his clothing, doing his mending, washing, preparing food,

and taking care of the rooms used by said Haines as an office, as per agreement, but land never so deeded nor amount paid and still due 20,000.00

$33,960.00

"CREDIT.

"By divers small payments each year not exceeding $20. in any year 240.00

"Balance $33,720.00

"This is to give notice to the administrator of the estate of Samuel Haines, late of Saco, deceased, of the above claim, in accordance with section 14 of chapter 89 of the Revised Statutes of Maine, and I hereby demand payment of the same.

"Dated at Saco this 29th day of June, A. D. 1904.

"PERXEDE LIBERTY."

This claim was supported by the affidavit of the claimant as required by the statute.

Tried at the September term, 1906, of the Supreme Judicial Court, York County. Counsel for the defense waived any objection to the plaintiff as a party, and consented that she might testify which she did. Verdict for plaintiff for $26,266.17.

During the trial the defendant took exceptions to the refusal of the presiding Justice to give certain requested instructions and to the admission of certain testimony admitted against the defendant's objection, and also after verdict filed a general motion for a new trial. The exceptions were not considered by the Law Court.

The case appears in the opinion.

Cleaves, Waterhouse & Emery and Foster & Foster, for plaintiff.

Symonds, Snow, Cook & Hutchinson and Allen & Abbott, for defendant.

SITTING: WHITEHOUSE, PEABODY, SPEAR, CORNISH, KING, JJ.

SPEAR, J. This is an action of assumpsit brought by the plaintiff to recover against the estate of Samuel Haines, late of Saco, County of York, the sum of $13,720 upon an account annexed for services performed, and also to recover $20,000 upon a special promise upon the part of the decedent in his lifetime to pay said sum to plaintiff. The alleged contract for the payment of the latter named sum was oral.

The facts as claimed by the plaintiff upon which she seeks to recover, are first: that she engaged in the employment of the decedent from October 1, 1889 to February 22, 1903, as set out in her claim, as an ordinary servant, for the agreed price of $20 per week; second, that Samuel Haines in his lifetime, and for many years prior to his death was afflicted with a loathsome and highly contagious disease, so noxious in its character that it was fraught with great danger to his attendant, and required unusual and special care; third, that later after the plaintiff had discovered the nature of the disease with which the decedent was afflicted and had expressed her intention, of at once declining to give him further care and attention and of leaving the house, he expressly agreed in consideration that she would remain and continue her services, to pay her in addition to the wages before alleged to have been agreed upon, the additional sum of $20,000 and the house.

Having carefully examined the testimony and the briefs of counsel, we are of the opinion that no useful purpose can be served in giving an extended analysis of the evidence upon which our conclusion may be based; besides, such an analysis, involving pure questions of fact, would extend far beyond the space allotted to the ordinary opinion. We shall therefore examine the testimony only so far as is necessary to explain the conclusions at which we arrive.

Without further discussion, the court are of the opinion that the verdict of the jury sustaining the affirmative of the first proposition may be permitted to stand, although the decision is accompanied with much doubt. The evidence is plenary that the plaintiff was a servant in the employ of the decedent during the period for which

she seeks to recover, but that she should permit her wages to remain unpaid to the alleged amount of $13,960 puts a heavy strain upon the most optimistic credulity.

As to the second and third propositions, we are clearly convinced that the finding of the jury should be set aside. While upon these issues there is a conflict of testimony, yet, in view of the nature of the case, the fact of a conflict is not decisive. The phrase "burden of proof," like the phrase "ordinary care," is a relative term and must be considered, not only in the light of the conflict of the evidence, but also with reference to the subject matter to which the burden of proof relates. With respect to ordinary merchandise accounts and payments thereof, and of cases involving simple issues of fact, the rule is well established that where a substantial conflict of testimony appears, the court will not disturb the verdict of the jury.

There is another class of cases, however, in which the courts hold that the burden of proof must rise above the mere conflict of testimony and become clear, convincing and conclusive, to sustain a verdict.

Says Wigmore, Vol. 4, section 2498: "But a stricter standard in some such phrase as 'clear and convincing proof' is commonly applied to measure the necessary persuasion for a charge of fraud; for the existence and contents of a lost will; for an agreement to bequeath by will; for mutual mistakes sufficient to justify reformation of an instrument; and for a few related cases."

The contents of a lost will may be proved by testimony of recollection as well as by copy. All the authorities concur that the burden of proof requires that they shall be clearly and satisfactorily proved. The generally accepted rule is found in the language of the court in *Davis et als.* v. *Sigourney*, 8 Metcalf, 487: "To authorize the probating of a lost will, by parol proof of its contents, depending upon the recollection of witnesses, the evidence must be strong, positive and free from all doubt."

In *Mundy* v. *Foster et als.*, 31 Mich. 313, a case in which the plaintiff sets up an agreement to bequeath by will, the court say in discussing the quality of proof required: "Such an oral arrange-

ment in order to be enforced to establish rights in lands at variance with the muniments of title, must be clearly and satisfactorily proved by testimony that is above suspicion."

Southard, Aplt., v. *Curley*, 134 N. Y. 148, is a case, involving an action to reform a contract upon the ground that owing to a mistake it failed to express the agreement between the parties, in which the court held that the burden of proof was upon the defendant of clearly establishing his contention by satisfactory proof, and collated many forms of phrasing the quality of proof required, some of which are quoted as follows: Lord Hardwick, in *Henikle* v. *Rotal Exchange Assior. Co.* (1 Vessey, Sr. 317), said: "There ought to be the strongest proof possible." In *U. S.* v. *Monroe*, 5 Mason, 572, the court said: "The evidence must be clear, unequivocal and decisive, not evidence which hangs equal or nearly equilibrio." In *Gillespie* v. *Moon*, 2 Johns. Chan. 585, Chancellor Kent remarks: "Does it satisfy the mind of the court?" Fry on Spec. Perf. (2 Am. ed.): "The proof must be clear, irrefragable and the strongest possible." *Coale* v. *Merryman*, 35 Md. 382: "The evidence must be such as to satisfy the mind of the court." *Lyman's Admr's* v. *Little*, 15 Vt. 576: "Equity will not correct a mistake in a written instrument except on clear and undoubted testimony." *Miner* v. *Hess*, 47 Ill. 170: "It must leave little, if any doubt." *Sawyer* v. *Hovey*, 3 Allen, 331: "The mistake must be made out according to the understanding of both parties by proof that is entirely exact and satisfactory." *Tufts and Colby* v. *Larned*, 27 Ia. 330: "The evidence of mistake must be such as will strike all minds alike as being unquestionable and free from reasonable doubt." *Mead* v. *Westchester F. I. Co.*, 64 N. Y. 453: "The proof upon this point should be so clear and convincing as to leave no room for doubt." *Ford* v. *Joyce*, 78 N. Y. 618: "The mistake should be proved as much to the satisfaction of the court as if admitted." *Linn* v. *Barkey*, 7 Ind. 69: The mistake "must be established beyond a reasonable controversy." *Hill* v. *Hill*, 10 Wkly. Dig. (N. Y.) 239: "The proof of the mistake should be clear and positive; it should not leave a reasonable doubt."

Our own court have fully sustained the spirit of the rule laid down in the above citations, in *Connor* v. *Pushor*, 86 Maine, 300, a real action, in which the defendant sought to disprove the plaintiff's seizin by oral evidence of a lost deed. The Justice trying the case instructed the jury that the evidence required to sustain such a defense should be clear and convincing, both as to the loss of the deed and its contents. The court in sustaining the ruling say: "The defendants urge that the jury were misdirected with regard to the amount of evidence necessary to establish the existence and contents of a lost and unrecorded deed. We think not. True, they were instructed that the evidence should be clear, convincing and satisfactory. But we think this instruction was correct. . . . This requirement does not militate against the rule that in civil suits a preponderance of evidence is all that is necessary. When an attempt is made to batter down recorded deeds by oral evidence of non-existing and unrecorded deeds, the oral evidence must be clear and strong, satisfactory and convincing, or it will not preponderate. It must be "plenary." So held in *Moses* v. *Morse*, 74 Maine, 472. The rule is the same when the deed is claimed to be inaccurate. The error must be established by proof that is plenary. *Parlin* v. *Small*, 68 Maine, 289.

It would appear from these citations that in this class of cases, the rule which obtains in the ordinary case is so modified in every common law jurisdiction, at least, that although all the while it only requires a preponderance of the evidence, yet to establish a preponderance, the proof must become "clear, convincing and satisfactory."

The case at bar fairly falls within the category of the class of cases above cited by Wigmore, and the decisions above quoted, in which the burden of proof requires the most clear, convincing and satisfactory evidence. While in terms it does not set up proof of an agreement to make a will, or of the contents of a lost will, it nevertheless involves a post mortem disposal of property based upon an ante mortem parol agreement calculated to effectuate such disposal. An offer to prove an agreement to make a will is nothing more than proof of an ante mortem agreement for a post mortem

disposal of property. Proof of the contents of a lost will is precisely the same. The result in all three cases is to effect a disposal of the decedent's property after his death by orally proving an agreement alleged to have been made prior to his death.

The case at bar in its legal aspect, bears a marked resemblance to a testamentary disposition of real and personal property, and is strikingly parallel with *Mundy* v. *Foster*, 31 Michigan, supra, which involved an oral agreement to bequeath by will. The one is an agreement to make a will to transfer; the other, a direct agreement to transfer, the stipulation to vest property in the contractee being the purpose and essence of the covenant in each case, and accomplishing precisely the same result, a disposition, pro tanto, of the decedent's estate. The one is sought to be proven under the same conditions as the other, the promissor in each case being dead, all the other circumstances necessarily being the same. Each is also sought to be established by ex parte evidence of the oral declarations of a deceased party whose lips are closed to any possible refutation of the claim asserted in subversion of the natural and legal descent of his property.

Therefore in the case before us, typical of a class now becoming somewhat common, the court is of opinion that the evidence required to establish an ante mortem contract that results in a post mortem disposition of an estate must come within the rule governing the quality of proof required to establish the reformation of an instrument, to prove the contents of a lost will, or a deed, or an agreement to bequeath by will.

We can conceive of no class of cases in which a higher kind of proof should be demanded than that which seeks to establish oral contracts calculated to subvert the muniments of title and divert descent of intestate property from its legal channel. No class is more susceptible to the temptation of fraud and none in which it can be more easily practiced.

Applying these rules of evidence to the plaintiff's contention, we think she has failed to sustain the burden of proof as to both the second and third propositions upon which she seeks to recover $20,000 from the estate of the decedent. Her second proposition

which, in the testimony, furnishes the occasion and establishes the foundation of her alleged contract, is not supported by such evidence as is required in this class of cases. In the first place, her attitude upon this proposition is inconsistent, improbable and self-contradictory. If her testimony is true, she was so shocked and excited in 1892 at the discovery of Mr. Haines' alleged real affliction, that she at once accused him of deceiving her and declared that if he would place $20,000 on the table, she would not stay with him, and then began packing her things.

Now in view of the fact, that, after many years, she had discovered the deception of Mr. Haines as to the malady with which he was alleged to have been suffering, and was so indignant that she was preparing to leave his employ at once; and that upon her making this loathsome discovery, and proposing forthwith to escape from its dangers, Mr. Haines then and there promised to pay her, in consideration that she would remain and assume the risks of his care, the sum of $20,000 and the house; and notwithstanding her mind was in such a state of rebellion, to even this proposition, that it was only upon the persuasive influence of Dr. Mayberry, that the dangers which she was assuming might be reduced to a minimum by the exercise of proper care, that she was induced and concluded to accept these large considerations and remain; nevertheless, while this shocking discovery and the consequent agreement to remain and take care of Mr. Haines were the only consideration disclosed by the testimony for the contract involving this very large amount of property, over $6000 having been allowed for her other services, she never mentioned, either directly or by inference, in the sworn statement of her claim against the estate of Samuel Haines, filed in the Probate Court, that he was afflicted with a noxious disease; that she knew anything about such a disease; that she ever administered the slightest care to his person for anything; or treated him as a nurse in any particular; but simply said he agreed "to pay her $20,000 in consideration of said Liberty moving into said house and caring for his clothing, doing his mending, washing, preparing food, and the taking care of the rooms used by said Haines as an office, as per agreement."

Now her contention in her testimony that the inception of her contract was based upon the discovery of Mr. Haines real affliction, and that the consideration was that she should remain and perform the revolting duties required in the treatment of his repulsive disease, is utterly inconsistent with, and self-contradictory of, her sworn statement filed in the Probate Court for which she claimed the sum of $20,000. It is inconceivable that her sworn statement purporting to contain true specifications of her claim, should contain no mention of the actual consideration, especially when that consideration, from its very nature, if her testimony is true, must have been so vividly impressed upon her mind as never to have been forgotten, and, besides, would have furnished at least a colorable reason for the existence of so unusual a contract. Such testimony fails to satisfy the mind of the court that the decedent was afflicted with any such disease as the plaintiff claims in her testimony.

And the other testimony in the case, weakened as it is by the plaintiff's version as above considered, also fails to establish the fact. While two physicians, respectable as far as we know, declared that Mr. Haines was afflicted with the disease alleged, yet other physicians equally credible whose opportunity was such that the condition of Mr. Haines, if as claimed, could not have been concealed, found no evidence of the disease upon him. Dr. Goodall of Saco attended him six weeks for a broken leg, during which time it was not contended that Mrs. Liberty nursed him or in any way cared for him, yet Dr. Goodall says that, if he had been suffering for several years to such an extent as to require treatment from one to four times a week, as claimed by the plaintiff, and that treatment had been omitted for six or seven weeks, "I should think they would have reached an almost intolerable condition. I should think the odor would have been noticed in the room first. He would have been suffering intensely and the ulcers would have spread more deeply and widely." In connection with this evidence it should be borne in mind that Mrs. Liberty testified that he was never free from ulcers during all the years while she claims to have nursed him, yet no evidence of the alleged disease was found by Dr. Goodall. Again, during his last illness he was attended by Dr. Haley of

Saco, who testified that during the time which he treated him he discovered no evidence of the disease alleged. In addition to all this, the undertaker who prepared the body for burial, declares that he saw neither ulcers nor scars nor blotches upon the back of Mr. Haines, and that his skin was in good condition and smooth as would naturally be expected of a person of his age.

It further appears from the testimony that men afflicted, as it is claimed Mr. Haines was, are intuitively anxious to conceal all evidence of the disease, yet the decedent, if the plaintiff's contention is true, although he knew that a discovery was altogether probable, if not absolutely certain, employed an entirely new physician to attend him with his broken leg, instead of commanding the services of those who were already acquainted with his condition.

When fairly considered, the weight of evidence preponderates heavily in favor of the defendant upon this proposition.

But it may be said that the verdict of a jury is not to be set aside because the evidence preponderates against it, and that the proposition now under discussion is not one involving the terms of the contract but whether the decedent was afflicted with a certain disease, and therefore should fall within the ordinary rule. The answer to this suggestion is that, when a collateral fact is an essential element of a contract and the proof of the contract falls within the strict rule above laid down, such collateral fact comes within the same rule. It is not sufficient that the proof of such fact raises a material conflict,—it must be such as to satisfy the mind of the court.

The third proposition, involving the alleged contract by the terms of which the plaintiff says she is entitled to $20,000 from the estate of Samuel Haines, is supported by the same evidence and falls within the same analysis as the proposition just discussed. As already shown, the very foundation upon which the contract is sought to be erected, was the alleged existence and discovery in 1892 of the condition of the decedent. The same inconsistency and improbability with respect to the consideration stated in her claim filed in the Probate Court and that proved at the trial, appear in the evidence offered to sustain the terms of the contract. Upon this phase of the case it will be observed that not only was the evidence offered to

prove the terms of the contract inconsistent with the claim filed in the Probate Court, but in one important feature, absolutely contradictory of it. The very first specification of the consideration named in the claim filed was "of said Liberty moving into said house." But it appears from the testimony that Mrs. Liberty went to Saco, and moved into the Franklin Street house and assumed her relations, whatever they were, to Mr. Haines, long before the alleged $20,000 contract was claimed to have been entered into at all. While a good deal of latitude may be allowed for error of statement in pleading, and filing of claims in Probate Court, it is nevertheless true that some regard for the facts must be required, and it is inconceivable, we reiterate, if not impossible, that a person having a claim of $20,000 should, in filing a sworn statement of that claim in Probate Court, and compiling a declaration in the writ to recover the sum in the Supreme Judicial Court, utterly ignore the real consideration in both instances and then undertake to prove a consideration, nearly all the elements of which, were entirely new, and some of which were flatly contradictory.

While any consideration, however small, may be regarded as sufficient to support a contract, yet the effect of a consideration when proved or admitted, and the effect of the evidence offered to prove it, are entirely different propositions. It is the effect of the evidence which we are treating here.

We feel constrained to say that the conduct of the plaintiff in the method of presenting her case to the court and the manner of attempting to prove it, suggests very strong suspicions of bad faith. Good public policy requires the court to say that, in this class of cases, the contention of any plaintiff must disclose motives of good faith, a claim consistent with the circumstances and probabilities of the situation and supported by clear, positive and convincing proof. The affirmative of none of these requirements appears from the evidence in the present case.

It is therefore the opinion of the court that the plaintiff has failed to sustain her alleged contract for $20,000 and is entitled to judgment for $6,266.17, the amount found by the jury in payment for the time she was unquestionably a servant of the decedent.

We assume that $20,000 of the verdict was upon the alleged contract, as the entire amount or nothing was the only issue, upon this phase of the case.

Our conclusion upon the facts makes it unnecessary to discuss the exceptions.

Motion sustained unless the plaintiff files a remititur for all of the verdict above $6,266.17, within thirty days from the date of filing this rescript.

J. S. BROGAN *vs.* ALEXANDER MCEACHERN and Logs.

ANDREW MCKINNON *vs.* SAME.

JAMES RICHARD *vs.* SAME.

JOSEPH ROBITAILLE *vs.* SAME.

JOSEPH CARTER *vs.* SAME.

ALONZO JOHNSTON *vs.* SAME.

DONALD MURRAY *vs.* SAME.

JAMES KENNEDY *vs.* SAME.

COLIN MCEACHERN *vs.* SAME.

GARDINER PICKETT *vs.* SAME.

Piscataquis. Opinion November 21, 1907.

Logs and Lumber. Labor Liens. "Marks" on Logs. "Name" of Mark. Assignment of Lien Claims. Non-Lien Items. Officer's Return to Town Clerk. Immaterial Evidence.

Where in an action to enforce a lien for labor on logs marked with a certain mark and a fac-simile of that mark is given in the command in the writ directing the officer to attach such logs, it is not necessary to give the mark a name, and the addition of a name is surplusage.

When the true and actual mark upon logs is correctly given in a writ in an action to enforce a lien for labor on such logs and the logs with that

mark are attached and are the logs upon which the lien is claimed, the mark itself identifies the logs, and the name given to that mark is wholly immaterial.

Where an order for the amount due him has been given to a laborer who has worked on logs and has a lien thereon for his services and such laborer assigns such order, the assignee thereof becomes the assignee of the claim for wages due such laborer and also of the lien upon the logs for the labor done upon them by such laborer, and may maintain an action in the name of such laborer to enforce the lien.

It is immaterial whether or not an order given to a laborer for the amount due him for his services on logs contains non-lien items when in a suit to enforce the lien of such laborer the action is brought upon the account for labor, and not upon the order, and before trial all non-lien items are eliminated from the account and the verdict is for lien items only.

When an officer has attached personal property which by reason of its bulk cannot be immediately removed, he is not required to file in the office of the clerk of the town in which the attachment was made, a full copy of his return upon the writ but only "so much of his return on the writ, as relates to the attachment, with the value of the defendant's property which he is thereby commanded to attach, the names of the parties, the date of the writ, and the court to which it is returnable." The statute, R. S., chapter 83, section 27, does not require the copy filed with the town clerk to contain a statement that the property attached could not be removed by reason of bulk.

When evidence has been admitted in the trial of a cause and it appears that such evidence was absolutely immaterial and without weight upon the issue on trial and that the party excepting thereto was not aggrieved by its admission, exceptions to the admission of such evidence will not be sustained even if the evidence was inadmissible.

On motions and exceptions by defendant Thomas Gilbert. Overruled.

Ten actions of assumpsit, each on an account annexed, against the defendant Alexander McEachern. The plaintiffs had been employed by the said defendant McEachern in a logging operation carried on by him for Thomas Gilbert, the owner of the logs. In each action, the plaintiff claimed a lien for labor on or about the logs in the logging operation, and logs were attached on each writ, in these actions, to enforce the alleged lien.

In each writ, in the command to the officer to attach logs, a facsimile of the mark on the logs was given and next after the facsimile the following was added "(T diamond-girdle G.)"

In each action, Thomas Gilbert, the owner of the logs, appeared to defend the alleged lien and thereby became a party defendant so far as the attached logs were concerned.

In the first of the above entitled actions the defendant Gilbert filed a plea as follows:

"STATE OF MAINE.

"Piscataquis, ss.

"Supreme Judicial Court, February Term, A. D. 1907.

"J. S. Brogan vs. Alexander McEachern and certain pine and spruce logs marked [Here follows a fac-simile of the mark on the logs] (T-diamond-girdle-G) and being the same logs that were cut the past winter by said McEachern and landed on Ship Pond Stream in Elliottsville Plantation in the County of Piscataquis, in said State, said logs being the property of Thomas Gilbert or persons unknown.

"And now, Thomas Gilbert, owner of the logs above described, comes and defends &c., when &c., and for plea says that the defendant Alexander McEachern never promised the plaintiff in manner and form as the plaintiff in his writ and declaration has declared against him and of this he puts himself on the country.

"By J. B. PEAKS, his Attorney."

In addition to this plea, the defendant Gilbert also filed the following brief statement: "And for brief statement said Gilbert further says that the plaintiff has no lien on the logs described in his writ and as therein alleged by him, and of this he claims a trial of the issue."

A similar plea, with the necessary change as to name of plaintiff, and a similar brief statement, was filed by the defendant Gilbert in all the other actions.

These ten actions were all tried together at the February term, 1907, of the Supreme Judicial Court, Piscataquis County. The verdict was for the plaintiff in each action for the amount legally due him for labor on the logs. Also in each action the following questions were submitted to the jury: (1) "Were the logs

described in the writ the same logs which were attached and returned by the officer?" (2). "Did the plaintiff have a lien on the logs described in his writ?" (3). "If the plaintiff had such lien was it continued by the attachment and return of the officer?" The jury answered each question in the affirmative.

During the trial of these actions, the plaintiffs offered evidence that the defendant McEachern drew orders upon the said Thomas Gilbert, the owner of the logs attached, "for the payment of the several sums due the plaintiffs by order of Thomas Gilbert, and that Thomas Gilbert promised the said Alexander McEachern that he would see the orders paid." The said "Thomas Gilbert seasonably objected to this testimony, because the actions were not upon the orders, but were an attempted enforcement of lien claims." This testimony was admitted and the defendant Gilbert excepted. The defendant Gilbert also filed a general motion in each of the aforesaid actions to have the verdict set aside.

The case shows that the defendant McEachern had given each plaintiff an order on the defendant Gilbert, for the amount due him and that these orders were all sold by the several plaintiffs to the Moosehead Clothing Company. The case also shows that some of the plaintiffs had labored from two to eleven Sundays each on the logs, but that at the trial all these Sunday items were struck out.

All the material facts appear in the opinion.

J. S. Williams and W. E. Parsons, for plaintiffs.

Joseph B. Peaks, C. J. Dunn and C. W. Hayes, for defendant Thomas Gilbert.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, CORNISH, KING, JJ.

STROUT, J. The above ten cases were tried together. In each a lien was claimed upon the logs attached for labor on and about them in a logging operation, carried on by the principal defendant, for Thomas Gilbert, the owner of the logs. The question in all of them was whether each plaintiff had a lien, and had perfected it in accordance with the statute. Upon this question the evidence was

practically the same in each case, except some minor difference alleged as to the officer's certificate of attachment to the town clerk. It was agreed that the evidence in all should be considered in each.

The logs cut and attached were marked "T" with the figure of a diamond and girdle and "G." Gilbert became a party to the suit to protect his interest. Each plaintiff had a verdict for the amount due him for labor upon the logs, and establishing a lien upon them.

The cases are here upon motions for new trials and exceptions.

As to the motions. The writs commanded the officer to attach certain logs marked, and here was given a fac-simile of the mark, and after that was added in parenthesis ("T diamond-girdle G") It is objected that the true name of the mark is "slue diamond girdle," and that it is mis-named in the writ. Great stress is laid upon this by the counsel for defense, but in our view it is easily disposed of. The writ gave the correct mark. It was not necessary to give it a name. The addition of the name is surplusage. The true and actual mark upon the logs is correctly given in the writs, and the defendant's logs with that mark were attached and are the logs upon which the liens were claimed. The mark identified the logs, and the name given to that mark is wholly immaterial. But if this were not so Colin W. McEachern testified that Gilbert "looked the mark over as we were putting it on, copying it from the paper, and said it was correct, "T. diamond girdle G." "He called it diamond girdle G.," the name given in the writ. Gilbert does not deny this. It hardly lies in his mouth to say that the name he gave the mark is incorrect, upon the testimony of witnesses, some of whom give it one name and some the other.

It appears that defendant McEachern gave each of the plaintiffs orders upon Gilbert for the amounts due, and the holders, the laborers, sold these orders to the Moosehead Clothing Company, who thereby became the assignee of the claim for wages due the laborers, and also of the lien upon the logs for the labor done upon them, and may maintain an action thereon in the name of the laborers to enforce the lien. *Murphy* v. *Adams*, 71 Maine, 113; *Phillips* v. *Vose*, 81 Maine, 134.

It is said the orders included non-lien items but if that is so, the actions were not upon the orders, but upon accounts for labor upon the logs, from which before trial all non-lien items were carefully eliminated. It is therefore immaterial, whether the orders included non-lien items or not, the verdicts were for lien items only. The evidence clearly shows that each plaintiff had a lien upon the logs marked with the characters copied in the writs, and that those logs were attached by the officer to perfect and secure the liens.

But it is argued that the attachments were not perfected by the officer, in his return of the attachments to the town clerk, and that thereby the liens have been lost. The statute requires the officer to file with the town clerk not a full copy of his return upon the writ, but "so much of his return on the writ as relates to the attachment, with the value of the defendant's property which he is thereby commanded to attach, the names of the parties, the date of the writ, and the court to which it is returnable." The officer certifies he has done this, but this may be contradicted by the actual return made, if that does contradict it. We have been furnished with only one of the officer's returns to the town clerk, that in which Brogan is plaintiff, which contains everything required by the statute. It does not contain the statement that the logs by reason of bulk could not be removed, but the statute does not require this. The objections to the returns to the clerk in the other suits do not impress us as of weight, and are not much relied upon by counsel. The verdicts are supported by the evidence.

As to the exceptions. Evidence was offered that the principal defendant drew orders upon Gilbert, owner of the logs, for the payment of the several sums due the plaintiffs, by order of Gilbert, and that he promised the principal defendant that he would see the orders paid. This evidence was admitted against objections by Gilbert, "because the actions were not upon the orders, but were an attempted enforcement of lien claims." This is the only exception presented. The issue, as claimed by Gilbert, was whether there was a lien, perfected or not. The orders and the promise to pay them had no tendency to establish or disprove the lien, and, whether the evidence was admissible or not, it was absolutely immaterial and

without weight upon the issue on trial. Gilbert could not have been aggrieved by its admission. In such case, even if the evidence was inadmissbile, the exceptions will not be sustained. *Tarr* v. *Smith*, 68 Maine, 97; *Decker* v. *Somerset Ins. Co.*, 66 Maine, 406; *Soule* v. *Winslow*, 66 Maine, 447; *Millett* v. *Marston*, 62 Maine, 477.

The entry in each case must be,

Exceptions and motion overruled.

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

Androscoggin. Opinion November 21, 1907.

Evidence. Descriptive Answers.

In the case at bar, a bundle of clapboards was introduced at the trial as an exhibit by the defendant as a sample of the clapboards put up by the plaintiffs under their contract with the defendant. The plaintiffs claimed that the clapboards exhibited did not come from those furnished by them. Upon this issue a witness was asked as to the appearance of the clapboards shown compared with other clapboards manufactured by the plaintiffs which he had seen before. The witness answered "They were not standard as far as dressing and grading." The same witness was also asked the following question: "What as compared to the clapboards you saw at the Moody barn, for instance, that were showed you by Mr. Trask?" The reply was "I thought they were an older lot." *Held:* That these answers were descriptive only.

On exceptions by defendant. Overruled.

Action of covenant broken. Plea, the general issue with brief statement as follows:

"And by way of brief statement, by leave of court pleaded, the defendant says that the plaintiffs have not on their part observed and performed the contract in said writ declared on particularly in that said clapboards were not manufactured, dressed and bundled in accordance therewith and were not merchantable; that said con-

tract was in June, 1904, mutually abandoned by the plaintiffs and this defendant and that at said last named time said contract was terminated and the said defendant for valuable consideration released therefrom.

"Wherefore he prays judgment."

Tried at the April term, 1907, of the Supreme Judicial Court, Androscoggin County. Verdict for plaintiffs for $2021.54.

The bill of exceptions states the case as follows:

"This is an action of covenant founded upon a contract under seal, dated April 5, 1904: wherein the plaintiffs agreed to sell and the defendant to take and pay for all six inch clapboards which the plaintiffs then had on hand at their mill at Newcastle, and all that they should saw prior to May 15th, 1904, of four specific grades: extras, clears, second clears and extra number ones, at a flat price of forty dollars per thousand at the mill.

"The plaintiffs were to dress said clapboards as soon after May 15th as they were in suitable condition to work, and to do all work in a workmanlike manner; the clapboards to be taken away from the mill by the defendant promptly when bundled and ready for delivery.

"The defendant on the thirteenth day of June, 1904, having prior to that date received clapboards under the contract, refused to receive any more.

"The plaintiffs on December 30, 1905, brought suit to recover for the clapboards received and not paid for, and damages for refusing to receive the remainder of the clapboards sawed by the plaintiffs prior to the date specified in the contract; the number so claimed by the plaintiffs to be 148,225. The amount due on the basis of the contract price for clapboards received and not paid for was one thousand three hundred aud four dollars ($1304.00). The verdict was for the plaintiffs for two thousand twenty one dollars and fifty-four cents ($2021.54).

"The defendant contended that the clapboards were not put up in accordance with the contract, and because thereof were worth much less than the clapboards for which he had contracted, in that they were all dressed too thin; that they were not properly sorted,

many clapboards of a lower grade being in bunches of a higher grade, and many clapboards of a higher grade being in bunches of a lower grade; and that many clapboards were put up in the various bunches branded of the grades provided for in the contract, but which were in fact of lower grades than any provided for in the contract and were clapboards not purchased by the defendant at all. The plaintiffs contended that the clapboards were in all respects in accordance with the contract.

"The defendant introduced evidence to prove that early in June, 1904, he took promiscuously from the clapboards that had been delivered to him under the contract, four bunches of each grade which he sent to Charles S. Wentworth & Co. at Boston, as samples on which they were to sell for him the clapboards he had purchased.

"Charles S. Wentworth wrote the defendant a letter in which he stated objections to the clapboards. Bundles of these clapboards were returned from Wentworth and delivered through several express offices to the court house at Auburn, but without coming into the possession of the defendant. Some of these bundles were present at the court house at the time of trial, and one bundle was introduced as an exhibit by the defendant as a sample of the clapboards put up by Damren Bros. under the contract. While in the express office at Wiscasset, some of the Wentworth bundles, including the one introduced had been opened and examined by one of the defendant's witnesses, who testified he only opened one at a time and restored them to the condition as found.

"Charles S. Wentworth, who afterwards sold clapboards subsequently put up by Damren Bros., and which the plaintiffs claim should have been received by the defendant, was presented by the plaintiffs as a witness.

"Wentworth had during the spring of 1904, seen some of the clapboards which Damren Bros. had delivered to the defendant under the contract, being taken by the defendant to the place where they were stored, known as the Moody barn. The plaintiffs argued that the clapboards which were sent to Wentworth as samples were not the clapboards delivered under the contract by Damren Bros. The court stated to the jury, referring to the above described clap-

boards and others presented: 'Now an important question arises there, raised by the plaintiff, and that is, are those clapboards a part of the Damren lot?' And speaking particularly of the clapboards which Wentworth saw at Sheepscot, in connection with those sent him to Boston, parenthetically said, 'whether they (the clapboards sent to Boston) were of the same sort is for you to say.' No witness testified in contradiction of the defendant's evidence that they were such clapboards, except the witness Charles S. Wentworth; who was allowed against the objection and exception of the defendant as tending to show the clapboards were of a different lot to answer the following questions:

"Q. What have you to say as to the appearance of the clapboards compared with other clapboards that the Damren Bros. manufactured that you have seen before?

"A. They were not standard as far as dressing and grading.

"Q. And now I want to ask you the question—the general appearance has been covered particularly by the letter, but I want to ask you—what as compared to the clapboards you saw at the Moody barn for instance, that were showed you by Mr. Trask.

"A. I thought they were an older lot.

"The plaintiffs upon the expression of the foregoing opinion, to which the witness Wentworth was allowed to testify, contended that the clapboards marked as an exhibit were not the Damren Bros. clapboards, manufactured in 1904, and to the admission of such questions and answers, the defendant duly excepted."

The Wentworth letter referred to in the bill of exceptions was made a part of the exceptions, and so much of said letter as relates to the clapboards is as follows:

"In regard to the pine clapboards would say, that we have examined them very carefully. The writer wanted to send a bunch of extras to a customer for a sample and he went through all the bunches which you sent, but was unable to secure more than 16, which could be pronounced 1st class extra clapboards.

"We find that one great fault with these clapboards is the dressing. Almost every board that we have seen so far has been more

or less roughly dressed. It looks as if the boards had been planed before they were dry, then again the sorting is not what it should be.

"We found very good clear clapboards in the 2d clears and very good 2d clears in the extra No. 1 and vice versa.

"These clapboards cannot be recommended as being extra quality and manufacture. We are sending you two clapboards which were taken out of two bunches, which were marked clears. These clapboards aside from the dressing we consider poor for the grade. We think it would be for your advantage to see your men who are putting up these clapboards for you and see that the dressing and sorting is done a little more carefully. We expect an order for one or two cars of your pine clapboards very soon."

This case has once before been before the Law Court, but on other points. See 102 Maine, 39.

Oakes, Pulsifer & Ludden, for plaintiffs.

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

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, SPEAR, CORNISH, JJ.

STROUT, J. By contract between the parties plaintiffs were to sell and defendant to buy an amount of clapboards. A part of the clapboards were received by the defendant, and he refused to receive any more. The suit is for the price of the clapboards received by defendant and for damages for refusal to receive the balance. Bundles of clapboards have been sent to Wentworth, at Boston, and one bundle was introduced as an exhibit by the defendant as a sample of the clapboards put up by the plaintiffs under the contract. Plaintiffs claimed that the clapboards exhibited did not come from those furnished by them. Upon this issue, Wentworth was asked as to the appearance of the clapboards shown compared with other clapboards manufactured by the plaintiffs which he had seen before, to which he answered "they were not standard as far as dressing and grading." And another question, "What, as compared to the clapboards you saw at the Moody barn, for instance,

that were showed you by Mr. Trask?" To which he answered "I thought they were an older lot." Some of the clapboards received by defendant had been stored in the Moody barn.

Both these questions were objected to, and being admitted, exception was taken, which is now presented to this court.

The issue was not as to the quality of the bundle presented as an exhibit. A comparison was asked as to this bundle and other clapboards manufactured by plaintiffs. The witness' answer was descriptive only. It was not a matter requiring expert knowledge. "Not up to standard (of plaintiffs' other clapboards) as to dressing and grading." Suppose he had said one was rough and the other smooth,— one dry and the other wet,— one sound and the other decayed,—one new and the other old. Either of these answers involved as much of an opinion as the one given. It was a practical description that could properly be given by any man using his eyesight. The exceptions refer to Wentworth's letter, in which it was said " almost every board that we have seen so far has been more or less roughly dressed. It looks as if the boards had been planed before they were dry." This letter was in the case without objection.

The answer to the second question, "I thought they were an older lot," is only descriptive. It is equivalent so saying they appeared older, certainly competent as a description. The objections are hypercritical.

Exceptions overruled.

AMANDA M. COTTON, Petitioner, *vs.* CHARLES H. COTTON.

Androscoggin. Opinion November 22, 1907.

Order to contribute to support of wife. Statute allows no appeal to Defendant. Private & Special Laws, 1891, chapter 152. Statute 1895, chapter 136. Statute 1897, chapter 175. Statute 1899, chapter 25. Statute 1905, chapter 123, section 6. R. S., chapter 63, section 7.

In the case at bar, the defendant appealed from an order of the Municipal Court of Auburn requiring him to contribute to the support of his wife in accordance with the provisions of Revised Statutes, chapter 63, section 7, as amended by the Public Laws of 1905, chapter 123, section 6. *Held:* That the statute does not give the defendant the right of appeal from the Municipal Court in such case.

On exceptions by defendant. Overruled.

Petition by Amanda M. Cotton, wife of the defendant, under the provisions of Revised Statutes, chapter 63, section 7, as amended by the Public Laws of 1905, chapter 123, section 6. The bill of exceptions, among other things, states as follows:

"On the 15th day of January, 1907, Amanda M. Cotton filed her petition in the Auburn Municipal Court against Charles H. Cotton, her husband, alleging that she was without sufficient means of support; that she was unable to labor, etc., and that her husband, Charles H. Cotton was able to work and had sufficient means, but had failed to give her any support, and prayed for an order of the court to issue commanding his attendance in court to show cause, if any he has, why an order of court should not issue for the weekly payment of some sum of money for his said wife's support, and for the costs of those proceedings.

"An order of court issued in due form and a hearing on said petition was had before Harry Mansur, Judge of said court, on the 22d day of January, 1907, and by said court, after hearing, said Charles H. Cotton was ordered to pay for the support of his said

wife, the sum of one dollar and fifty cents per week until further order of said Municipal Court. The said Charles H. Cotton was allowed to take an appeal in due form and to prosecute said appeal recognized with sufficient sureties. Said appeal was duly entered in the Supreme Judicial Court at the term next succeeding said hearing, namely, the April term, 1907."

At said April term of said Supreme Judicial Court the matter was heard and the presiding Justice ruled that the statute did not give the defendant the right of appeal from the Municipal Court in such case, and dismissed the appeal. To this ruling and order of dismissal the defendant excepted.

L. W. Fales, for plaintiff.

Edgar M. Briggs, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, SPEAR, CORNISH, JJ.

WHITEHOUSE, J. This is an appeal from an order of the Municipal Court of the City of Auburn, requiring the defendant to contribute to the support of his wife in accordance with the provisions of Revised Statutes, chapter 63, section 7, as amended by the Public Laws of 1905, chapter 123, section 6. The presiding Justice ruled that the statute did not give the defendant the right of appeal from the Municipal Court in such case, and accordingly dismissed the defendant's appeal. The case comes to the Law Court on exceptions to this ruling.

In support of his exceptions, the defendant invokes the express provisions of chapter 152 of the Private and Special Laws of 1891 amendatory of the charter of the Municipal Court of the City of Auburn, which declares that "any party may appeal from a judgment or sentence of said court to the supreme judicial court in the same manner and subject to the same conditions as from the judgment or sentence of a trial justice." The question now before this court is therefore, whether these general provisions of the charter of the Auburn Municipal Court must be held applicable to the wife's petition for support from her husband, authorized by a subsequent

statute, or whether it was the intention of the legislature to confer upon the Municipal Courts as well as upon the Supreme Judicial and Superior courts, jurisdiction and authority to grant prompt and summary relief in such cases without the inevitable delays incident to the right of appeal.

In the light of the history and manifest purpose of the legislation upon this subject, it is the opinion of the court that the latter view of the question is the just and proper one and that the defendant's contention cannot be sustained. The original enactment giving to the wife the right to petition for such support, is found in chapter 136 of the Public Laws of 1895. By this act, jurisdiction was conferred only upon the Supreme Judicial Court, but since the authority thus vested in the court could only be exercised in term time, it soon became apparent that the immediate support obviously contemplated by the statute, could not be obtained by this method of procedure. It was accordingly provided by chapter 175 of the Public Laws of 1897, that the Supreme Judicial Court might exercise its jurisdiction over such petitions "in term time or vacation." But the remedy was still deemed inadequate, and it was further provided by chapter 25 of the Public Laws of 1899, that such petition might be heard by the "supreme judicial court, the superior courts and the Bangor municipal court, in term time or vacation." Finally for the purpose of rendering the procedure still more convenient and expeditious, and incidentally to afford relief to the Supreme Judicial Court, it was provided by section 6 of chapter 123 of the Public Laws of 1905 amendatory of R. S., chapter 63, section 7, that authority over these petitions might be exercised and the relief sought be granted by the "supreme judicial court, the superior courts, the probate courts and any municipal court in term time or vacation." The undoubted purpose of these amendments was to give to the inferior courts the same power to hear and render final decision upon the simple question of fact involved in the inquiry, that had previously been exercised by the Supreme Judicial Court, subject only to appropriate redress in the event of an abuse of such power. If the defendant could secure the opportunity for

delay afforded by exercising a right of appeal to the Supreme Judicial Court and thus vacating the order of the court below, it is obvious that one of the vital purposes of the statute would necessarily be defeated, and in many instances the ravages of hunger and disease would outrun the benevolence of the statute. Such orders are ordinarily of a temporary character subject to revision by the court which makes them, and no injustice is likely to result from the exercise of such power by the lower courts. In the case at bar it appears that the order of the Municipal Court made after due notice and hearing required the defendant to contribute to the support of his wife the sum of $1.50 per week until further order of that court, and it is not claimed or suggested that there was any irregularity in the proceedings.

It is accordingly the opinion of the court that the ruling of the single Justice was based upon a correct interpretation of the statute, and that the appeal was properly dismissed. The entry must therefore be,

Exceptions overruled.

ELLA JOHNSON WOODCOCK,
Appellant from Decree of Judge of Probate.

Waldo. Opinion Nov. 26, 1907.

Wills. Devise over. Adopted Child. R. S., 1883, chapter 74, section 10.

Where a testator devises property to his own child by blood and then over to the "child or children" of that child, if any, otherwise to others of the testator's blood, a child of the latter by legal adoption only is not included and takes nothing under the will, even though adopted before the making of the will.

On report. Decree of Probate Court affirmed.

The appellant, Ella Johnson Woodcock, is the alleged daughter by adoption of Horatio H. Johnson, late of Belfast, deceased intestate. The alleged adoption was in 1882.

The mother of said Horatio H. Johnson, Ann F. Johnson, died July 24, 1891, leaving a will dated Feb. 6, 1890, containing, among other things, two items reading as follows:

"2nd. I give, devise and bequeath unto my daughter Mary F. Johnson for and during the term of her natural life, the use and income of all the rest, residue and remainder of my estate, real, personal or mixed wherever found or however situated, after paying the taxes and insurance thereon, and other necessary incidental expenses pertaining thereto.

"3rd. Upon the decease of my said daughter Mary, without a child or children, I give and devise the balance of my estate then remaining unto my following named three children, Arbella Hersey, Horatio H. Johnson and Charles E. Johnson equally, and in case either of my said three children shall die before said Mary, leaving a child or children, then it is my will and desire and I do hereby devise and bequeath that the child or children of said deceased child shall receive the same share as its or their parent would have

received if living. And in case my said daughter, Mary, shall die leaving a child or children then it is my will and I do hereby devise and bequeath that the said child or children of said Mary shall receive the same share of my estate then remaining as either of my own children shall receive or would receive if living."

The said Mary F. Johnson named in said will, died July 21, 1906, without issue. The said Arbella Hersey named in said will, died April 21, 1895, leaving two children, Ralph W. Hersey and Edward J. Hersey. The said Charles E. Johnson named in said will, is still living. The said Horatio H. Johnson named in said will, died August 4, 1896, without issue.

Robert F. Dunton, of Belfast, was duly appointed "administrator de bonis non with will annexed" of the estate of said Ann F. Johnson, and on the petition of the said Charles E. Johnson representing that there was in the hands of said administrator the sum of $9000 for distribution among the persons legally entitled to the same, the Judge of Probate decreed that this sum should be distributed as follows: To said Charles E. Johnson $4,500. To said Ralph W. Hersey and Edward J. Hersey the sum of $2,250 each. From this decree, the said Ella Johnson Woodcock, who claimed the share that the said Horatio H. Johnson would have taken had he survived his said sister Mary F. Johnson, took an appeal.

The appeal was heard at the April term, 1907, of the Supreme Judicial Court, Waldo County, and at the conclusion of the evidence it was agreed that the cause be reported to the Law Court for decision, with the stipulation that "upon so much of the evidence as is legally admissible the court is to enter such judgment as the legal rights of the parties require."

Certain questions in relation to the legality of the alleged adoption of the said Ella Johnson Woodcock by the said Horatio H. Johnson were raised by the defendants, but for the purposes of the the case, the Law Court assumed the adoption to be valid.

The case sufficiently appears in the opinion.

Wm. P. Thompson, for plaintiff.

Dunton & Morse, for defendants.

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

EMERY, C. J. Ann F. Johnson in February, 1890, made her will which contained among others the following provision, viz:

"3d. Upon the decease of my said daughter Mary without a child or children, I give and devise the balance of my estate then remaining unto my following named three children, Arbella Hersey, Horatio H. Johnson and Charles E. Johnson equally, and in case either of my said three children shall die before said Mary, leaving a child or children, then it is my will and desire and I do hereby devise and bequeath that the child or children of said deceased child shall receive the same share as its or their parent would have received if living."

The testatrix died in 1891. Horatio H. Johnson, her son named in the will, died in 1896 before the daughter Mary, who died in 1906. Horatio left no child of his blood, but did leave a child by adoption, the appellant Ella, who was adopted under a decree of the Probate Court in 1882, previous to the making of the will. For the purpose of this opinion that decree is assumed to be valid.

The question is whether the appellant Ella takes the share Horatio H. Johnson would have taken had he survived his sister Mary. In other words the question is whether the words "child or children" as used by the testatrix in the clause of her will above quoted includes a child by adoption and not of the blood.

Where one makes provision for his own "child or children," by that designation, he should be held to have included an adopted child, since he is under obligation in morals if not in law to make provision for such child. Thus in *Virgin, Exr.*, v. *Marwick*, 97 Maine, 578, where the proceeds of a life insurance policy were made payable to the insured's "surviving children," an adopted child, though adopted after the date of the policy, was held to be within its provisions. See also *Martin* v. *Ætna Life Ins. Co.*, 73 Maine, 25. On the other hand in statutes exempting children from an inheritance tax, an adopted child is not included in the term "child." In re *Miller's Estate*, 110 N. Y. 216. *Commonwealth*

v. *Nancrede*, 32 Pa. St. 389. In the latter case the court said: "Giving an adopted son a right to inherit does not make him a son in fact."

When in a will provision is made for "a child or children" of some other person than the testator, an adopted child is not included unless other language in the will makes it clear that he was intended to be included, which is not the case here. In making a devise over from his own children to their "child or children" there is a presumption that the testator intended "child or children" of his own blood, and did not intend his estate to go to a stranger to his blood. Blood relationship has always been recognized by the common law as a potent factor in testacy. In this case, Ella, the adopted child of Horatio, however fully his child in law was not the grandchild of Horatio's mother, the testatrix, was not in any way related to her, was a stranger to her blood. The testatrix was under no sort of obligation, moral or family, to make any provision for her. We do not think it clear from the terms of her will that she intended Horatio's share to go out of the blood to a child by adoption only, and hence we hold that Ella, who was only a child by adoption, does not take anything under the will. *Russell* v. *Russell*, 84 Ala. 48. *Schafer* v. *Eneu*, 54 Pa. St. 304.

The appellant cites *Warren* v. *Prescott*, 84 Maine, 483, where it was held that an adopted child was within the meaning of the words "lineal descendants" in the statute, R. S., 1883, ch. 74, sec. 10, and as such would prevent a legacy lapsing, where a legacy was bequeathed to his adopted parent by a relative and the legatee died before the testator. That case, however, was one of the construction of the words "lineal descendants" in a statute. It is not applicable to this case which is one of the construction of the words "child or children" in a will. In this case, too, the legatee Horatio did not die before his mother the testatrix, and there is no question of lapsing of legacy but simply one of who takes the legacy.

Decree of Probate Court affirmed with costs.
Case remitted to the Probate Court.

EDWARD J. MILTON *vs.* BANGOR RAILWAY & ELECTRIC COMPANY.

Penobscot. Opinion November 26, 1907.

Street Railroads. Defective Crossing over Tracks. Common Law Liability. Special Limitations of Liability Unconstitutional, When. Private and Special Laws, 1891, section 3. R. S., chapter 53, section 27.

1. Whenever a franchise or right coupled with a corresponding duty is conferred by the legislature upon a person or corporation and is accepted, such person or corporation is answerable by the common law to a third person who sustains damage by the neglect of that duty.
2. An acceptance by a street railway company of a franchise to occupy portions of the streets of a town with its railroad, coupled with the duty of keeping such portions of the streets in repair, gives a right of action against the company by a traveler injured by its neglect of that duty.
3. The people of the State have not given the legislature power to exempt any particular person or corporation from the operation of the general law of the State or to impose special conditions or limitations upon rights of action against a particular person or corporation.
4. An Act of the legislature that no action shall be maintained against a particular street railway company therein named, for injuries caused by its neglect of duty to keep in repair those parts of the street of a town occupied by its railway, unless one of its directors had twenty-four hours actual prior notice of the defect and subsequent notice of the injury within fourteen days, is to that extent unconstitutional and void.

On report. Judgment for plaintiff.

Action on the case to recover damages for injuries to the plaintiff's horse and harness caused by an alleged defect in a crossing over the defendant's tracks in the City of Old Town. The cause came on to be heard before a jury at the April term, 1907, of the Supreme Judicial Court, Penobscot County. After the evidence was taken out, it was agreed to report the case to the Law Court for decision in accordance with the stipulations hereinafter stated.

The report, among other things alleges as follows:

"Plaintiff offered evidence to show a defective crossing over said defendant's tracks at the junction of Elm street and Stillwater Avenue in the city of Old Town; that said defect was due to the defendant's negligence; and that his own negligence did not contribute to his injury. It was admitted by defendant that it owned and operated the line of electric road between Bangor and said Oldtown, at the point where and at the time when the plaintiff suffered injury to his horse and harness. Plaintiff admitted that the Bangor Railway & Electric Company was the successor of the Bangor, Orono and Old Town Railway Company.

"Defendant moved for a nonsuit, on the ground that the plaintiff had failed to prove that the defendant had 24 hours actual notice of the defect causing plaintiff's injury, or that within 14 days thereafter he had given notice thereof to the directors of the defendant corporation.

"Defendant claimed this right of notice by virtue of chap. 116 of the Private and Special Acts of 1891, entitled 'An act to incorporate the Old Town, Orono & Veazie Railway Company,' sect. 3 of said act providing in part as follows: . . . 'Said corporation shall be liable for any loss or damage which any person may sustain by reason of any carelessness, neglect or misconduct of its agents or servants, or by reason of any defect in so much of said streets or roads as is occupied by said railroad if such defect arises from neglect or misconduct of the corporation, its agents or servants; and in actions brought against the company to recover damages by reason of such defects, the plaintiff shall have the rights and be subject to the burdens of proof and limitations and conditions provided by the general statutes applicable to suits for such causes against towns as now existing, the directors of said company standing in this respect in place of town officers.'

"It was admitted that the existence of this right in the defendant depended upon the construction of chap. 495 of the Private and Special Acts of 1889, entitled 'An Act to incorporate the Old Town Street Railway Company'; chap. 116 of the Private and

Special Acts of 1891, before recited; sect. 27 of chap. 53 of the Revised Statutes; chap. 559 of the Private and Special Acts of 1893, entitled 'An Act to change the name and amend the charter of the Old Town, Orono & Veazie Railway Company'; chap. 111 of the Private and Special Acts of 1895, entitled 'An Act to amend the charter of the Bangor, Orono & Oldtown Railway Company'; and chap. 46 of the Private and Special Acts of 1905, entitled 'An Act to confirm the organization of the Old Town Electric Company, to change its name to Bangor Railway and Electric Company, and to authorize it to acquire the properties and franchises of the Public Works Company, the Bangor, Orono and Old Town Railway Company and the Bangor, Hampden & Winterport Railway Company, and to confer certain powers upon said Bangor Railway & Electric Company." (Here follows various excerpts from the acts and statutes mentioned in the preceding paragraph, and also an admission in relation to a certain lease between the Old Town, Orono & Veazie Railway Company and the Old Town Street Railway Company, for the term of 999 years.)

"It was admitted that the Bangor Railway & Electric Company accepted the franchise conferred by this act. (Private and Special Laws, 1905, chapter 46); that special meetings of the stockholders and directors of the Bangor, Orono and Old Town Railway Company were duly called and held on the 7th day of April, 1905, and that at such meetings it was unanimously voted to merge the Bangor, Orono & Old Town Railway Company into the Bangor Railway and Electric Company and that for this purpose by a deed of indenture dated April 7th, 1905, duly executed and delivered, the Bangor, Orono & Old Town Railway Company did sell and the Bangor Railway and Electric Company did purchase all the property of said Bangor, Orono and Old Town Railway Company, including 'rights, privileges, immunities and franchises.'

"It was agreed that the case should be reported to the Law Court for its decision. If the Court shall hold that under the various legislative enactments herein set forth, defendant's liability for plaintiff's injuries, caused by defect in a public way, and due to its negligence is conditioned upon 24 hours actual notice of said

defect prior to said injuries, and upon notice given by the plaintiff to the directors of the defendant corporation within 14 days after said injuries, judgment to be for the defendant; otherwise for the plaintiff in the sum of fifty dollars."

The case sufficiently appears in the opinion.

Waterhouse & Crawford, for plaintiff.

E. C. Ryder, for defendant.

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

EMERY, C. J. The Old Town, Orono and Veazie Railroad Company incorporated in 1891 by chap. 116 of the special laws of that year, received authority to occupy portions of the streets of Old Town with its railroad tracks, &c., but coupled with the duty of keeping and maintaining in repair all such portions and of making all other repairs of such streets which should be rendered necessary by the occupation of them by its railroad. (Secs. 1 and 2 of the charter.) Under this charter that company constructed its tracks and operated its railroad through various of the streets of Old Town. Its property, franchise and duty subsequently passed by various conveyances and legislative acts to the defendant company which since 1905 has maintained the tracks and operated the railroad through the same and other streets of Old Town.

The plaintiff, while traveling in 1906 with his horse and carriage through the streets of Old Town, suffered an injury to his horse and harness through a defect in a crossing over the defendant company's tracks at a junction of two streets, which defect was due to the defendant company's neglect of its duty under its charter. The plaintiff was without fault and has not been compensated.

For defense the defendant company relies solely upon the following provision in sec. 3 of the original charter of 1891, viz:

"Said corporation shall be liable for any loss or damage which any person may sustain by reason of any carelessness, neglect or misconduct of its agents or servants, or by reason of any defect in so much of said streets or roads as is occupied by said railroad, if such defect arises from neglect or misconduct of the corporation,

its agents or servants; and in actions brought against the company to recover damages by reason of such defects, the plaintiff shall have the rights and be subject to the burdens of proof and limitations and conditions provided by the general statutes applicable to suits for such causes against towns as now existing, the directors of said company standing in this respect in place of town officers."

To maintain a suit for such a cause of action against a town it must be made to appear that one or more of certain specified town officers had actual notice of the defect twenty-four hours before the injury was received from it, and within fourteen days after the injury received notice thereof from the plaintiff. There being no evidence to the contrary it must be assumed that no director of the defendant company had any such notice of the defect or of the injury. The defendant contends that the right of action against it for damages thus caused by it, is a creature of the statute cited and is limited to cases stated in that statute, viz., to cases where a director had the twenty-four hours previous notice and the subsequent fourteen days' notice.

This contention cannot be sustained. The plaintiff has a common law right of action independent of the statute. There was granted by the State to the defendant company a right, a franchise, to occupy portions of the streets, but coupled with the corresponding duty of keeping them in repair. The duty was prescribed for the protection of the traveling public. It was voluntarily assumed along with the right, and, with it, was assumed the necessary concomitant of a common law liability to any of the traveling public suffering injury through its breach. The assumption of the duty creates the liability and the consequent right of action in favor of those persons for whose protection the duty was prescribed. *Veazie* v. *Penobscot R. R. Co.*, 49 Maine, 119; *Tobin* v. *P. S. & P. R. R. Co.*, 59 Maine, 183; *Gillett* v. *Western R. R. Corp.*, 8 Allen, 560; *Gates* v. *Pennsylvania R. R. Co.*, 150 Pa. St. 50 (24 At. Rep. 638). "At common law, whenever a right is conferred and a corresponding duty imposed upon a person or corporation, it is answerable to a third person who sustains damage by the negligent discharge of that duty." *Mann* v. *Central Vermont R. R. Co.*, 55 Vt. 484 at p. 487.

This principle is affirmed in the case of street railroads, ex majore cautela, by our general statutes R. S., ch. 53, sec. 27. viz:

"All street railroad corporations shall be liable for any loss or damage which any person may sustain, by reason of any negligence or misconduct of any such corporation, its agents or servants, or by reason of any obstructions or defects in any street or road of any city or town, caused by the negligence of such corporation, its agents or servants."

Of course, municipal corporations which act in the care of the streets, as governmental agencies, as trustees for the public, are not within this common law rule. The distinction and the reasons for it are familiar and need no new statement. *Riddle* v. *Proprietors, &c.*, 7 Mass. 169.

The defendant further contends, however, that if the legislature did not create the plaintiff's right of action, it has by the words of the charter quoted above exempted the defendant company from liability for injuries caused by its negligent performance of its duty of keeping the streets in repair, unless some one of its directors had twenty-four hours previous notice of the defect and received notice of the injury within fourteen days afterward. To this claim of exemption the answer should be apparent. The people have not conferred upon the legislature the power to exempt any particular person or corporation from the operation of the general law, statutory or common. *Holden* v. *James*, 11 Mass. 396; *Simonds* v. *Simonds*, 103 Mass. 572; *Lewis* v. *Webb*, 3 Maine, 326; *Durham* v. *Lewiston*, 4 Maine, 140. In *Lewis* v. *Webb*, supra, the court, per Mellen, C. J., said "On principle then it can never be within the bounds of legitimate legislation to enact a special law, or pass a resolve dispensing with the general law in a particular case, and granting a privilege and indulgence to one man by way of exemption from the general law, leaving all other persons under its operation."

We have no occasion to consider whether the attempted statutory exemption is forbidden by the XIV Amendment to the U. S. Constitution, or by Section 19 of the Maine Declaration of Rights which declares that "every person for an injury done him in person,

reputation, property or immunities shall have remedy by due course of law." *Preston* v. *Drew*, 33 Maine, 558; *Bennett* v. *Davis*, 90 Maine, 102. It sufficiently appears, without reference to those constitutional provisions, that despite the provisions of its charter the defendant company is not exempt from liability for the consequences of its negligence in the performance of the duty it assumed, and that the plaintiff is entitled to judgment according to the stipulations in the report, to wit, for fifty dollars.

Judgment for the plaintiff for fifty dollars.

C. B. HARTFORD *vs.* DENNIS MCGILLICUDDY.

Androscoggin. Opinion November 26, 1907.

Contracts of Agency. Duration of Same. Real Estate Brokers. Commissions.

If a real estate broker procures and produces a purchaser ready and willing and able to complete the purchase on the authorized terms and through the fault of the owner, the sale is not consummated the commission is due.

In the case at bar, the defendant, in 1896, placed in the hands of the plaintiff, a real estate agent, certain real estate to be sold at a given price and for selling the same the plaintiff was to have a commission. The defendant never withdrew the property from the hands of the plaintiff, and there was no express revocation of the contract by the defendant and no revocation by implication or by law. In 1906, after having made several unsuccessful efforts to sell the same, the plaintiff effected the sale of the property on the authorized terms but the defendant refused to make the conveyance. The plaintiff then brought suit to recover his commission. The verdict was for the plaintiff.

Held: (1) That the relation between the parties was that of principal and agent, and while no definite period of time was expressly agreed upon during which the agency was to continue yet the agency being established for a particular purpose, to wit, to sell the real estate, it was presumed to continue until the sale was effected, and the burden was on the defendant to rebut this presumption. Cases involving the question of reasonable time within which an offer of reward is held to continue, are not analogous. (2) That the special findings by the jury that the defendant in 1896

authorized the plaintiff to sell the land in question for $2800 and that he procured a purchaser for the land at that price, as well as the general verdict, are sustained by the evidence. (3) That the fact that a partner of the would be purchaser had attempted to buy direct of the owner and the owner had refused to sell, should not deprive the plaintiff of his commission as he had no knowledge of that fact and acted in good faith.

Contracts of agency may be terminated by operation of law but such cases fall within one of three classes, a change in the law making the required acts illegal, a change in the subject matter of the contract as the destruction of the property by fire, or a change in the condition of the parties, as by death or insanity. But the case at bar falls within none of these classes.

On motion by defendant. Overruled.

Assumpsit by the plaintiff, a real estate agent, to recover a commission of two per cent on the price, $2800, fixed by the owner for the sale of certain real estate in Lewiston, the plaintiff claiming that he procured a customer on the authorized terms but that the defendant refused to make the conveyance. Plea, the general issue with a brief statement interposing the statute of limitations.

Tried at the April term, 1907, of the Supreme Judicial Court, Androscoggin County. Verdict for plaintiff for $56.00. The following questions were also submitted to the jury. 1. "Did the defendant in 1896 authorize the plaintiff to sell the land in question for $2800?" 2. "Did the plaintiff in 1906 procure a purchaser for the land for the price of $2800?" The jury answered both questions in the affirmative. The defendant then filed a general motion to have the verdict set aside.

All the material facts are stated in the opinion.

McGillicuddy & Morey, for plaintiff.

Frank W. Butler, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, SPEAR, CORNISH, JJ.

CORNISH, J. This is an action of assumpsit brought by a real estate agent to recover a commission of two per cent on the price fixed by the owner for the sale of real estate, the plaintiff claiming that he procured a customer on the authorized terms but that the defendant refused to make the conveyance.

The jury found for the plaintiff and the defendant by motion asks to have the verdict set aside on two grounds, first, because whatever authority had been given by him to the agent to make a sale had been revoked by operation of law, and second, because as a matter of fact, the plaintiff did not procure the purchaser. So far as material to the questions before us, the evidence shows the following facts.

The plaintiff is a real estate agent residing in Lewiston, where the defendant also resided up to the year 1896, when he moved with his family to North Jay where he has since made his home. Just prior to his leaving Lewiston, the defendant placed in the plaintiff's hands for sale, certain vacant real estate in Lewiston, the price as claimed by the defendant to be $3000, or as claimed by the plaintiff, the asking price to be $3000 but the lowest figure to be $2800. The plaintiff at once placed his signs upon the land where they remained for many years and as he says, until shortly after this suit was begun. From time to time he endeavored to sell the property to various parties but without success. In 1901 or 1902 he wrote the defendant suggesting the advisability of selling off the wood lot, but the defendant preferred to sell the whole together. In 1903 he had an interview with one Bridgham concerning a sale, but the latter wished only to purchase one portion and negotiations therefore ceased for the time. In December, 1905, a Mr. Whitten, who was interested with Mr. Bridgham, wrote directly to the defendant offering $2000 for the property and the defendant replied declining that offer but making a counter offer to sell for $2800. Early in April, 1906, Mr. Whitten went to North Jay to interview the defendant but the latter refused to stand by his offer. On April 19, 1906, Mr. Bridgham, went again to the plaintiff, who knew nothing of the attempted trade between Mr. Whitten and the defendant, renewed the negotiations of some years before and offered $2800 for the entire property which the plaintiff accepted. A check for one hundred dollars was given on that day to bind the bargain and within a week a tender of the remaining $2700 was made to the plaintiff. The plaintiff notified the defendant of the sale as soon as it was made, and the defendant's wife who held the title,

replied, at first denying the plaintiff's authority to sell at any price, and later denying that he was authorized to sell for $2800, and refusing to make the transfer. This suit resulted.

The defendant's first contention is that where no time limit is agreed upon by the parties, a real estate broker is entitled to only a reasonable time in which to find a purchaser, and if no purchaser is found within a reasonable time, the contract terminates by operation of law; that what is a reasonable time is a question of law and that under the facts of this case the court must hold that the authority given to the plaintiff in 1896 was revoked by operation of law prior to 1906.

We are unable to reach that conclusion. The relation between these parties is that of principal and agent and the rights and liabilities of a real estate agent under such circumstances are well settled. The principal in 1896 conferred upon the agent the authority to sell the real estate at a given price. It is true that no definite period of time was expressly agreed upon during which the agency was to continue. That was unnecessary. Its duration was fixed in another way. It was established for a particular purpose and was therefore in the contemplation of the parties to continue until that purpose was accomplished unless sooner terminated by revocation or otherwise. Clark and Skyles Agency, Vol. 1, sec. 154. The plaintiff was appointed to sell this land, and his agency, once established, was presumed to continue until the sale was effected, and the burden was on the defendant to rebut the presumption. *Bourke* v. *Van Keuren*, 20 Col. 95. That burden the defendant has not sustained. Such termination may be proved by express revocation on the part of the principal, *Sibbald* v. *Bethlehem Iron Co.*, 83 N. Y. 378, or by such conduct of the parties or such circumstances as would justify the conclusion that there had been in fact a termination. But that is a question of fact for the jury and not of law for the court. The only evidence in this case tending to prove such termination by implication was the lapse of a period of ten years between the creation of the agency and the accomplishment of its purpose. That was simply one fact to be considered by the jury and over against it was other evidence tending strongly to

negative such a termination. The plaintiff's signs remained on the premises and more or less correspondence passed between the parties during all these years. The defendant had never returned to Lewiston to attend to the sale of the property himself nor had he withdrawn it from the plaintiff's hands and placed it in the charge of any other agent. Of striking significance too, is his admission that in his interview with Mr. Whitten he asked the latter if the plaintiff had anything to do with the sale, and that the reason for this inquiry was to ascertain whether the plaintiff was instrumental in making the sale. He doubtless had in mind the question of commissions but that could only arise in case the plaintiff were still his agent. It is evident that the continuance of the agency was recognized by the defendant as well as by the plaintiff.

Contracts of agency may be terminated by operation of law but such cases fall within one of three classes, a change in the law making the required acts illegal, a change in the subject matter of the contract as the destruction of the property by fire, or a change in the condition of the parties, as by death or insanity. I Clark and Skyles Agency, sec. 181. Within none of these classes does the present case fall.

The authorities cited by the defendant as to the reasonable time within which an offer of reward is held to continue are not analogous. In those cases the proposal is made to all the world and the courts properly hold that such proposal as a mere offer must be accepted by performance within a reasonable time or in the absence of other facts, the law will presume a revocation after a reasonable time. *Mitchell* v. *Abbott*, 86 Maine, 338.

But in the case at bar there was a completed contract of agency for a special purpose and it was presumed to continue until that purpose was accomplished unless revoked in fact. There was no evidence of revocation in this case other than the mere lapse of time and the jury have found that not to be sufficient, in which conclusion we concur.

The second point raised by the defendant is that the evidence does not sustain the finding of the jury that the plaintiff procured a purchaser for the land in 1906 for $2800. The rule as laid down

in recent decisions in this State requires that the agent shall procure and produce to the principal a customer willing and prepared to purchase and pay for the property at the price and on the terms given by the principal to the agent. *Garcelon* v. *Tibbetts*, 84 Maine, 148; *Smith* v. *Lawrence*, 98 Maine, 92.

In the case at bar the jury returned special findings that the defendant in 1896 authorized the plaintiff to sell the land in question for $2800 and that he procured a purchaser for the land for the price of $2800. The precise point was therefore brought sharply to their attention. These special findings as well as the general verdict are sustained by the evidence. The plaintiff's negotiations with the purchaser Bridgham began three years before the sale and then were broken off. The plaintiff alone brought the matter to Mr. Bridgham's attention. These negotiations were renewed and completed in April, 1906. The fact that in the meantime Mr. Bridgham's partner had also unsuccessfully attempted to negotiate with the owner, ought not to destroy the plaintiff's claim, as the plaintiff was in entire ignorance of that fact and acted in the utmost good faith in making the sale. To hold otherwise would be to afford too great temptation to owners of property to repudiate the commissions of their agents after a sale had been consummated.

If a real estate broker procures and produces a purchaser ready and willing and able to complete the purchase on the authorized terms and through the fault of the owner, the sale is not consummated the commission is due. *McGavock* v. *Woodlief*, 20 How. (U. S.) 221; *Garcelon* v. *Tibbetts*, 84 Maine, 148. The jury have found that state of facts in this case and the evidence does not warrant the reversal of the verdict.

Motion overruled.

ROCKLAND SAVINGS BANK

vs.

WILLIAM G. ALDEN, AND JOSEPH E. MOORE, Trustee.

Knox. Opinion November 26, 1907.

Trustee Process. Same not maintainable against Trustee in Bankruptcy Proceedings. United States Bankruptcy Court. Jurisdiction. Bankruptcy Rule XXIX. United States Bankruptcy Act, 1898, section 47, clauses 3, 4.

In a trustee process in which the plaintiff sought to hold certain dividends declared by the referee in bankruptcy in favor of the principal defendant Alden, it appeared from the trustee's disclosure that among the claims against the bankrupt estate allowed by the referee were notes in favor of the defendant Alden amounting to $7000 and a preferred claim in his favor for $300. On these claims the referee declared dividends aggregating $2190 for which checks were drawn at different times by the trustee and countersigned by the referee and payable to the defendant Alden; but by reason of the service of the trustee process upon the defendant Moore as trustee in bankruptcy, these checks were not delivered to the payee therein named but were retained in possession of the trustee. The funds belonging to the estate against which these checks were drawn, remained in the Camden National Bank in which they were deposited by the trustee.

Held: (1) That in such a case the jurisdiction of the United States bankruptcy court does not cease but that the funds of a bankrupt estate continue in the custody of the law until the trustee in bankruptcy actually pays to the distributees the dividends awarded them. (2) That the established rule exempting money in the custody of the law from trustee process is applicable to the funds of a bankrupt estate in the hands of the trustee in bankruptcy under the circumstances stated.

There is an obvious distinction between the effect upon the jurisdiction of the court of bankruptcy of a voluntary assignment of a dividend by a distributee to his creditor, and an attempt on the part of such creditor to reach the dividend by a process of foreign attachment in the State court. In the former case the assignee of the dividend may upon petition be allowed to intervene and have the validity of his assignment and the justice of his claim determined by the court of bankruptcy in which the matter is pending. He does not thereby usurp the paramount authority of the Federal court. He does not in anyway interfere with its exclusive jurisdiction. By intervening he voluntarily submits to its authority. On

the other hand the creditor of the distributee invokes the trustee process of a State court, which in effect commands the trustee of a court having exclusive jurisdiction of the matter, not to pay over the dividend, but to await the judgment of the State court. Thus it would essentially interfere with the exercise of the paramount Federal authority and obstruct the orderly administration of the bankrupt estate.

On report. Trustee discharged.

Trustee process in which the plaintiff sought to hold certain dividends declared by the referee in bankruptcy in favor of the principal defendant, William G. Alden. The said principal defendant, was duly defaulted.

The facts appear in the trustee's disclosure which, omitting caption, is as follows:

"And now the said Joseph E. Moore comes and defends and says that he ought not to be adjudged the trustee of said defendant in this action because he says that at the time of the service of the writ in this case upon him, to wit, on the nineteenth day of September A. D. 1905, he had not in his hands and possession any goods, effects or credits of the said defendant, unless it shall appear from the following statement of facts which the trustee hereby submits:

"On September 3, 1904, the Megunticook Woolen Co. of Camden, Knox County, Maine, was petitioned into bankruptcy and on September 20, 1904 was adjudged a bankrupt and at the first meeting of the creditors October 19, 1904, I was appointed trustee in bankruptcy of said Woolen Co. under the U. S. bankruptcy law, and duly qualified and proceeded to act in closing up said Woolen Co.'s affairs under the provision of that law and converted the assets of the company into cash by due proceedings had under the direction of the U. S. Dist. Court.

"Lewis F. Starrett of Rockland, Maine, was a referee in bankruptcy to whom said case in bankruptcy was referred and he acted in the proceedings.

"A large number of claims were proved before, and allowed by, said referee and among them a general claim on notes in favor of the defendant W. G. Alden for the sum of seven thousand dollars ($7000) and a preferred claim in his favor for three hundred dollars ($300) as certified to me by said referee.

"The property of said Woolen Co. was sold and turned into cash, December 29, 1904, out of which I paid the bills, incurred by me in running said plant under orders of court, and the balance I retained for expenses and fees to be allowed the trustee and parties, and for distribution among creditors whose claims had been allowed; and all of which was cash in my hands.

"After due proceedings, said referee on the 18th day of July, A. D. 1905, declared the first dividend or distribution of twenty per cent, on claims proved and allowed against said company and certified the same to me on that day. He declared a dividend or distribution amounting to fourteen hundred dollars ($1400) on the said claim of seven thousand dollars of W. G. Alden. He made no declaration of dividend or order of payment on the said three hundred dollars ($300) preferred claim of said Alden.

"On July 26, 1905, the Rockland Savings Bank brought suit and on same day served a trustee process upon me. On July 28, 1905, I drew checks in payment of said dividends and distribution which were countersigned by Lewis F. Starrett, referee, and sent them out, except I retained the one payable to said Alden, on account of said trustee process.

"On Sept. 19, 1905, I was notified that the said suit of Rockland Savings Bank against said Alden had been discontinued and not entered in court on that day, and at eight o'clock and forty-five minutes in the afternoon on said Sept. 19, 1905, a trustee process of said Rockland Savings Bank against W. G. Alden was served upon me, said amount due said Alden from me as trustee of said Megunticook Woolen Co. then being in my hands.

"That on Dec. 16, 1905, I made a report to the court that after paying said first dividend and fees and expenses as allowed by the court, there was still in my hands for distribution among creditors the sum of $7,196.27.

"On January 20, 1906, at ten o'clock in the forenoon there was a meeting of creditors and a dividend and decree of distribution of the whole of said balance, being 7 per cent on the indebtedness proved and allowed. The amount of the dividend or distribution to W. G. Alden was four hundred and ninety dollars ($490) on the

general claim of seven thousand dollars ($7000), and also the preferred claim of three hundred dollars for which I drew checks January 29, 1906, which were countersigned by Lewis F. Starrett, referee, one check for four hundred and ninety dollars, and a separate check for three hundred dollars, but I did not deliver said checks to said Alden.

"On January 20, 1906, at ten o'clock and thirty minutes in the forenoon; January 29, 1906, at nine o'clock and thirty minutes in the forenoon, and February 10, 1906, at nine o'clock and thirty minutes in the forenoon, a trustee writ of Rockland National Bank against W. G. Alden was served on me as trustee of said Alden, at the three several dates named.

"I then and still hold the funds as named, not having delivered any check to said Alden. No other trustee process has been served on me.

"The Camden National Bank was not named by the U. S. Court as a Bank of deposit for funds in hands of Trustees of Estates in bankruptcy, nor was there any bank so named in the jurisdiction of L. F. Starrett, referee, during the time I was trustee and held the funds as named in this disclosure. The Megunticook Woolen Company had kept its deposit in the Camden National Bank and I continued in the same bank on my own motion. The amount in my hands retained from first dividend made no part of the $7,196.27 reported by me as the amount in my hands for final distribution. The first dividend was treated as paid.

"I annex copies of the checks issued by me payable to said Alden named in the disclosure.

"I respectfully submit whether I am liable to be charged for any sum in either suit and if so for how much?

"JOSEPH E. MOORE."

This disclosure was duly sworn to by the said Joseph E. Moore before a justice of the peace. The copies of the checks mentioned in the disclosure are omitted in this report.

The cause came on for hearing at the September term, 1906, of the Supreme Judicial Court, Knox County, and by agreement of

the parties, the case was "reported to the Law Court, for the Law Court to decide the question of the liability of the trustee upon the trustee's disclosure."

Rodney I. Thompson, for plaintiff.

Arthur S. Littlefield, for trustee.

S. T. Kimball, for Rockland National Bank.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, SPEAR, CORNISH, JJ.

WHITEHOUSE, J. This is a trustee process in which the plaintiff seeks to hold certain dividends declared by the referee in bankruptcy in favor of the principal defendant Alden.

September 20, 1904, the Megunticook Woolen Company of Camden was adjudged bankrupt by the U. S. District Court and the defendant Moore was appointed its trustee in bankruptcy. Among the claims against the estate allowed by the referee were notes in favor of the defendant Alden amounting to $7000 and a preferred claim in his favor for $300. On these claims the referee declared dividends aggregating $2190, for which checks were drawn at different times by the trustee and countersigned by the referee payable to the defendant Alden; but by reason of the service of this trustee process upon the defendant Moore, as trustee in bankruptcy, these checks were not delivered to the payee therein named but were retained in the possession of the trustee. The funds belonging to the estate against which these checks were drawn, remain in the Camden National Bank in which they were deposited by the trustee.

It is provided in section 47 of the bankrupt law that trustees in bankruptcy shall (3) "deposit all money received by them in one of the designated depositories," and while it appears from the disclosure of the trustee that no bank in the jurisdiction of the referee in this case was designated by the United States court as a bank of deposit for funds of bankrupt estates, the Camden National Bank was in fact the depository which was selected by the trustee with the acquiescence of the court for the deposit of all funds belonging to the bankrupt estate in question.

The fourth clause of section 47 declares that trustees shall "draw money only by check or draft on the depositories in which it has been deposited," and it is prescribed by Rule 29 of the Supreme Court of the United States that "no moneys deposited as required by the act shall be drawn from the depository unless by check or warrant signed by the clerk of the court or by a trustee and countersigned by the judge of the court or by a referee designated for that purpose."

In view of these regulations it is suggested in behalf of the defendants that after the fund in question had been deposited in the Camden National Bank, it ceased to be under the personal control of the trustee; that although checks were drawn by the trustee and countersigned by the referee, no one except the payee named in those checks, was empowered, in the ordinary course of bankruptcy proceedings, to draw the money called for by the checks. It is said that inasmuch as the money in the bank is not under the personal control of the trustee, and this court has no authority over the judge or referee of the United States court, the defendant Moore, if charged as trustee in this proceeding, would be powerless to obtain the money with which to meet the judgment against him. It is accordingly contended that under such circumstances, the funds, even after dividends are declared, are still in the custody of the law until they are actually received by the party entitled thereto, by virtue of an order properly issued.

Thus the question now presented for the determination of the court is whether a trustee in bankruptcy under the circumstances disclosed by the foregoing statement of facts, is liable to this trustee process issuing from a State court.

But inasmuch as it is uniformly held by all courts that, in the absence of special statutory provisions to the contrary, money which is properly said to be in custodia legis cannot be reached by the process of foreign attachment, the question more specifically stated, is whether a fund in the situation existing at the time of the service of the process in this case, is still in the custody of the law, or whether after distribution is ordered and the checks are drawn and countersigned but not delivered, the money has ceased to be in the

possession of the court or in the custody of the law. The plaintiff contends that the final order for distribution had been given by the United States court, that the purpose of the legal custody had been accomplished, that nothing further remained to be done by that court, and that the money cannot now be properly considered as in the custody of the law.

The decisions in the Federal courts have uniformly recognized the doctrine that funds thus situated belonging to a bankrupt estate are in the custody of the law and not amenable to process of foreign attachment against the trustee in bankruptcy.

In re Cunningham, (1879) 6 Fed. Cases, 958 (No. 3478) the facts respecting the condition of the fund were substantially the same as in the case at bar. The dividend had been declared and distribution ordered, but before payment was made, a process of foreign attachment issuing from the State court was instituted in favor of a plaintiff to whom one of the dividend creditors of the bankrupt estate was indebted, and served on the "assignee" (trustee) in bankruptcy. In that suit judgment was entered in the State court against the principal defendant, the dividend creditor, and against the assignee in bankruptcy as garnishee for the amount of the dividend. A petition was thereupon presented to the United States court by the plaintiff in that proceeding asking that the assignee in bankruptcy be directed to pay the amount of the dividend to him. Subsequently the original creditor of the bankrupt estate made a voluntary assignment of the dividend declared in his favor, to a third party who, upon petition, was allowed to intervene for the purpose of having his rights determined in the United States court. It was held in a carefully considered and exhaustive opinion that the rule exempting money in the custody of the law from the process of foreign attachment was applicable to the funds of a bankrupt estate in the hands of the assignee in bankruptcy under the circumstances stated, and that the intervening party who had received an assignment of the dividend after the service of the trustee process upon the assignee in bankruptcy, was entitled to have the dividend paid to him. In the opinion the court says, inter alia: "The State court has no authority to bring an assignee

before it who is acting under the orders of the United States court; *Atkins* v. *Stradley* (Iowa) 1 N. W. 609. The true doctrine is that, when property or money is in custodia legis, the officer holding it is the mere hand of the court; his possession is the possession of the court; to interfere with his possession is to invade the jurisdiction of the court itself; and an officer so situated is bound by the orders and judgments of the court whose mere agent he is, and he can make no disposition of it without the consent of his own court, expressed or implied. How can such an officer when garnisheed, know what answer he can make with safety to himself, in advance of the orders and judgments of the court having possession of the property and jurisdiction of his person? How could such an officer so expose himself by his answer as garnishee to the danger of a personal judgment in some other court, before the determination of the court having control of him and the property? It cannot for a moment be doubted that the court of bankruptcy has exclusive jurisdiction of the bankrupt's estate, and of its administration from the time of the adjudication to the final discharge of the estate, and the discharge of the assignee. This jurisdiction, does not, by any means, cease with the order of distribution. It is clearly within the power of the court, and its duty, to see that its assignee pays over to the distributees the dividends awarded to them. The assignee failing to perform this duty, the court will punish him for contempt; order a suit upon his official bond, and refuse to give him a final discharge. This jurisdiction is exclusive. No other court can touch, or bind the assets of the bankrupt, or authorize any suit against the assignee, who is the officer of the court. It follows that any action in any other tribunal, aiming to control the action of the assignee, or directly or indirectly to compel the assignee to dispose of the assets or pay over money in his hands belonging to the estate, must be utterly without jurisdiction, and therefore null and void."

It will be observed that this decision clearly determines that the jurisdiction of the United States court does not cease, and that the funds of the estate continue in the custody of the law until the trustee in bankruptcy actually pays to the distributees the dividends

awarded them. It also forcibly illustrates the distinction between the effect upon the jurisdiction of the court of bankruptcy, of a voluntary assignment of a dividend by a distributee to his creditor, and an attempt on the part of such a creditor to reach the dividend by a process of foreign attachment in the State court. In the former case the assignee of the dividend may upon petition be allowed to intervene and have the validity of his assignment and the justice of his claim determined by the court of bankruptcy in which the matter is pending. He does not thereby usurp the paramount authority of the Federal court. He does not in any way interfere with its exclusive jurisdiction. By intervening he voluntarily submits to its authority. On the other hand the creditor of the distributee invokes the trustee process of a State court, which in effect commands the trustee of a court having exclusive jurisdiction of the matter, not to pay over the dividend, but to await the judgment of the State court. Thus it would essentially interfere with the exercise of the paramount Federal authority and obstruct the orderly administration of the bankrupt estate.

In *Gilbert* v. *Quimby*, 1 Fed. Rep. 113, the dividend had also been declared when the process of foreign attachment was invoked and a State officer assumed to attach the dividend in the hands of the assignee in bankruptcy. In the opinion the court says: "That the dividend was not attachable on process from the State courts would seem to be quite clear. While in the hands of the assignee it would be a part of the estate of the bankrupt in the custody of the court. It would not be held the property of the debtor, but would only be property that would become his when he should get it."

It will be perceived that this is also direct authority in support of the proposition that an estate in bankruptcy is deemed to be in the custody of the Federal court until the distribution is effected by the actual payment of the dividends to the creditors to whom they are awarded or their assignees.

In re Bridgman, Vol. 4 of Fed. Cases, (No. 1867) the situation was substantially the same as in the last named cases, and it was held that the regular distribution of the estate by the court of

bankruptcy could not be obstructed or delayed by any process from a State court. The following statement of opinion by the register was approved and adopted by the court: "The simple question in this case is, whose warrant or summons shall the assignee obey? That of the United States District Court in bankruptcy, ordering him to pay this money to the creditor of the bankrupt, or that of the Superior Court of Randolph County, Georgia, summoning him to answer to that court as to the money in his hands of the said creditor? The answer is plain. The distribution of the assets of the bankrupt, which is essential to the due execution of the provisions of the bankrupt act, cannot be stayed or prevented by the process of a state court." See also In re Kohlsaat No. 7918, Fed. Cases; Chisholm et als. Bankrupts, 4 Fed. Rep. 526; *Clark* v. *Shaw*, 28 Fed. Rep. 356; In re Tune 115 Fed. Rep. 916. See also *Buchanan* v. *Alexander*, 4 How. (U. S.) 20.

The doctrine established by the Federal cases is also supported by the great weight of authority in the State courts relating to funds in the hands of assignees of insolvent estates, in the custody of receivers, and analogous cases. *Colby* v. *Coates*, 6 Cush. 558; *Columbian Book Co.* v. *DeGolyer*, 115 Mass. 67; *Com.* v. *Hide and Leather Ins. Co.*, 119 Mass. 155; *Voorhees* v. *Sessions*, 34 Mich. 99; *People ex rel. Tremper* v. *Brooks*, 40 Mich. 333; *McGowen* v. *Myers*, 66 Iowa, 99.

Numerous decisions may be found in the State courts holding that funds in the hands of executors and administrators are subject to the trustee process; but it will be found that they are controlled by special statutory provisions, or influenced by considerations not applicable to the case at bar.

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

Trustee discharged.

CITY OF PORTLAND

vs.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY.

Cumberland. Opinion December 6, 1907.

Telephone Companies. Conduits. Fixtures. Annexation. Taxation. Excise Tax. Private & Special Laws, 1885, chapter 513; 1891, chapter 204, section 1. Revised Statutes, chapter 8, sections 35, 36, 37, 38, 39, 40, 41.

In the case at bar, the city of Portland sought to recover a tax assessed by the city upon the conduits of the defendant company, as real estate, in addition to an excise tax assessed upon the defendant by the State. The conduits in question were laid in the streets of Portland under the authority of section 1, chapter 204 of the Private and Special Laws of 1891, by virtue of license therefor, granted by the municipal officers according to regulations established by them. Under these regulations the location of the conduits, wherever made, was subject to revocation and change at the order of the municipal officers. The quality of permanency in the annexation did not exist and the conduits were not laid for the benefit of the freehold. It is also provided by Revised Statutes, chapter 8, section 41, that the excise tax assessed upon the company "shall be in lieu of all taxes upon . . . its property used in the conduct of its telephone or telegraph business, including the poles, wires, insulators," etc. But the statute contains no specification of the conduits of the company among the items of personal property thus exempted. The method of conveying telephone wires by subterranean conduits instead of poles, had not been adopted, however, at the time of the passage of the original act of 1883 providing for the taxation of telephone companies.

Held: (1) That the intention with which an article is annexed to the freehold has come to be recognized as a cardinal rule and most important criterion by which to determine its character as a fixture; that the attendant facts and circumstances are chiefly valuable as evidence of such intention; and that this controlling intention is not the secret intention with which the article is affixed, but the intention which the law deduces from all the circumstances of the annexation.

(2) That there was nothing in the nature of conduits, the mode and purpose of annexation or the relation of the parties to each other to warrant the inference that the defendant company intended to relinquish its owner-

ship in these pipes or that the owners of the soil expected to acquire title to them by annexation, and that being laid under a license revocable at the will of the municipal officers so far as any particular highway or location was concerned they did not become a constituent part of the freehold.

(3) That it was the purpose of the legislature to impose upon the telephone companies an excise tax for the privilege of doing business in this State and to exempt all personal property used in its business, leaving only its real estate, such as land and buildings for local taxation; and that the question whether the expression of one thing in the statute is to operate as the exclusion of the other is one of intention to be gathered from an examination of all parts of the statute by the aid of the usual rules of interpretation.

(4) That under the circumstances of this case, the conduits of the defendant company in the streets of Portland being in fact a part of the property used by the company in the conduct of its business, are properly held to be embraced in the term "property" referred to in Revised Statutes, chapter 8, section 41, that they are not excluded by the express mention of other items of exempted property in the same section and that they are not subject to taxation by the city of Portland as real estate.

On agreed statement. Judgment for defendant.

Action of debt brought in the Superior Court, Cumberland County, to recover the sum of $1484 for taxes assessed by the plaintiff city against the defendant company, a corporation, for the year 1906. Said tax was assessed on the conduits of the defendant company in the plaintiff city, as *real estate*, and was in addition to the excise tax assessed upon the defendant company by the State Assessors under the provisions of Revised Statutes, chapter 8, sections 35, 36, 37, 38, 39, 40 and 41.

The cause came on for hearing at the April term, 1907, of said Superior Court, at which time an agreed statement of facts was filed and the case was sent to the Law Court with the following stipulations: "Upon the foregoing statement of facts the court is to render such judgment as the rights of the parties require, and if the court decides that said conduits were real estate and were taxable as such by said plaintiff city, judgment is to be rendered for the plaintiff city for the sum of fourteen hundred and eighty four dollars, with interest from the date of the writ. If said conduits were not real estate and were not taxable as such by said plaintiff city, judgment shall be rendered for defendant corporation."

The only question presented to the Law Court was whether or not the conduits of the defendant company were legally taxable as real estate by the plaintiff city.

All the material facts are stated in the opinion.

Michael T. O'Brien, City Solicitor, for plaintiff.

Payson & Virgin, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, SPEAR, KING, JJ.

WHITEHOUSE, J. This is an action of debt to recover the sum of $1484.00 for taxes assessed by the plaintiff city against the defendant corporation, for the year 1906. The case comes to this court upon agreed statement of facts. It is admitted that the defendant is a legally organized corporation authorized by the Private and Special Laws of 1885, chapter 513, to do business in this State, and that during the year 1906, it was carrying on a telephone business in the plaintiff city and throughout the State. The tax in question was assessed upon the conduits of the company, as real estate, and was in addition to an excise tax assessed by the State Assessors upon the defendant corporation by virtue of sections 35 to 41, inclusive, of chapter 8 of Revised Statutes.

The conduits in question were iron and earthenware tubes or pipes laid under the surface of the streets with branch pipes running to poles set along the sides of the streets and the buildings on the streets, through which wires were run for the purpose of connecting the telephones in the central office of the defendant corporation, with telephones in the buildings of their subscribers and patrons.

These conduits were laid in the streets of Portland under the authority of section one of chapter 204 of the Private and Special Laws of 1891, and by virtue of licenses therefor granted to the defendant corporation by the municipal officers of the City of Portland, under rules and regulations established by them. Section one of chapter 204 of the Private and Special Laws of 1891, reads as follows:

"The New England Telephone and Telegraph Company may have the right to place its wires and cables under the surface of streets in the cities of Portland and Lewiston, with the permission and under the supervision of the municipal officers and subject to such rules and regulations as they may from time to time impose, and for that purpose may, when authorized by the board of mayor and aldermen of said cities, construct and maintain its cables, wires, conduits and manholes in any public way or street designated in such grant of authority."

Section 1 of the rules and regulations established by the municipal officers of Portland, provides, that these conduits shall be constructed and maintained "in accordance with the regulations hereinafter provided, and subject to existing ordinances and such rules and regulations in addition to, or in amendment thereof, as may hereafter be passed."

It is further provided by section nine of these regulations that the defendant company "shall remove its conduits to other suitable locations whenever ordered to do so by the board of mayor and aldermen," and by article 5 of section 10, that the company "will at once comply with any changes in its conduits, manholes or poles that the board of mayor and aldermen may after hearing duly appointed, order." And section 11, is as follows:

"Any authority granted by said board of mayor and aldermen may, after notice and hearing, be revoked or altered at any time without liability on the part of the city therefor; but in case any location in any street shall be revoked, a substitute location in some other street, that will in the opinion of the said board accommodate the service, shall be granted."

Sections 36 and 41, chapter 8 of the Revised Statutes, prescribe the method of taxing telephone companies in this State, as follows: "Every corporation, association or person operating in whole or in part a telephone or telegraph line within the state for tolls or other compensation, shall pay to the treasurer of state for the use of the state an annual excise tax for the privilege of conducting such business within the state, which tax, with the tax provided for in section forty-one, is in place of all taxes upon the property of such corpo-

ration, association or person employed in such business, and of all taxes upon the shares of the capital stock of any such corporation."

"The excise tax collected under the six preceding sections shall be in lieu of all taxes upon any corporation therein designated, upon its shares of capital stock and its property used in the conduct of its telephone or telegraph business, including the poles, wires, insulators, office furniture, batteries, instruments, telegraphic and telephonic apparatus, telephones and transmitters used under lease or license or owned by such corporation, association or person; provided, however, that the real estate and also personal property not hereinabove exempted, owned by such corporation, association or person, shall be taxed in the municipality in which the same is situated; but the amount of the tax assessed upon such real estate if owned and actually used by such corporation, association or person in the transaction of their business, shall be deducted by the board of state assessors from the tax laid hereunder. The assessment of taxes on such real estate shall be legal, whether assessed as resident or non-resident property."

Thus it appears that the only question to be determined by the court is whether the conduits of the defendant corporation were legally taxed as real estate by the City of Portland. The defendant contends that these conduits are not real estate and cannot therefore be legally taxed as such by the city.

The intention with which an article is annexed to the freehold has come to be recognized as the cardinal rule and most important criterion by which to determine its character as a fixture, and the attendant facts and circumstances are chiefly valuable as evidence of such intention. "This controlling intention is not the initial intention at the time of procuring the article in question, nor the secret intention with which it is affixed, but the intention which the law deduces from all the circumstances of the annexation. . . . If the annexation is not intended to be permanent, the chattel will not be deemed a fixture." Cyc. of Law & Proc. Vol. 19, pages 1046, 1047, and cases cited. In accordance with this view was the decision of this court in *Telephone Co.* v. *Cyr*, 95 Maine, 287, and the principles enunciated in that case are invoked by the defendant

company as decisive of the case at bar. The question involved in that case was whether the telephone line of the company, consisting of poles, wires and insulators was personal property as between debtor and creditor at the time of its seizure and sale on execution, and it was held by the court in that case that from such external facts as the nature of the structure and mode of attachment, the purpose and use for which the annexation was made and the relation and situation of the party making it, no intention to make a permanent annexation could be legally deduced and that the poles, wires and insulators there in question, continued to retain their character as chattels which might be seized and sold as personal property. In the opinion, the court say: "'The only privilege granted in any particular spot, parcel, or portion of land is temporary and not permanent, a mere license revocable at the will of the municipal officers so far as any particular portion of the highway or any particular highway is concerned, and not a permanent vested interest in the land itself."

"In determining the intention a most important consideration is the relation of the party making the annexation to the property in question. 1 Wash. Real. Prop. 5 Ed. page 22.

"Tried by this test, no intention can be inferred to make the posts, wires and insulators in this case a permanent accession to the freehold. The owner of the chattels was not the owner of the soil. It had no right to the continued enjoyment of its use, simply a revocable license, a temporary privilege which might be determined at any time by the municipal officers. There is nothing from which it can be inferred that it intended to deprive itself of its property. It is the temporary character of the privilege, obtained under the Act of 1885, which distinguishes it from the rights and interests of railroad and other quasi public corporations in lands taken under the right of eminent domain, or in public roads and highways, the use of which has been directly granted to them by the legislature without any such limitations as are imposed by that act. Under such circumstances, the rights and interests acquired are not subject to be determined at the will of third parties and are permanent and vested."

These considerations respecting the intention of the owner in erecting a line of telephone poles, are equally applicable to the conduits in the case at bar, which were employed as a more convenient and improved method of accomplishing the same purpose. It has been seen that by virtue of the rules and regulations of the municipal officers under which these iron and earthenware tubes were laid under the surface of the streets of Portland, the city reserved full right and authority to revoke or change the location of them whenever it might be deemed necessary or proper, and the defendant company would be compelled to remove such conduits "whenever ordered to do so by the board of mayor and aldermen." Wherever the location might be made, it was subject to revocation and change at the order of the municipal officers. The quality of permanency in the annexation did not exist. The conduits were obviously not designed to make the land more useful. They were not laid for the benefit of the freehold. There is nothing in the nature of the pipes, the mode and purpose of annexation or the relation of the parties to each other, to warrant the inference that the defendant company intended to relinquish its ownership of the pipes, or that the owner of the soil expected to acquire title to them by such annexation. They did not become a constituent part of the freehold. There is manifestly no distinction in principle between the line of poles under consideration in the Cyr case and the subterranean conduits in the case at bar.

It is true that in *Paris* v. *Norway Water Company*, 85 Maine, 330, it was held by this court that the water pipes, hydrants and conduits of a water company laid through the streets of a city or town, are taxed as real estate by the company in possession of them in the city or town where they are laid, but as pointed out in *Telephone Company* v. *Cyr*, supra, there is a marked distinction between the character of the location in case of these water pipes and the location of the conduits in the case at bar. The charter of the Water Company in that case, found in chapter 369 of Laws of 1885, expressly authorized the company to lay down and maintain its water pipes in the streets and they were not removable at the order of the municipal officers. In the opinion in that case, the

court say: "In using the street or road they place their pipes or rails in, or upon, the ground, there permanently to remain. They occupy land with appliances which become valuable for the revenue they yield. These appliances are fixed, permanent, used in connection with the soil that supports and sustains them. When considered as the property of their respective companies, they are not land within the common law rule. But when considered as if owned by the same person, who has title to the soil, they may properly enough be so considered."

But in the Cyr case, it has been seen it was held by the court that the interest of the party placing the conduits under the surface of the streets was "a mere license revocable at the will of the municipal officers so far as any particular portion of the highway or any particular highway, is concerned, and not a permanent vested interest in the land itself."

In some analogous cases in other States, conclusions have been reached in harmony with these views. In *Telephone Co.* v. *Terminal Co.*, 182 Mass. 397, upon a petition filed for the assessment of land damages by reason of the discontinuance of certain streets, the status of the plaintiff's conduits and wires was brought in question and the court said: "All the statutes and ordinances upon which the petitioners rely as a justification for their action in constructing conduits in the public streets and as giving them rights of property there, are merely provisions for the regulation of the different public rights in the streets. None of them purports to convey private rights of property. Most of them expressly state the limitations upon the authority given, and make the petitioners subject to possible future proceedings terminating or modifying their rights.

"But where there is no such express provision the result is the same. Their rights in connection with the rights of others of the public are subject to reasonable regulation, or even to termination at any time, if the supreme authority acting in the public interest shall so determine. It follows that they have no rights of property in the street, and their structures that were built therein were personal property which they had a right to remove, and which could not be subjects for the assessment of damages under statutes of this

kind." See also *Lorain Steel Co.* v. *Railway Co.*, 187 Mass. 500. So also in *Newport Illuminating Co.* v. *Assessors*, 19 R. I. 632, where poles of the plaintiff company were erected in the streets by permission of the city council, and the city reserved the right to remove them at any time; it was held that the corporation had acquired no vested right in the streets but that the poles and wires were simply articles of personal property, although in all probability, they would be allowed to remain substantially as they were for an indefinite period.

The fact has not been overlooked that in *Telephone Co.* v. *Cyr*, supra, the poles and wires there under consideration, were held to retain their character as personal property as between debtor and creditor, and that other and different considerations might in some instances be involved in determining whether they would retain their character as chattels for the purpose of taxation. In ordinary cases, however, in the absence of any statutory provisions to the contrary, property which is personal between debtor and creditor is presumptively personal for the purpose of taxation. Furthermore in the case at bar, it has been seen that section 41 of chapter 8 of the Revised Statutes above quoted, expressly includes poles and wires among the items of personal property exempted from taxation.

But the counsel for the plaintiff appears to attach much significance to the fact that conduits are not expressly mentioned in the specification of exempted items of the defendant's personal property in the statute last named; and with respect to some statutes such an omission might be deemed of noteworthy importance in ascertaining the intention of the legislature. In this case, however, it is a matter of common knowledge that at the time of the passage of the original act in 1883, providing for the taxation of telephone companies, this method of conveying wires by means of underground pipes instead of poles, had not been adopted by telephone companies, and the word conduits was therefore not suggested to the legislative mind and was not specified in the act. But the excise tax there provided for is declared to be "in lieu of all taxes upon any corporation therein designated, upon its shares of capital stock and its property used in the conduct of its telephone

or telegraph business;" and in view of the clear and unambiguous terms of this clause considered in connection with all other parts of the act, it seems to have been the manifest purpose of the legislature to impose upon telephone companies an excise tax for the privilege of doing business in this State, and to exempt all personal property used in its business, leaving only its real estate, such as land and buildings for local taxation. Whether the expression of one thing is to operate as the exclusion of another, is ordinarily a question of intention, to be gathered from an examination of all parts of a statute by the aid of the usual rules of interpretation; and under the circumstances of this case, the maxim "expressio unius est exclusio alterius" has but slight application and affords but little aid. In section 216 of Endlich on the Interpretation of Statutes, the author says: "As, however, mere particular expressions will not be allowed entirely to exclude a more general intent clearly manifested by a statute, so the effect of particular provisions upon more general ones overlapping them must also be a question of legislative intention. This intention is often best served by permitting the subject matter of the particular provision to stand side by side with that of the general provision."

Section 112, relating to the extension of an act to new conditions, contains the following in regard to things ejusdem generis, viz: "The language of a statute is generally extended to new things which were not known and could not have been contemplated by the legislature when it was passed. This occurs, when the act deals with a genus, and the thing which afterwards comes into existence is a species of it."

It is accordingly the opinion of the court that the conduits of the defendant company in the streets of Portland, being in fact a part of the property used by the company in the conduct of its business, are properly held to be embraced in the term "property" referred to in section 41 of chapter 8, Revised Statutes; that they are not excluded by the express mention of other items of exempted property in the same section, and that they are not subject to taxation by the City of Portland as real estate. The entry must therefore be,

Judgment for the defendant.

FRANK P. TOWLE *vs.* EDWIN M. MORSE.

Somerset. Opinion December 9, 1907.

Highways. Automobiles. Negligence. Proximate Cause. R. S., chapter 24, section 9.

With respect to the methods of travel and transportation on the highway, as in all other spheres of action, the law seeks to adapt itself to the new conditions arising from the progress of invention and discovery. The ordinary highway is open to all suitable methods of use and automobiles are now recognized as legitimate means of conveyance on such highways. The fact that horses unaccustomed to seeing them are likely to be frightened by the unusual sound and appearance of them, has not been deemed sufficient reason for prohibiting their use but it is an element in the question of due care on the part of the drivers of both horses and motor cars, and a consideration to be entertained in determining whether such care has been exercised to avoid accident and injury in the exigencies of the particular situation.

A person with a horse and wagon and a person with an automobile have a right to use the highways with their respective vehicles but it is the duty of each to exercise his right with due regard to the corresponding rights of the other.

In the case at bar, the plaintiff and his sister were riding in an open wagon drawn by one horse and discovering the canopy top of an approaching automobile in which the defendant and a companion were traveling, the sister gave the statutory signal by raising the hand for the automobile to stop. The defendant disregarded the signal to stop and ran the automobile out of the highway two or three rods into a dooryard. The plaintiff was thereby induced to believe that he could drive along in safety, but the automobile unexpectedly turned and reappeared in the highway directly in front of the plaintiff frightening his horse and causing personal injuries to the plaintiff. The verdict was for the plaintiff for $225.

If the defendant had regarded the signal and promptly stopped his machine, the plaintiff would have had an opportunity to drive into the dooryard himself as he intended to do. If the defendant had kept his car stationary for a few seconds in the dooryard, the plaintiff could have driven along the highway in safety. The defendant did neither of these things; but having induced the plaintiff to believe that the car would remain beyond the area of danger, he suddenly reappeared with it in front of the plaintiff

partly in the highway. His explanation of this management of his car was that the team was so far up the road that it had passed out of his mind. This must be deemed thoughtless inattention on his part, and "thoughtless inattention" has been declared by the court of this State to be the "essence of negligence."

Held: That the defendant's thoughtless inattention under the circumstances stated was a failure of duty on his part toward the plaintiff and the proximate cause of the injury, and that the verdict in favor of the plaintiff was warranted by the evidence.

On motion by defendant. Overruled.

Action on the case brought by the plaintiff to recover damages for personal injuries received by him as the result of the alleged failure of duty on the part of the defendant toward him in the use and management of his automobile on the public highway between Pittsfield and Palmyra. Plea, the general issue.

Tried at the March term, 1907, of the Supreme Judicial Court, Somerset County. Verdict for plaintiff for $225. The defendant then filed a general motion to have the verdict set aside.

The case appears in the opinion.

Manson & Coolidge, for plaintiff.

Gould & Lawrence, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, CORNISH, KING, JJ.

WHITEHOUSE, J. The plaintiff recovered a verdict of $225 for personal injuries received by him as a result of the alleged failure of duty on the part of the defendant toward him in the use and management of his automobile on the public highway between Pittsfield and Palmyra. The case comes to the Law Court on a motion to set aside the verdict as against the evidence upon the question of the defendant's liability.

In his amended declaration the plaintiff thus states his cause of action: "The defendant, being the owner, operator and manager of an automobile, was then and there running said automobile, on said public highway toward the plaintiff, and when the defendant with his automobile as aforesaid arrived at a distance of one hundred feet from the plaintiff with a loud voice requested the

defendant to stop said automobile, and visibly signalled by putting up the hand to the defendant to stop said automobile; but the defendant negligently and unlawfully continued to run at a high rate of speed said automobile, which was propelled by an exploding gasoline engine, toward the plaintiff until the defendant with said automobile arrived within thirty feet of the plaintiff, when said defendant did then and there negligently and unlawfully stop said automobile in the middle of said public highway; and the defendant did then and there go away and leave said automobile there standing without shutting off said exploding gasolene engine, but negligently and unlawfully allowed it to produce a loud noise."

It is further alleged in conclusion that "on account of the aforesaid unlawful and negligent act of the defendant in operating his automobile" the plaintiff's horse became frightened, and the plaintiff was violently thrown to the ground and injured.

Although the averment in the plaintiff's declaration thus characterizes the alleged failure of duty on the part of the defendant as a single "unlawful and negligent act" it will be seen that when analyzed, it in fact comprises three distinct acts of negligence, viz: First, in negligently and unlawfully continuing to run his automobile after receiving the signal to stop. Second, by stopping the car "in the middle of the public highway." Third, in leaving the car in that situation without shutting off the exploding gasolene engine, and thus allowing it to "produce a loud noise."

There is less than ordinary discrepancy in the testimony relating to the material facts and vital questions involved in the controversy. The responsibility resting upon the jury was not so much to reconcile conflicting evidence as it was to deduce the legitimate conclusion from facts proved or admitted.

On the morning of August 9, 1906, the plaintiff and his sister were riding in an open wagon drawn by a horse five and a half years old, on the highway leading from Palmyra towards Pittsfield. It is not questioned by the defendant that the horse was ordinarily gentle and well trained and reasonably suitable for driving upon the highway. They were traveling southerly and when near the residence of Mr. Keirstead, situated on the easterly side of the road and at a

little distance therefrom, they discovered the canopy top of an approaching automobile, a touring car, in which the defendant and his companion, Mr. Whitman, were traveling northerly. The distance between the parties at this moment is estimated by the plaintiff at 100 feet and by the defendant at 500 feet. The marked difference of opinion upon this point, however, did not become of great importance. The plaintiff says that as the road was narrow where they were likely to meet, he "hollered" to attract the defendant's attention when he saw the top of the car, and as soon as the occupants came into view, his sister raised her hand as the signal for them to stop, and the defendant admits that he saw this signal. At this juncture the plaintiff's team was north and the automobile was south of Mr. Keirstead's residence. A short distance from the highway the driveway leading from Keirstead's house diverges in two directions, one branch turning northerly and the other southerly thus forming a triangle with the highway for a base, which was about two rods long. Within this triangle, "three or four rods" from the highway, stood a post with a mail box upon it.

The defendant admits that he disregarded the signal to stop, and testifies as follows in relation to the course pursued by him: "Seeing that I had plenty of room and would in no way inconvenience them, I went to the farm house where I was going, turned into the yard around the mail box,—the machine was going north,—turned it round and brought it facing south in the driveway and partly in the road in front of the house. The team was so far up the road that it passed out of my mind." He admits that the power was not turned off and that the gasolene engine was left running, but claims that it made no other noise than a slight clicking sound which could not be heard more than five feet away.

After calling and signalling to the defendant, the plaintiff drove along with the intention of driving into Keirstead's yard himself, but when he saw the automobile running "three or four rods" out of the highway beyond the mail box, he assumed that he could drive along in the highway with perfect safety. But when the car circled about the post and came back into the southerly driveway and partly into the highway, a very short distance ahead of the

team, the horse became so frightened that the plaintiff jumped out of the wagon, seized the horse by the head and attempted to lead him past the car. In so doing, he was thrown to the ground and received the injuries of which he complains. The plaintiff insists that while the attempt to extricate his sister and himself from the apparent danger in which the unexpected return of the defendant's car to the highway, had suddenly placed them, might reasonably have been made in several ways, the course adopted by him under the stress of appearances at the time, will be found consistent with ordinary care and prudence even when calmly re-examined after the event. He says it was not practicable to turn about, because the road was too narrow. He could not drive into the yard because the way was obstructed by the automobile. He could not safely remain where he was, because the unexpected return of the car to the highway brought it into close proximity to his team and the horse became so frightened by the appearance of the automobile, the odor of the gasolene, and the noise of the engine, that the plaintiff was justified in believing that the horse could not be controlled by means of the reins alone.

The burden was upon the plaintiff to prove not only that there was a want of ordinary care on the part of the defendant with respect to one of the acts of negligence specified in the declaration, but that such want of care was the proximate cause of the injury. It is provided by section 9 of chapter 24, Revised Statutes, that upon request and signal by putting up the hand from the driver of a horse, the person operating an automobile shall "cause such vehicle to come to a stop as soon as possible and to remain stationary as long as may be necessary to allow such animal or animals to pass." And in the absence of any explanation the failure of the defendant to stop his car in obedience to the plaintiff's signal, would be evidence of negligence on his part and if it had proved to be the real and efficient cause of the injury, it might be sufficient to establish the defendant's liability on that ground alone. But it is manifest that the defendant's failure to stop at that point was not the cause of the injury. Instead of stopping in a narrow road to allow the plaintiff to pass, he ran the machine forward past the

Keirstead driveway and out to the easterly side of the mail box, a distance of three or four rods from the main road, and as the plaintiff had reason to expect the car to remain stationary at that point to enable his team to pass, there appeared to be excellent opportunity for him to proceed in safety. The plaintiff acted upon this appearance and was driving along past the northerly approach to the Keirstead house when the immediate return of the automobile to the highway created a new and dangerous situation. It is claimed that the conduct of the defendant which produced that situation was thoughtless and inconsiderate and without due regard for the safety of the plaintiff.

It is not contended, however, that the court can say as a matter of law that on receiving the statutory signal to stop, it was the duty of the defendant in the first instance to run his car entirely outside of the traveled way in order to give the plaintiff a safe passage. Both the plaintiff and the defendant had the right to use the highway with their respective vehicles, and each must exercise his right with due regard to the corresponding rights of the other. With respect to the methods of travel and transportation on the highway, as in all other spheres of action, the law seeks to adapt itself to the new conditions arising from the progress of invention and discovery. The ordinary highway is open to all suitable methods of use, and as observed by Cooley, C. J., in *Macomber* v. *Nichols*, 34 Mich. 217, "it cannot be assumed that these will be the same from age to age or that new means of making the way useful must be excluded merely because their introduction may tend to the inconvenience or even to the injury of those who continue to use the road after the same manner as formerly. A highway established for the general benefit of passage and traffic, must admit new methods of use whenever it is found that the general benefit requires them." Automobiles are now recognized as legitimate means of conveyance on the public highway. The fact that horses unaccustomed to see them are likely to be frightened by the unusual sound and appearance of them has not been deemed sufficient reason for prohibiting their use, but it is an element in the question of due care on the part of the drivers of both horses and motor cars, and a consideration to be

entertained in determining whether such care has been exercised to avoid accident and injury in the exigencies of the particular situation.

In the case at bar the defendant was duly apprised of the plaintiff's apprehension that his horse would be frightened by the car. If he had regarded the signal and promptly stopped his machine, the plaintiff would have had the opportunity to drive into the Keirstead door yard as he intended to do. If the defendant had kept his car stationary for a few seconds on the easterly side of the mail box, the plaintiff could have driven along the highway in safety. The defendant did neither of these things; but having induced the plaintiff to believe that the car would remain beyond the area of danger, he suddenly reappears with it in front of the plaintiff, partly in the highway. His explanation of this extraordinary management of the car is that the team was so far up the road that it had passed out of mind. This must be deemed thoughtless inattention on his part, and "thoughtless inattention" has been declared by this court to be the "essence of negligence." *Tasker* v. *Farmingdale*, 85 Maine, 523.

It is also the opinion of the court that this thoughtless inattention on the part of the defendant was the proximate cause of the injury, and that the conclusion reached by the jury was warranted by the evidence.

Motion overruled.

ESTHER ANDERSON, Admx., *vs.* CHARLES G. WETTER, Receiver.

Knox. Opinion December 9, 1907.

Pleadings. Amendments. New Cause of Action. "Immediate Death Caused by Wrongful Acts." No Action Therefor at Common Law. Statute Authorizes Recovery for the Death only. Rule V of Rules of Court. 9 and 10 Victoria 1847, chapter 93. Statute 1844, chapter 109, section 3; 1848, chapter 70; 1855, chapter 161; 1891, chapter 124. R. S., chapter 84, section 10; chapter 89, sections 9, 10.

It is doubtless true that greater liberality than formerly is allowed in the matter of amendments, and that mere technicalities are not viewed with favor. But it is also true that well established principals and precedents are not to be lightly set aside. "It will not be wise to depart too far from the established rule of pleading. Constant departure from these rules will soon result in confusion. In the end it will be found that justice will be better subserved by adhering to the remedies provided by law than in departing from them."

Amendments in matters of substance may be allowed under Rule V of "Rules of the Supreme Judicial Court," but this rule also provides that "no new count or amendment of a declaration will be allowed, unless it be consistent with the original declaration, and for the same cause of action."

Immediate death caused by wrongful acts was unknown to the common law as a cause of action. Under the statute of this State passed in 1891 and following Lord Campbell's Act in England (1847), it was made so. The common law gave to the personal representatives a right of action to recover for conscious suffering up to the time of death, but nothing for the death itself. The statute does not apply in case of conscious suffering and gives damages only for the death itself which must follow immediately. The statute did not create a new remedy for an existing cause of action but created a cause itself where none existed before. When thus created, a new cause of action arose with different parties in interest, different ground of suit, different rule of damages, different application of funds and different period of limitation.

In the case at bar which was an action of tort for causing the death of plaintiff's intestate, the declaration alleged that the suit was brought for the benefit of the estate, that the intestate "died in about three and one half hours," and the amount of the damage claimed was ten thousand dollars. The plaintiff asked leave to amend by substituting for the original declaration a count under Revised Statutes, chapter 89, sections 9 and 10, alleging that the suit was brought for the benefit of the widow and children of the intestate, that death was immediate, and fixing the amount of damages at five thousand dollars. The amendment was allowed and the defendant excepted.

Held: (1). That the original declaration was at common law and not under the statute. It did not allege immediate death and it failed to appear either by inference or direct averment, whether the plaintiff's intestate became unconscious from his injuries or endured conscious suffering while he survived.

(2). That the amendment was not properly allowed, because it introduced a new cause of action. It did not set out the same cause of action with fuller statement and in a more perfect form but alleged a new and distinct cause of action, and such amendments are not allowable.

A cause of action is neither the circumstances that occasioned the suit nor the remedy employed, but a legal right of action.

On exceptions by defendant. Sustained.

Action on the case brought by the plaintiff in her capacity as administratrix of the estate of August Anderson, late of Rockland, deceased, and against the defendant as receiver of William J. Gray and others, owners and operators of a granite quarry, for negligently causing the death of the said August Anderson.

The writ was returnable to and entered at the September term, 1906, of the Supreme Judicial Court, Knox County, and at the same term the defendant demurred to the plaintiff's declaration. Hearing was had on the demurrer at the following January term of said Supreme Judicial Court. The demurrer was sustained and the plaintiff was given leave to amend. The amendment when filed was objected to by the defendant but was allowed by the presiding Justice and thereupon the defendant excepted.

The original declaration in the plaintiff's writ is as follows:

"In a plea of the case; for that the said Wm. J. Gray, Peter Gray, Alexander Gray and Margaret Gray at south Thomaston in the county of Knox on the 24th day of May A. D. 1905, were and for a long time prior thereto had been the owners, operators and occupants of a granite quarry called the High Island Granite Quarry, situated within the limits of South Thomaston and were then and there engaged in quarrying granite in which they employed a large number of men, and it was the duty of the said Wm. J. Gray, Peter Gray, Alexander Gray and Margaret Gray to provide suitable tools, machinery, rigging, derricks, ropes and appliances for carrying on said operation of quarrying and hoisting

granite and also a safe and secure place for all their workmen therein employed by them or their superintendent or agents, and the plaintiff avers that on the twenty-fourth day of May A. D. 1905 and for a long time prior thereto the said August Anderson, husband of said plaintiff was in the employ of said Wm. J. Gray, Peter Gray, Alexander Gray and Margaret Gray and on said day aforesaid was legally at work there doing such work about said quarry as ordered by said Wm. J. Gray, Peter Gray, Alexander Gray and Margaret Gray or their superintendent and on the said twenty-fourth day of May A. D. 1905 was ordered by said Wm. Gray, Peter Gray, Alexander Gray and Margaret Gray or their superintendent to take down a derrick and cause it to be moved to another location. And the said August Anderson was on said 24th day of May working at the top of said derrick when the main guy rope parted at the bight of the block causing the derrick to fall throwing the said August Anderson about forty-five feet striking upon his head from which injury occasioned as aforesaid the said August Anderson died in about three and one-half hours after being thrown as aforesaid and striking upon his head.

"And the plaintiff avers that the rope which parted was not a suitable and sufficient rope to be used upon said derrick and was worn, old and rotten, unfit and unsafe to be used upon said derrick of which fact and knowledge the said Wm. J. Gray, Peter Gray, Alexander Gray and Margaret Gray had notice, and it was the legal duty of said Wm. J. Gray, Peter Gray, Alexander Gray and Margaret Gray to provide strong and suitable ropes to be used upon said derrick and the plaintiff further avers that on the said 24th day of May aforesaid the said August Anderson was in the exercise of due care in all work performed by him. And the plaintiff avers that the death of said August Anderson was caused by the negligence, fault and wrongful act of said Wm. J. Gray, Peter Gray, Alexander Gray and Margaret Gray in furnishing an insufficient rope which broke because it was worn, old and rotten and unfit for use which fact was known or could have been known had Wm. J. Gray, Peter Gray, Alexander Gray and Margaret Gray exercised proper care and caution in furnishing proper, strong and safe rope

instead of the rotten one used and furnished by the said Wm. J. Gray, Peter Gray, Alexander Gray and Margaret Gray upon said derrick. Whereby an action hath accrued to have and recover as administratrix of the estate of said August Anderson for the death caused as aforesaid the sum of ten thousand dollars for the benefit of said estate.

"And the plaintiff avers that Charles G. Wetter of Philadelphia in State of Pennsylvania was at the January term of the Supreme Judicial Court held at Rockland on the first Tuesday of January A. D. 1906, duly appointed receiver of the property of said Wm. J. Gray, Peter Gray, Alexander Gray and Margaret Gray in Knox county. And the plaintiff further says that on the second day of February 1906 that leave was granted by Hon. A. M. Spear one of the Justices of the Supreme Judicial Court to prosecute this suit against Charles G. Wetter, Receiver of the estate of the parties aforesaid, to the damage of the said plaintiff (as she says), the sum of twenty thousand dollars."

The amendment filed and allowed, is as follows:

"In a plea of the case, for that the said Wm. J. Gray, Peter Gray, Alexander Gray and Margaret Gray, at South Thomaston in said county of Knox, on the twenty-fourth day of May A. D. 1905, were and for a long time prior thereto had been and were the owners, occupants and in the control, management and operation of a certain granite quarry called the High Island Granite Quarry, situated on High Island and within the limits of said South Thomaston, and were then and there engaged in quarrying granite, in which employment they employed a large number of men; that as incidental to their said operations of their said quarry and for the purposes thereof, to wit, for the purpose of hoisting out blocks of stone from said quarry and moving and changing said blocks of stone when necessary in the operation of said quarry plant, the said Wm. J. Gray, Peter Gray, Alexander Gray and Margaret Gray long prior to said twenty-fourth day of May 1905, had erected and owned, controlled, maintained and managed and on said twenty-fourth day of May 1905 continued to own, control, maintain and manage on said quarry plant, a certain wooden derrick of great height, to wit: of the

height of eighty feet, which said derrick was held in place by several wire guys attached to the top of said derrick, thence extending in various directions to the ground, where they were attached; that there was attached at the bottom of said derrick a boom, so called, of great length, to wit: of the length of seventy-five feet; that said boom and derrick were operated by guy ropes, so called, furnished and put in place by said Wm. J. Gray, Peter Gray, Alexander Gray and Margaret Gray, which said wooden derrick, boom, guys and guy ropes were on said twenty-fourth day of May 1905, defective, decayed, out of repair, unsafe and unsuitable in construction and material for the purposes for which they had been erected and for which they were then maintained and operated by said Wm. J. Gray, Peter Gray, Alexander Gray and Margaret Gray, all of which the said Wm. J. Gray, Peter Gray, Alexander Gray and Margaret Gray then well knew or ought to have known by the exercise of reasonable care and diligence.

"And the plaintiff avers that on the said twenty-fourth day of May 1905, it was the duty of the said Wm. J. Gray, Peter Gray, Alexander Gray and Margaret Gray, being then as aforesaid the owners of and in control and management of said wooden derrick, booms, guys and guy ropes, to have, keep and maintain the same in a reasonably safe and suitable condition for the protection and safety of all persons rightfully and lawfully using the same for the purposes for which the same were then and there maintained and operated by said Wm. J. Gray, Peter Gray, Alexander Gray and Margaret Gray.

"And the plaintiff further avers that on said twenty-fourth day of May 1905, the said August Anderson was in the employ of said William J. Gray, Peter Gray, Alexander Gray and Margaret Gray, as a laborer at day wages and had been for a long time prior thereto, doing such work about said quarry plant as said Wm. J. Gray, Peter Gray, Alexander Gray and Margaret Gray or their superintendent and agents ordered him to do; that on said twenty-fourth day of May 1905 said August Anderson was ordered by said William J. Gray, Peter Gray, Alexander Gray and Margaret Gray or their superintendent and agents, to take down said derrick and move it to

another location that said August Anderson, in obedience to said orders, was on said twenty-fourth day of May 1905, lawfully at work at the top of said derrick and in the exercise of due care; that while said August Anderson was so at work and while in the exercise of due care, the main guy rope so furnished and maintained as aforesaid by said Wm. J. Gray, Peter Gray, Alexander Gray, and Margaret Gray, because of its decayed and unsuitable condition as aforesaid, which decayed and unsuitable condition was well known to said Wm. J. Gray, Peter Gray, Alexander Gray and Margaret Gray, or ought to have been known by the exercise of reasonable care and diligence, suddenly broke and parted at the bight of the rope at the block, causing the derrick to fall, and throwing the said August Anderson, while so at work and while in the exercise of due care and diligence and without any fault of said August Anderson, to the ground, eighty feet, where he struck upon his head; and by reason thereof, he was then and there instantly killed.

"And the plaintiff avers that the death of said August Anderson was caused by the negligence, fault and wrongful act of said William Gray, Peter Gray, Alexander Gray and Margaret Gray, as aforesaid, and not by any fault or negligence of August Anderson.

"Whereby and by reason whereof, an action has accrued to the plaintiff as administratrix, aforesaid, to recover damages to the amount of five thousand dollars, for the benefit of the widow and Elsa M. Anderson, aged four years and Augustus A. Anderson, aged one year, the two children of said August Anderson, by virtue of the statutes in such case made and provided.

"And the plaintiff avers that she is the widow, and that said Elsa M. Anderson and Augustus A. Anderson are the children of said August Anderson; that she is unable to perform much manual labor on account of sickness and the tender ages of said children; that she and said children were at the time of the death of said August Anderson and for a long time prior thereto, had been entirely dependent upon said August Anderson for their maintenance and support, and have otherwise suffered great pecuniary damages by reason of and resulting from the death of said August Anderson as aforesaid.

"And the plaintiff avers and says that she is the administratrix of the estate of said August Anderson, and that letters of administration have been duly issued to her, the plaintiff, by the Judge of Probate for the said county of Knox and State of Maine; that she is therefore the personal representative of the estate of said August Anderson deceased.

"And the plaintiff further avers that said Charles G. Wetter of Philadelphia in the State of Pennsylvania, was at the January term of the Supreme Judicial Court held at Rockland in said county of Knox, duly appointed Receiver of the property of said Wm. J. Gray, Peter Gray, Alexander Gray and Margaret Gray, within and for the State of Maine, and that he has duly qualified as said Receiver and is in control and management of the said property of said Wm. J. Gray, Peter Gray, Alexander Gray and Margaret Gray.

"And the plaintiff further avers and says that on the second day of February 1906 on a petition therefor, leave was granted to her the plaintiff, by Hon. A. M. Spear, one of the Justices of the Supreme Judicial Court for said State of Maine, to prosecute this suit against said Charles G. Wetter, Receiver of the estate as aforesaid."

Sections 9 and 10 of chapter 89 of the Revised Statutes, read as follows:

"Sec. 9. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as shall amount to a felony."

"Sec. 10. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of his widow, if no children, and of the children, if no widow, and if both, then of her and them equally, and, if neither,

of his heirs. The jury may give such damages as they shall deem a fair and just compensation, not exceeding five thousand dollars, with reference to the pecuniary injuries resulting from such death to the persons for whose benefit such action is brought, provided, that such action shall be commenced within two years after the death of such person."

The gist of the case appears in the opinion.

L. M. Staples and M. A. Johnson, for plaintiff.

Arthur S. Littlefield, for defendant.

SITTING: WHITEHOUSE, STROUT, PEABODY, CORNISH, KING, JJ.

CORNISH, J. This is an action against the defendant as Receiver of William J. Gray and others, owners and operators of a granite quarry, for negligently causing the death of August Anderson, plaintiff's intestate. To the original declaration in the writ, the defendant demurred, his demurrer was sustained and the plaintiff was given leave to amend. The amendment when filed was objected to by the defendant but allowed by the presiding Justice and on defendant's exceptions to this ruling, the case comes before this court.

Two questions are involved: First, was the original declaration intended to be made under the common law? Second, if so, can the writ be amended by substituting for the original declaration a declaration under Revised Statutes, chapter 89, sections 9 and 10.

The original declaration was inartificially drawn, but was manifestly designed to set out a cause of action at common law. In any event, it did not embody the essential elements to bring it within the statutory declaration. It alleges, not immediate death, nor death without recovering consciousness, but that the intestate "died in about three and one half hours after being thrown as aforesaid and striking upon his head." A similar allegation in *Sawyer* v. *Perry*, 88 Maine, 42, was held to describe a common law right of action. "It fails to appear, either by inference or direct averment, whether he became unconscious from his injuries or endured conscious suffering while he survived." *Conley* v. *Gas Light Co.*, 96 Maine, 281.

The amount of damages claimed in the writ is ten thousand dollars, while the limit in the statutory action is five thousand dollars, and the action is brought in the name of the administratrix for the benefit of the estate and not for the exclusive benefit of the widow and children as under the statute.

Our conclusion, therefore, on the first point is that the original declaration was framed under the common law.

That being so, the question arises whether the amendment, clearly introducing a cause of action under the statute, was allowable. All the points above referred to as keeping the original declaration outside the statutory requirements have been changed in the amendment to meet those requirements.

Amendments in matters of form are allowed under Revised Statutes, chapter 84, sec. 10, and in matters of substance under Rule V, of this court. But this rule also provides that "no new count or amendment of a declaration will be allowed, unless it be consistent with the original declaration, and for the same cause of action." It is familiar law that an amendment introducing a new cause of action is not allowable. *Bangor, Old Town and Milford R. R. Co.* v. *Smith*, 49 Maine, 9; *Milliken* v. *Whitehouse*, 49 Maine, 527; *Cooper* v. *Waldron*, 50 Maine, 80; *Farmer* v. *Portland*, 63 Maine, 46; *Lawry* v. *Lawry*, 88 Maine, 482. The existence of the rule is admitted, its application is sometimes difficult.

What is meant by the term "cause of action?" Some confusion has arisen from a misapprehension of its exact significance.

It does not refer to the facts and circumstances which may be introduced in evidence and because of whose occurrence the action has resulted. Those might be spoken of as causes for action but they are not properly speaking a cause of action.

The term is clearly and discriminatingly defined by Mr. Pomeroy, as follows:

"The primary right belonging to plaintiff and the corresponding duty belonging to defendant, and the delict or wrong done by the defendant, consisting in a breach of such primary right or duty, constitute a cause of action." Pomeroy Rem., sec. 452.

So too, causes of action are often confounded with remedies. This is clearly brought out in the case of *Emory* v. *Hazard Powder Co.*, 22 S. C. 476, 53 Am. Rep. 730, where the court say: "Causes of action are very often confounded with remedies; and being regarded as synonymous, the rules established with reference to the one are sometimes supposed to be applicable to the other. This however is a mistaken view of the subject, as a brief investigation will show. A cause of action may be defined in general terms to be a legal right, invaded without justification or sufficient excuse. Upon such invasion a cause of action arises, which entitles the party injured to some relief, by the application of such remedies as the laws may afford. But the cause of action, and the remedy sought are entirely different matters. The one precedes, and it is true, gives rise to the other, but they are separate and distinct from each other, and are governed by different rules and principles. It is true, that the motive which prompts the action is a desire for relief, and to obtain this relief is the object of the action; but this is not the legal sense of the phrase "cause of action." On the contrary, that sense is as stated above; i. e. a breach of one's legal rights."

A cause of action is therefore neither the circumstances that occasioned the suit, nor the remedy employed, but a legal right of action. The adjectives good and bad cannot, strictly speaking, be applied to it. "If a person have a legal right to sue, he has a good (that is legally sufficient) cause of action. If he have no legal right to sue, he has not merely a bad cause of action, but no cause, so that good cause of action can never mean more than cause of action." *Parker* v. *Enslow*, 102 Ill. 272, 40 Am. Rep. 588.

With this definition in mind that a cause of action is a right of action, let us consider the nature of the proposed amendment. "By the common law no value is put upon human life to be recovered in the way of damages." *Nickerson* v. *Harriman*, 38 Maine, 277; *Carey* v. *Berkshire R. R.*, 1 Cush. 475. No cause or right of action exists in case of such wrongful death. This means, not merely that there exists a cause of action which is extinguished or abated by other recognized legal principles, but that no cause or right of action ever arises or exists for such a wrongful act.

Such is the doctrine of the common law under which the original declaration in this writ was framed.

But, following Lord Campbell's Act in England, 9 and 10 Victoria, chap. 93, (1847), in most of the States the common law has been abrogated to a greater or less extent, and by statute a new cause of action has been created.

In this State as early as 1821, an act was passed providing for recovery by indictment for the use of the heirs, in case a life was lost through a defect in a highway for which a town was liable. By chapter 70 of the Public Laws of 1848, a similar provision was enacted with reference to steamboats and railroads, fixing the limit of recovery at $2000, which act was superseded by chapter 161 of the Public Laws of 1855, making the limit $5000.

This provision was held to have been made to obviate the objection to such recovery arising from the long established doctrine of the common law that no action for damage could be sustained for such loss of life. *State* v. *Grand Trunk Railway*, 58 Maine, 176.

This proceeding by indictment continued until 1891 when in chapter 124 of the Public Laws, the Legislature passed an act "To give a right of action for injuries causing death," by a civil suit, brought in the name of the personal representatives, for the benefit of the widow and children or heirs of the deceased, and extending the scope to any person or corporation through whose wrongful act or negligence the death occurred. The passage of this act was held to supersede and abrogate the remedy by indictment. *State* v. *Maine Central R. R. Co.*, 90 Maine, 267. The Act of 1891 is now embodied in Revised Statutes, chapter 89, sections 9 and 10.

The effect of this legislation is apparent. It was not to create a new remedy for an existing cause of action but to create the cause of action itself where none existed before. It was therefore necessarily a new cause of action, a new right of action.

The two causes are inherently distinct, both in their nature and in their results. The statutory cause of action begins where the common law leaves off. The common law gave to the personal representative a right of action to recover for conscious suffering up to the time of death, but nothing for the death itself. The statute

does not apply in case of conscious suffering, and therefore gives no damage for that; but for the death itself which must follow immediately. The former is brought for the benefit of the estate, the latter for the benefit of the next of kin, and ignores the estate. The rule of damages in the two actions is entirely different, *McKay* v. *New England Dredging Co.*, 92 Maine, 454, and while the amount under the statute is limited to $5000, at common law it is unlimited. The limitation of the common law action is six years, of the statutory action two years. With different parties in interest, different ground of suit, different rule of damages, different application of funds and different period of limitation, can there be any doubt that there is a different and a new cause of action.

In *Sawyer* v. *Perry*, 88 Maine, 42, the court, in discussing the purpose of the statute, say, the object was "not to give a new right of action where ample means of redress already existed, but to supplement the existing law, and give a new right of action in a class of cases where no means of redress before existed."

In *McKay* v. *New England Dredging Co.*, supra, the court say: "The right to any compensation is wholly created by the statute and the amount of the compensation is to be measured solely by the standard prescribed by the statute. At common law, in cases like this there was no right of action in the widow, children or heirs for any compensation. . . . The statute is to be construed as a new statute creating a new right and not as affirming or reviving an ancient right."

Similar statutes have received the same construction in other jurisdictions, where they have been held to be, not remedial in their nature, but creative of a distinctly new and independent right. *Fink* v. *Garman*, 40 Pa. St. 95; *Matz* v. *Chicago & A. R. R. Co.*, 85 Fed. Rep. 180; *Union Pacific Railroad* v. *Wyler*, 158 U. S. 285.

The test as to what constitutes a new cause of action was laid down by Chief Justice Parker in *Ball* v. *Claflin*, 5 Pick. 303, as follows: "The new count, offered under leave to amend, must be consistent with the former count or counts, that is, it must be of the like kind of action, subject to the same plea, and such as might

have been originally joined with the others. It must be for the same cause of action, that is, the subject matter of the new count must be the same as of the old; it must not be for an additional claim or demand, but only a variation of the form of demanding the same thing."

The same court had occasion to apply this test in the recent case of *Brennan* v. *Standard Oil Co.*, 187 Mass. 376, where they held that a count by an administrator for the benefit of the next of kin under the statute, for causing the death of plaintiff's intestate, cannot be joined with a count at common law for conscious suffering of the intestate before his death. This case is precisely in point as showing that the new count is not "consistent with the original declaration" as required by our rule of court. The learned counsel for the plaintiff cites many cases where amendments in matters of substance have been allowed, but a careful examination shows that they were all within their legitimate sphere. They simply contained a fuller statement of the plaintiff's claim as in *Mitchell* v. *Chase*, 87 Maine, 172, where the court found that the plaintiff intended to institute an action under the statute relating to damages by dogs, but failed to set it out in detail; or the amendment was merely additional to the description of the alleged defect as in *Chapman* v. *Nobleboro*, 76 Maine, 427; *Babb* v. *Paper Co.*, 99 Maine, 298, and similar cases. They all come within the rule laid down by this court in *Pullen* v. *Hutchinson*, 25 Maine, 249, and *Annis* v. *Gilmore*, 47 Maine, 152, that "where an intended cause of action is defectively set forth, and yet so as clearly to be distinguished from any other cause of action, in the manner it would be if the declaration was perfect, then the amendment may be properly allowed." In other words, an amendment in the case at bar which would make a fuller statement of the plaintiff's claim at common law would be allowable, but to insert an inconsistent count and a new and entirely different cause of action is a subversion of the rule.

The case falls more nearly within the decision in *Milliken* v. *Whitehouse*, 49 Maine, 527, where the court say "the original count contained nothing that would or could lead to the conclusion, or even the suspicion, that the facts made essential to the mainten-

ance of the action required by sec. 3, chap. 109, of the statute of 1844, were any part of the cause of action, and it does not fall within the provisions of the statute allowing amendments in the discretion of the court." It is further argued that the amendment should be allowed because it is based upon the same facts as the original declaration, and that in that sense the cause of action is the same. This arises from misapprehension as to the meaning of the term "cause of action," before defined. The point is answered by the Supreme Court of the United States in these words: "It is argued, however, that, as all the facts necessary to recovery were averred in the original petition, the subsequent amendment set out no new cause of action in alleging the Kansas statute. If the argument were sound, it would only tend to support the proposition that there was no departure or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law. The most common, if not the invariable, test of departure in law, as settled by the authorities referred to, is a change from the assertion of a cause of action under the common or general law to a reliance upon a statute giving a particular or exceptional right." *Union Pacific Railway* v. *Wyler*, 158 U. S. 285.

It is doubtless true that greater liberality than formerly is allowed in the matter of amendments, and that mere technicalities are not viewed with favor. But it is also true that well established principles and precedents are not to be lightly set aside. "It will not be wise to depart too far from the established rules of pleading. Constant departure from these rules will soon result in confusion. In the end it will be found that justice will be better subserved by adhering to the remedies provided by law than in departing from them." *Lawry* v. *Lawry*, 88 Maine, 482.

Our conclusion therefore is, that the amendment was improperly allowed, and the entry must be,

Exceptions sustained.

C. G. CHALMERS

vs.

A. S. LITTLEFIELD, S. T. KIMBALL AND J. E. MOORE.

Knox. Opinion December 14, 1907.

Railroad Mortgages. After-Acquired Property. Receivers. Actions against, not maintainable, when. U. S. Bankruptcy Act, 1898, section 4b, Statute 1905, chapter 85. R. S., chapter 52, sections 32, 59; chapter 53, sections 18, 24; chapter 83, section 27.

Where, after a street railway corporation with a franchise for a street railway had been duly organized and a copy of the survey and location of its route had been filed with the railroad commissioners, it proceeded to purchase land for a power house and to make arrangements for rights of way over private property wherever the location was outside of the highway, and subsequently executed a mortgage of its franchise and all its property, real and personal, then existing and thereafter to be acquired, including roadbed and materials and equipment of every kind, to secure an issue of bonds which were afterwards issued, and the mortgage contained a description of the route of the road as located, by courses and distances, and which said mortgage had been duly recorded both in the registry of deeds in the county and in the town where the railway was wholly located, *Held:* That it was not necessary that the corporation should have been actually possessed of tangible property, at the time the mortgage was given approximating in value the amount of the bonds which the mortgage was given to secure in order that an express provision therefor in the mortgage might be legally operative to include subsequently acquired property. Such a requirement would defeat the principal purpose for which such a mortgage is given, which is for the purpose of procuring the necessary funds for the construction and equipment of such railway, and it would be a self-destructive provision that would require such railway fully constructed and equipped as the only legal basis of such a mortgage.

In the case at bar, the defendants were the receivers of the Rockland, South Thomaston & Owl's Head Railway, a corporation. The plaintiff brought an action of trover against the defendants for the alleged conversion of

certain steel rails which were a part of a quantity purchased by the corporation for use in the construction of its street railway. The defendants were appointed receivers of the corporation prior to the alleged conversion and these steel rails had come into their possession as a part of the property of the corporation and had been used by them in completing the railway. Previous to the appointment of the defendants as receivers, the plaintiff in an action of assumpsit against the corporation had attached the steel rails alleged to have been converted by the defendants, and on a judgment obtained after the appointment of the defendants as receivers, and without leave of court, the attached rails were seized and sold on the execution issued on the judgment the plaintiff being the purchaser of the rails at the execution sale. The action of trover also was brought against the defendants without permission of the court. Prior to the plaintiff's attachment of the rails in his action of assumpsit, the corporation had executed a mortgage of its franchise and all its property, real and personal, then existing and thereafter to be acquired, including roadbed and material and equipment of every kind, to secure an issue of bonds, which were afterwards issued, and which said mortgage was duly recorded. Also prior to the plaintiff's judgment and the sale on execution in his action of assumpsit, equity proceedings were instituted praying for a foreclosure of the mortgage and the appointment of a receiver and thereupon the defendants were appointed receivers of the corporation and took possession of all the property of the corporation including the rails which, as aforesaid, were used by them in completing the railway.

Held: (1) That the defendants were legally appointed receivers of the corporation.

(2) That while the action of trover was brought against the defendants as individuals, yet whatever was done by them in using the rails in completing the street railway, was done by them in their capacity as receivers and not as individuals.

(3) That the mortgage was a valid mortgage and included the after-acquired property.

(4) That the rails alleged to have been converted by the defendants, were included in the description of after-acquired property in the mortgage.

(5) That the rails alleged to have been converted by the defendants legally passed into the custody of the defendants as receivers and were thus in the custody of the law.

(6) That the plaintiff without leave of court had no authority to seize and sell the rails on execution issued on the judgment, in his action of assumpsit, which was taken after the receivers were appointed and such a sale has no validity and passes no title. Property in custodia legis is not thus subject to seizure and sale on execution.

(7) That when property is lawfully in the hands of a receiver, a suit therefor cannot be brought against the receiver except by leave of court.

On report. Judgment for defendants.

Action of trover brought against the defendants as individuals for the alleged conversion of 136 steel rails of the aggregate value of $1440. These rails were a part of a quantity purchased by the Rockland, South Thomaston & Owl's Head Railway, a corporation, for use in the construction of a street railway from the Rockland line to Crescent Beach and Owl's Head.

The plaintiff claimed title to the rails and the right to recover in his action of trover by virtue of an attachment of the rails in an action of assumpsit brought by him against the aforesaid corporation and a sale of the same on the execution which issued on the judgment in his action of assumpsit, the plaintiff being the purchaser of said rails at the execution sale. The plaintiff's attachment of the rails in his action of assumpsit was made July 12, 1904, judgment rendered at the April term, 1906, of the Supreme Judicial Court, Knox County, execution issued May 26, 1906, and sale of the rails on execution was made June 14, 1906.

The pleadings filed by the defendants as shown by the "agreed statement of pleadings" were as follows:

"On second day of return term defendants filed a statement that they were receivers, duly appointed by the court and setting out the bills in equity under which they were appointed, and that the property sued for came into their hands as part of the property of the railway, and that they used a portion of it in completing the railroad under order of court; that plaintiff's judgment was taken after their appointment, and whatever was done by defendants was done as receivers and not as individuals and asked that no further proceedings in this case be allowed in this court, and said cause be dismissed, upon which no ruling was made.

"At the trial term defendants pleaded general issue, and by brief statement set up same as in the statement filed at first term, and further that this suit was brought without leave of court."

Plaintiff and defendants agreed upon the following statements "in lieu of documents:"

"That the Town of South Thomaston executed and delivered a deed of two acres of land, being a portion of the Town Farm in

South Thomaston, to said company for station purposes, dated Sept. 30, 1903, recorded Oct. 3, 1903.

"That the Rockland, South Thomaston & Owl's Head Railway executed and delivered to the Federal Trust Company of Boston, a mortgage of all its property and franchise real and personal then owned or hereafter to be acquired by it, therein describing the route of said road by courses and distances for security of the bonds of said Railway, dated Oct. 1, 1903, recorded in Knox Registry, Oct. 3, 1903, Vol. 127, Page 458, and in the Town Clerk's office at South Thomaston, Oct. 1, 1903.

"That a bill in equity was filed, March 27, 1906, by M. A. Johnson, therein claiming to be the owner of $38,000, par value of the bonds of said company, and praying for a foreclosure of said mortgage.

"That A. S. Littlefield, as counsel for said company, filed an answer the same day.

"That on said March 27, 1906, Thomas McGaffrey of Boston, filed a bill against said corporation, and said company filed an answer signed by A. S. Littlefield as counsel for said company.

"That on the same day A. S. Littlefield and S. T. Kimball were appointed by the court receivers of said railway corporation.

"That said bill of M. A. Johnson was amended, on his motion, by a decree of the court June 11, 1906, so as to substitute the Federal Trust Company as plaintiff instead of M. A. Johnson, in the bill filed by him, and J. E. Moore was thereupon appointed a receiver, to act as such with said Littlefield and Kimball. Said receivers were duly qualified and gave bond as required by said decree."

Tried at the April term, 1907, of the aforesaid Supreme Judicial Court. At the conclusion of the evidence the case was "reported to the Law Court for decision upon so much of the evidence as would be legally admissible if seasonably objected to, the Law Court to render such judgment as the law and the legal evidence require."

The case appears in the opinion.

D. N. Mortland, for plaintiff.

S. T. Kimball, Arthur S. Littlefield and Joseph E. Moore, for defendants.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, CORNISH, KING, JJ.

WHITEHOUSE, J. This is an action of trover brought against the defendants for the alleged conversion on July 1, 1906, of 136 steel rails of the aggregate value of $1440. These rails were a part of a quantity purchased by the Rockland, South Thomaston & Owl's Head Railway, for use in the construction of a street railway from the Rockland line to Crescent Beach and Owl's Head.

The plaintiff claims title to the rails and the right to recover in this action by virtue of an attachment in an action of assumpsit brought by him against the corporation July 12, 1904, and a sale June 14, 1906, on the execution which issued on the judgment in that case.

The defendants deny that the plaintiff acquired any title to the rails by force of his attachment thereof and sale on execution, and justify their acts on the ground that prior to the alleged conversion by them, they had been duly appointed by the court, receivers of the corporation, and that the rails sued for came into their possession as a part of the property of the railway.

It appears that the plaintiff's judgment in the action of assumpsit in which his attachment was made, was not taken until after the appointment of the defendants as receivers, and although this action of trover is brought against them as individuals, it is not in controversy that whatever was done by them in using the rails for the construction of the railroad, was done by them in their capacity as receivers and not as individuals.

After the company had been duly organized and a copy of the survey and location of its route had been filed with the railroad commissioners, it proceeded to purchase land for a power house and to make agreements for rights of way over private property wherever the location was outside of the highway; and subsequently on October 3, 1903, the corporation executed a mortgage to the Federal Trust Company of Boston, of its franchise and all its property, real and personal, then existing and thereafter to be acquired, including roadbed and material and equipment of every kind, to

secure an issue of bonds to the amount of $175,000, which were afterwards issued. The mortgage contained a description of the route of the road as located, by courses and distances.

It is not in controversy that thereupon materials for the construction of the road were purchased, the roadbed graded and ties and rails laid nearly the entire length of the road from Rockland line to Crescent Beach, and the road so nearly completed that it was accepted by the railroad commissioners in 1904 to within about a quarter of a mile of its present terminus, and rails and ties were laid further on to Crescent Beach. In the progress of this work, poles, wire and rails had been delivered and laid along the side of the road as far as Crescent Beach for future use in building the road, and among the materials were the rails sued for in this case.

At the time the property of the corporation thus came into the actual possession of the receivers, all of the rails in question taken by them were lying on private lands in close proximity to the railroad location where they were originally deposited when purchased by the officers of the corporation. They did not appear to be in charge of any keeper appointed by the officer making the attachment, nor was any actual change made in their location or custody at the time of the sale on the execution. The rails were from 24 to 30 feet in length and weighed 60 pounds to the yard, and the officer appears to have treated them as property which by reason of its bulk could not be immediately removed, (R. S., chap. 83, sec. 27) and sought to preserve the attachment by filing a copy of his return in the town clerk's office.

But in consequence of financial embarrassment, a bill in equity was filed in this court March 27, 1906, praying for a foreclosure of the mortgage above described and the appointment of a receiver. The Federal Trust Company, the mortgagee therein named, was duly admitted as a party plaintiff to this bill and the defendants having been appointed receivers of the corporation, made written demands upon its officers for possession of its property, and with the express consent of these officers took possession of all its property including the rails in question. By virtue of a decree of the court authorizing and directing them so to do, the receivers pro-

ceeded to complete the road to Crescent Beach and for that purpose used a portion of the rails in question which were placed beside the road for that purpose. The defendants accordingly contend that this action of trover is not maintainable, first, because any lien created by the plaintiff's alleged attachment of the rails in question was not preserved by the appointment of a keeper to maintain possession of the property. Second, because the property was covered by the terms of the mortgage and legally passed into the custody of the receivers and no action could be maintained against them without permission of the court.

Upon the threshold of the inquiry, the plaintiff challenges the validity of the receivers' appointment, on the ground that the court had no jurisdiction of the proceedings by virtue of which they were appointed. This objection, however, is clearly untenable. It appears to have been suggested by the recent decision of this court in *Moody* v. *Port Clyde Development Co.*, 102 Maine, 365. It was there held that chapter 85 of the Public Laws of 1905 under which the receiver in that case was appointed, was in effect an insolvent law, and that inasmuch as the United States Bankruptcy Act of 1898 was in existence at that time, chapter 85 of the Laws of 1905, never went into operation and the State court had no authority to appoint a receiver. But in the case at bar the court was clearly authorized to take jurisdiction of the bill for the foreclosure of this mortgage by virtue of chapter 52, sec. 59 of the Revised Statutes and in accordance with articles 2 and 3 of the mortgage. It had authority to appoint a receiver without the aid of the provisions of chapter 85 of the Laws of 1905. Furthermore, it appears from section 4 b of the United States Bankruptcy Law of 1898, as amended in 1903, that railroad corporations are not included in the terms of that Act since it is expressly made applicable only to corporations engaged principally in "manufacturing, trading, printing, publishing, mining and the mercantile pursuits." It was accordingly held in *Gailing* v. *Seymour Lumber Company*, 113 Fed. Rep. 483, with respect to the bill brought to foreclose a mortgage and appoint a receiver, that although the State law was suspended as applied to cases of insolvency, it was a good bill for the

foreclosure of a mortgage and the appointment of a receiver and that the receiver was entitled to hold the property as against the trustee in bankruptcy, the latter being entitled only to the excess of value of the property above the mortgage debt.

It is next contended in behalf of the plaintiff that notwithstanding the provisions of R. S., ch. 53, sec. 24, that "Any street railway corporation may issue bonds in accordance with the provisions of the general law for any lawful purpose and secure the same by mortgage of its road, franchise and property," the mortgage in question to the Federal Trust Company cannot legally include after acquired property like the rails in question, for the reason alleged that at that time the corporation had no tangible property in existence and nothing to mortgage except its franchise. The general proposition is not questioned that a mortgage attaches to any property which is an "accession to the thing granted, which is embraced within the powers of the company as they existed when the mortgage was executed," but it is argued that the subsequently acquired property in this case was not an accession to anything that existed when the mortgage was made.

But it has been seen that prior to the execution of the mortgage, the corporation had acquired title to two acres of land for station purposes, and it is not controverted that it was a legally organized corporation with a franchise for a street railway and that a copy of the survey and location had been filed with the commissioners. It is not necessary that the corporation should be actually possessed of tangible property approximating in value the amount of the bonds which the mortgage is given to secure in order that an express provision therefor in the mortgage may be legally operative to include subsequently acquired property. Such a requirement would defeat the principal purpose for which such mortgages are authorized. They are executed for the purpose of procuring the necessary funds for the construction and equipment of the railroad, and it would be a self-destructive provision that would require a railroad fully constructed and equipped as the only legal basis of such a mortgage. This practical feature of the question is more fully recognized in R. S., ch. 52, sec. 32, which by section 18 of chapter 53 is expressly made

applicable to street railroads. It provides that "A railroad corporation to obtain money to build or furnish its road, or to pay any debts contracted for that purpose, may issue its bonds in sums not less than one hundred dollars," etc.

The judicial opinion of the State as announced in the comparatively recent decisions of this court is no less explicit and conclusive upon this question.

In the case at bar the general description in the mortgage of the property covered by it is as follows: "All and singular the roadbed, tracks, and poles, lines, wires, machinery, rolling-stock and railroad equipment, together with all its property, rights and privileges, and franchises of every kind and nature, including rights of way, land and buildings."

Then follows a description of after-acquired property as follows: "All property, rights, privileges and franchises of every kind and nature which the Railway Company shall hereafter acquire, or which shall come into its possession as owner, the Company hereby covenanting with the Trustee and its successors, that from time to time as the Railway Company acquires and comes into the possession or enjoyment of additional property (real, personal or mixed and whether for railway, lighting, heating or power purposes), rights, privileges and franchises, the same shall become and remain subject to the lien of this mortgage as fully and completely as though owned and possessed by the Company at the date hereof; and that it will from time to time, on request, make and deliver to the Trustee, such deeds or other instruments in writing as may be appropriate to vest the title thereto, free from all liens and incumbrances in the Trustees, to be held upon and subject to the Trusts and agreements herein contained."

In *Hamlin* v. *Jerrard*, 72 Maine, 62, the plaintiff brought an action of trespass against a sheriff for taking on a writ and selling on execution a narrow gauge locomotive engine that had been purchased with a view to a change of gauge on the road in the near future, but not then made. In the opinion the court say:

"The mortgagors had a charter for a railroad, with all the necessary franchises and rights for its construction, equipment and opera-

tion. The mortgagee had previously contracted to construct and equip it for the company, and the work had been commenced. He was to be paid partly in the bonds of the company, which would sell in the market. . . . . A large part of the numerous railroads in this country have been constructed by the aid of mortgages to individuals or trustees. . . . . "The weight of authority in this country is in favor of the doctrine that the power to mortgage is incident to the rights granted by the Act of incorporation. Even if the franchise to be a corporation cannot be assigned, "the franchises to build, own and manage a railroad, and take tolls thereon, are not necessarily corporate rights; they are capable of existing in and of being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable." "When the railroad itself is mortgaged with the franchise, the rolling-stock to be acquired for the purpose of completing or repairing it is so appurtenant to it, that the company have a present, existing interest in it sufficient to uphold the grant of both together, the one as incident to the other. Their title to the railroad is the foundation of an interest in the cars and engines to be acquired for its use." "We regard it as settled by the weight of authority that any property connected with the use of the franchise of a railroad corporation for the purposes intended by its charter, to be subsequently acquired, may be effectually mortgaged. The validity of such a lien upon after acquired property is distinctly held by this court in *Morrill* v. *Noyes*, 56 Maine, 458, 471, at least against a later mortgage given after the property was in existence and in the possession of the company; and the language of the court is quite as applicable to the case of a subsequent attaching creditor: 'That a mortgage of a railroad and the franchises of the company with all the rolling stock then owned and to be afterwards acquired and placed upon the road, will create a valid lien upon cars and engines subsequently purchased, there would seem to be no longer any doubt.'

"It may therefore be regarded as judicially settled, with little or no divergence of opinion, that in equity a mortgage of a railroad

will be held to apply to after-acquired rolling-stock, and other personal property, if the terms of the mortgage cover such future acquisitions."

"But all rolling-stock to be acquired, as well as materials and equipments for constructing, maintaining, operating, repairing and replacing the road and its appurtenances or any part thereof, are within the specific statement of property mortgaged." . . . . "We think that such property as this, of a class specially mentioned in the mortgage, acquired for lawful railroad purposes, or land for present use, or to meet expected requirments, is held by the mortgagors subject in equity to the mortgage from the time their title and possession accrued, and that when the trustees become actually possessed of it under the mortgage, they may hold such possession at law against the attaching creditors of the corporation." . . .

"In equity it is not disputed that the moment the property comes into existence the agreement operates upon it."

The equitable principle governing the provision in the mortgage relating to the execution upon request of further mortgages of after-acquired property, is thus explained in Rorer on Railroads, page 246. "Upon the principle that equity considers that as done which a chancellor would decree to be done, and as upon every acquisition of property within the description contained in the mortgage a chancellor would decree the company to execute a mortgage it will be, therefore, considered and treated as though it had been done."

It appears that prior to the plaintiff's attachment of the rails, the mortgage to the Federal Trust Company was recorded in the Registry of Deeds of Knox County, and in the office of the town clerk of South Thomaston in which the railroad built by this corporation was wholly located. Furthermore it appears from the testimony of the plaintiff himself that before his attachment was made, the plaintiff personally examined the record of this mortgage in the Registry of Deeds.

The defendants thereupon contend that if the rails be deemed personal property under the circumstances of this case, no legal attachment of them could in any event have been made on the

plaintiff's writ, except in conformity with the general provisions of the statute relating to the attachment of personal property under mortgage.

But it is unnecessary to give further consideration to this branch of the discussion.

It is not in controversy that the rails sued for became the property of the corporation by purchase, and it is the opinion of the court that they were included in the description of after-acquired property in the mortgage, and that they legally passed into the custody of the defendants as receivers who had been appointed by the court to take possession of all the property of the corporation and manage it for the interest of bondholders and creditors as their rights might be made to appear. The entire property was thus in the custody of the law when the plaintiff without leave of court presumed to seize and sell the rails in question which formed a part of it, on the execution issued on a judgment which was also taken after the receivers were appointed. This the law did not permit the plaintiff to do. The authorities are substantially uniform in support of the proposition that such a sale has no validity and passes no title. Property in custodia legis is not thus subject to seizure and sale on execution. This doctrine, so manifestly indispensable to the successful management of property and the orderly administration of estates is so firmly established and generally recognized, that no citation of authorities in support of it is necessary. "If a creditor thinks the property not properly in the hands of the receiver, or that the demands for which it is placed there are unjust, it is his duty to apply to the same court which appointed the receiver and placed him in possession thereof, for its discharge from legal custody, that he may proceed against it by suitable process in his own behalf. But it cannot be wrested by piecemeal from the custody of the law by adverse proceedings. Not even a suit will lie against a receiver, except by permission of the court appointing him. The party aggrieved is to apply for relief to that same court." 2 Rorer on Railroads, p. 899, sec. 3.

Again in Alderson on Receivers, section 584, the principle applicable to such situations is thus stated: "The possession of the

receiver being considered the possession of the court, the property in his hands is looked upon as being in custodia legis, and, on that account, it is not to be taken upon any writ of attachment or execution while in his possession. In compliance with this rule it has been decided that the recovery of a judgment against partners after the appointment of a receiver for the benefit of creditors, does not create a lien upon any of the firm property or funds in his hands, and such property or funds cannot be levied upon by execution or reached by garnishment because it is already in custodia legis. So also the owner of a judgment lien upon land in the possession of a receiver cannot levy execution thereon, but must apply to the court in chancery which will protect his interests when making sale or distributing the proceeds of the land."

In *Walling* v. *Miller*, 108 N. Y. 173 and *Wiswall* v. *Sampson*, 14 How. (U. S.) 52, it was explicitly declared that while property is thus in the custody of the court, a sale thereof on execution without leave of the court, was wholly illegal and void. See also same case, 2 Am. St. Rep. 400, and extended note thereto; *Gilman* v. *Ketcham*, 84 Wis. 60.

This action of trover against the receivers in this case was also brought without leave of court. It is true, as already stated, that the plaintiff has declared against the defendants as individuals and not as receivers, but it is not in controversy that whatever was done by them was done in their capacity as receivers. In *Morrill* v. *Noyes*, 56 Maine, 458, the plaintiff had leave to bring suit against the defendant and elected to bring it against him as an individual and not as receiver, on the ground that as receiver he had no right to take the property. The court thus explain the course of procedure under such circumstances: "After the receiver has taken possession, any person claiming the property, or any interest therein, may present his claim to the court. He may be made a party to the suit in order to establish his claim. Or he may petition to have it heard before a master. Or he may, by express permission of the court, bring a suit for the possession, care being taken to protect the receiver, But the receiver will not be ordered to deliver the property to a claimant until his right is established, in one of these

modes. Nor can any claimant bring a suit against the receiver, except by leave of court, without being liable for a contempt, if the property is a part of the subject matter in controversy.

"The general principles are decisive of the case before us. The receiver came rightfully into possession of the property. It was his duty to retain possession until ordered otherwise by the court. The plaintiffs had leave to bring this suit, but they chose the form of their action. They have mistaken their remedy. Their action is not a suit for the possession, but is an attempt to hold the receiver personally liable for the value of the property. Such an action cannot be maintained under the circumstances of this case." See also Alderson on Receivers, pages 521 to 524, and Rorer on Railroads, p. 894.

The conclusion is that this action is not maintainable and that the entry must be,

Judgment for the defendants.

ABRAHAM LAZAROVITCH *vs.* H. TATILBUM.

Cumberland. Opinion December 16, 1907.

Replevin. Conditional Sales. Title. Assignment. Evidence.

The plaintiff brought an action of replevin for certain household furniture alleged to have been delivered to the defendant by the Reliable Furniture Company of Portland, on a so called lease, which constituted a conditional sale, the title remaining in the vendor until the goods were paid for, and a breach of condition having occurred. The plaintiff set up title from the vendor by a written assignment which by its terms assigned and transferred to the plaintiff "all demands of every kind and description" which the vendor had against various persons including the claim against the defendant for the unpaid purchase price of the furniture. The defendant contended that the sale was absolute, that no lease was given, and that in any event the plaintiff under the mere assignment of the claim did not obtain sufficient title to the property to maintain replevin. During the trial and against the defendant's objection, certain receipts given by the vendor and accepted by the defendant were admitted in evidence. Also the defendant offered in evidence a certain mortgage of the furniture given by him to one Muskin subsequent to the purchase of the furniture, which was excluded. The verdict was for the plaintiff.

Held: (1) That on the question of fact whether a lease was given and whether the original sale was conditional or unconditional, the jury having found in favor of the plaintiff, the court does not feel warranted in disturbing the verdict. The evidence was a mass of contradictions, most of the witnesses being related by blood or by marriage, and if the jury were satisfied upon this proposition of fact their conclusion ought to stand.

(2) That under the assignment given by the vendor to the plaintiff, which was for a valuable consideration, it was the intention of the assignor to convey and of the assignee to purchase all the interest of the assignor in the personal property which had been conditionally sold, and which was in fact retained as security for the debt, and that the plaintiff had sufficient title to maintain replevin in case of breach of condition.

(3) That the receipts given by the vendor and accepted by the defendant when installments were paid, in which the furniture was described as leased, were properly admitted as being in the nature of an admission, their weight being for the jury.

(4) That a mortgage of the furniture given by the defendant to a third person subsequent to the conditional sale, was properly excluded as having no probative force on the question of title and being a mere self-serving act.

On motion and exceptions by defendant. Overruled.

Replevin brought in the Superior Court, Cumberland County, for certain household furniture alleged to have been delivered to the defendant by the Reliable Furniture Company of Portland, on a so called lease which constituted a conditional sale. The Reliable Furniture Company was a firm composed of Louis Silverman and Max Levi. The plaintiff claimed as assignee from the vendors. Plea, the general issue with a brief statement to the effect that no lease of the furniture was given, that the sale was absolute and that the furniture was subsequently mortgaged by the defendant to one Julius Muskin whose mortgage was duly recorded.

Tried at the April term, 1907, of said Superior Court. Verdict for plaintiff. The defendant then filed a general motion for a new trial, and also took exceptions to certain rulings made by the presiding Justice during the trial.

The written assignment under which the plaintiff claimed, is as follows:

"Know all men by these presents, that we, Louis Silverman and Max Levi, doing business under the name of Levi & Silverman, in consideration of nine hundred (900) dollars to us paid by Abraham Lazaerovitch the receipt whereof we do hereby acknowledge, do hereby assign and transfer to said Abraham Lazaerovitch all demands of every kind and description which we have against the persons whose names and addresses are given below with the amount of each claim stated, and we hereby make constitute and appoint said Abraham Lazaerovitch our lawful attorney to collect the same in our name or his own without expense to us."

(Attached to this was a list containing sixty-seven names with addresses, with the amount of each claim stated opposite the respective name and address. Among the list of names the following appears:

"H. Tatilbum 51 Franklin St. 163.00"

The total amount of the claims contained in the list is $2165.37)

"All the above being of Portland except where otherwise specified. And we, Louis Silverman and Max Levi do hereby constitute and

appoint the said Abraham Lazaerovitch and his assigns to be our attorney irrevocable in the premises, to do and perform all acts, matters and things touching the premises in the like manner to all intents and purposes as we could if personally present.

"In witness whereof, we have set our hands and seals this twentieth day of December, A. D. 1906.

"Signed, Sealed and delivered in presence of (Signed) LOUIS SILVERMAN" (seal)
"MAX LEVI" (seal)

The case appears in the opinion.

George S. Murphy and Connellan & Robinson, for plaintiff.

Dennis A. Meaher, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, CORNISH, KING, JJ.

CORNISH, J. Replevin for certain household furniture alleged to have been delivered to the defendant by the Reliable Furniture Company of Portland, on a so-called lease, which constituted a conditional sale. The plaintiff claims as assignee from the vendors. The defendant contends that no lease was given, that the sale was absolute and that the goods were subsequently mortgaged by him to a third party.

On the question of fact whether a lease was given and whether the original sale was conditional or unconditional, the jury have found in favor of the plaintiff and we do not feel warranted in disturbing the verdict. The evidence is a mass of contradictions, most of the witnesses being related by blood or by marriage, and if the jury were satisfied upon this proposition of fact their conclusion ought to stand.

The important question is whether, assuming that a lease was given and that the sale was conditional, the plaintiff had sufficient title or right of possession to maintain replevin against the vendee.

The lease itself was not produced at the trial, the plaintiff claiming that it had been lost but the general form used by the Furniture Company was as follows:

"$..... Portland, Maine. 190

For value received.....promise to pay Reliable Furniture Co. or order.....Dollars, as follows;.....

.....Dollars down; balance in.....

payments of.....Dollars with.....

until the full sum is paid. This note is given in payment for the following described property, this day bought by me from said Reliable Furniture Co., viz:

.....

.....

.....

and it is agreed that the title to said goods shall remain in said Reliable Furniture Co. until said sum and interest are fully paid. Said goods shall not be removed from No. .....street without consent of said Reliable Furniture Co. in writing.

I further agree if the first and every payment is not paid at maturity.....will deliver the above mentioned goods to Reliable Furniture Co. or their order, without any legal proceedings on their part, or cost to them."

The Reliable Furniture Co. was a firm composed of Louis Silverman and Max Levi, which firm on December 20, 1906, gave to the plaintiff, who had been their collector, an assignment, which by its terms assigned and transferred to him all "demands of every kind and description" which they had against various parties including the defendant, and constituted the plaintiff, their attorney to collect the same either in their name or his and to do and perform "all acts, matters and things touching the premises in the like manner to all intents and purposes as we would if personally present."

The plaintiff claims that with this assignment were delivered to him all the leases which went with the various claims and that this particular lease was also to be delivered if found. The jury have sustained that contention. The defendant had paid a portion of the purchase price but the balance of $163 was unpaid and the conditions of the lease had been broken, so that the original vendors would have been entitled to maintain this action.

The validity of such conditional sales as between the parties, and the continuance of the title in the vendor have been so often upheld by the courts of this and other States that the citation of authorities is unnecessary. Has such title passed to the plaintiff under the facts of this case?

A general assignment in insolvency will pass the vendor's title to such assignee. *Pulsifer* v. *D'Estimauville*, 86 Maine, 96. And the doctrine is well settled in many States that an assignment of the note or claim on which the conditional sale of personal property is based carries with it a transfer of title in the property itself.

It would be admitted that at least an equitable title to the property passed to the assignee and that by proper process he could be subrogated to the rights of the assignor. But the courts have gone further and to prevent circuity of action where personal property is involved, have held that the property itself passes as incident to the claim. This question arose in the case of *Esty* v. *Graham*, 46 N. H. 167, and the court in the course of the opinion say: "In form this is neither a pledge nor mortgage, but the obvious purpose of the parties was a sale and the holding of the melodeon as security for the price and we think it must be so regarded. If it be so, then the property so held passes with the debt as a mere incident as in other cases of collateral security; otherwise the vendor, who has already received pay for his property, continues to hold it, with the chance that it may become his absolutely, if the vendee should fail to pay the price to the assignees." This decision is affirmed in the recent case of *Cutting* v. *Whittemore*, 72 N. H. 107. The same doctrine that the assignment of the note or claim gives to the assignee all the payee's rights and interests in the property, is held in *Spoon* v. *Frambach*, 83 Minn. 301; *Myres* v. *Yaple*, 60 Mich. 339; *Kimball* v. *Mellon*, 80 Wis. 133, and *Baton* v. *Groseclove*, 11 Idaho, 227. In the last mentioned case the court express their conclusion as follows:

"It must be conceded that when the vendor of property parts with possession and at the same time he reserves to himself the legal title to the property and thereafter sells, assigns and tranfers to a third party all of his rights and interests in and to the contract,

that he is thereafter left without any interest either in the title or possession of the property or the contract. While this is true, the title to the property must rest somewhere, either in the original vendee of the property or the assignee of the contract. To say that the title passed to the vendee of the property will be to deprive the owner of the legal title, to whom the purchase price has not yet been paid, of a valuable property right. It must amount to depriving him of the right of disposition of his property and cutting off the security which he had retained for the payment of the debt. The assignment of such a contract carries with it, the legal title of the property and gives to the assignee of the contract all the rights and remedies enjoyed by the assignor."

In the case at bar the evidence shows more than a mere assignment of the claim. There was an evident intention to transfer the property itself and to convey to the assignee all the rights therein held by the vendors and without which the claims themselves were doubtless of little value. The assignment was under seal and not only were the vendors' demands of all kinds against the defendant transferred, but as full authority was given the plaintiff "in all matters and things touching the premises" as the vendors themselves possessed. This instrument was drawn by an attorney to whom both of the parties went for the purpose. Moreover, valuable consideration was paid by the assignee to the original vendors, paid not merely for the claims but for the vendors' interest in the property; and as the property itself was in the hands of a third party, such payment by the plaintiff to the conditional vendors was sufficient to pass title then and there as between the parties without actual delivery. While the vendors held the title to the property as security, it was not the title of a mere mortgagee or pledgee. The title of a mortgagee or pledgee becomes absolute in case the note is not paid and proper proceedings are taken. The title of a conditional vendor is already complete and is defeasible only in case the note is paid. Until that time he has the same right and authority to sell and transfer his interest in the property that any other owner of personal property has and by the same methods.

The only additional act that could have been done by the vendors in this case would have been the execution and delivery of a bill of sale of all their right, title and interest in the property. We do not think that was necessary. In our opinion the plaintiff succeeded to all the rights of the vendors legal as well as equitable, and therefore was entitled to bring this action of replevin.

The first exception by the defendant is to the admission of the receipts given by the plaintiff as agent and collector of the vendors to the defendant when installments were paid. These receipts were in the nature of an admission by the defendant that he held the furniture under a lease. They were fourteen in number and were given at various times between Aug. 1, 1906 when the initial payment of one hundred dollars was made and December 17, 1906, the later receipts being for one dollar each, and all stating that they are for leased furniture. They were accepted by the defendant in that form and were admissible on the question of the existence of a lease, their weight being for the jury.

The second exception is to the exclusion of a mortgage of the property purporting to have been given by the defendant to a boarder in his house. The ruling was correct. The question at issue was whether the title was in the assignee of the vendors or in the vendee. The act of the vendee in mortgaging the property could have no probative force upon that issue. It was merely a self-serving act.

Motion and exceptions overruled.

FRANCES L. LAZELL *vs.* WENDELL BOARDMAN et als.

Waldo. Opinion December 17, 1907.

Measurements. Statute Mile. Marine Mile. Historical Works as Evidence.

The plaintiff claimed title to the southwestern of the two Ensign Islands in West Penobscot Bay, under a quitclaim deed from the land agent of the State of Maine dated January 3, 1879, purporting to convey to her, "all the right, title and interest that the said state may have in any and all the islands hereinafter specified situated in Penobscot Bay in said state of Maine." Among the several islands enumerated in said deed were the said Ensign Islands. The defendants entered said southwestern island and cut and carried away certain growing trees standing thereon and thereupon the plaintiff brought an action of trespass quare clausum to recover damages therefor. The vital question involved was that of title. Among other things it was contended in defense that the said island claimed by the plaintiff was included in the Muscongus Grant, executed sometime between 1620 and 1635; and, by the Articles of Separation from Massachusetts, never became the property of the State of Maine. It was conceded that the Muscongus Grant included the said island claimed by the plaintiff if within three miles of the main land. It was also agreed that the said island claimed by the plaintiff, if measured by statute miles, is more than three miles from the main land and therefore became the property of the State of Maine by the aforesaid Articles of Separation; but if measured by geographical or marine miles, that it is less than three miles from the main land, and consequently became a part of the Muscongus Grant and was never owned by the State of Maine. *Held:* That the three mile limit should be measured by the marine mile.

In this case, three historical works, "Williamson's History of Maine," "Williamson's History of Belfast" and "Farrow's History of Islesboro" were used in evidence and were properly so used and were entitled to such weight as authorities as they might have on the question whether or not the aforesaid island is within the boundary of the Muscongus Grant, but that weight, if any, is but little.

On report. Judgment for defendants.

Trespass quare clausum brought by the plaintiff against the defendants to recover damages for cutting and carrying away trees from the southwestern of the two Ensign Islands in West Penobscot Bay in Waldo County. Plea, the general issue with brief statement as follows:

"1. That the title to the premises described in the writ is not in the plaintiff, but is in the defendant, Wendall Boardman.

"2. That the plaintiff had not any title to the real estate described in her writ, and was not in the lawful possession thereof, at the time of the alleged acts of trespass contained in her writ."

Tried at the September term, 1906, of the Supreme Judicial Court, Waldo County. At the conclusion of the evidence, and by agreement of the parties, the case was reported to the Law Court to render such judgment as the law and the legally admissible evidence required.

All the material facts are stated in the opinion.

The "Muscongus Grant," now known as the "Waldo Patent," as printed in volume 10, folio 237, of the "York Deeds," which said volume was published under the authority of chapter 181 of the Resolves of 1893, is as follows:

"To all to whom these Presents Shall Come Greeting Know ye yt ye Counsell established at the Plimouth in ye County of Devon for ye planting Ruling Ordering and Governing of New England in America for Divers good Causes & Considerations them thereunto especially moving Have given granted Bargained Sold Enfieffed allotted and Sett over & by these presents do Clarly & absolutely give grant Bargaine Sell alliene enfiffe allott & assigne & Confirm unto John Beauchamp of London Gentlemen, & Thomas Leverett of Boston in ye County of Lincorn gent their heirs associates & assigns all & Singular those lands Tenement & Hereditments whatsoever with ye appurtenances thereof in New England aforesd which are Cittuate Lying & being within or between a place thence Commonly Called or known by ye name of Musrongruss towards ye South orr Southwest & a strait line Extending from thence directly ten Leaugs — up — into ye Maine land & Contains thence toward ye great Sea Commonly Called ye South Sea & ye utmost Limits of ye space ten Leauges — — — — — on ye North & North East — of a River in New England aforesd Commonly Called Penobscott Towards ye North & Northeast & ye great Sea Commonly Called ye westarn ocean, towards ye east & astait & direct line extending from ye most westeran part & Point of ye Sd Straight line which extends from

Mecongoss aforesd towards ye South Sea to ye uttermose Northeram limmits of ye Sd ten leagues on ye North side of ye Sd River of, Penobscott towards ye west & all land & ground wood Soiles River waters Fishings Herredittments Profitts Commodityes Priviledges Fraimchises — & Emoliments whatsoever Situate Lying & being arising happening or Remaining or which Shall arise or Remain within ye Limmits & bounds aforesd or any of them together with all Sd land yt ly & be within ye Space of Three miles within ye Space of Sd land & pmisses or any of them to have & to hold all & Singulary ye Sd land Teniments & hereditments & pmisses whatsoever with ye appurtenances & every part & parcell thereof unto ye Sd John Beauchamp & Thomas Leverett their heirs associates & assigns forever to their only proper & absolute use & behoofe of ye sd Jno Beauchamp & Thos Leverett their heirs associates & assigns forevermore to be Holden of ye Kings most Excellent Majesty & Successors as of his manner of East Greenwich by ffealtie only & not in Capite nor by length of Service Yielding & paying unto his majesty his heirs & Successors ye fifth part of all Such Oare of Gold & Silver yt Shall be gotten & obtained in or upon ye pmisses or any part thereof In Witness whereof ye Sd Counsell established at Plymoth in ye County of Devon for ye Planting Ruling ordering and Governing of New England in America have hereunto putt ye Common Seal ye Thirteenth day of March in ye first year of ye Reign of Our Soveraign Lord Charls by ye Grace of God King of England Scotland France & Ireland Defender of ye Faith &c. Anno Domini 1629

(Seal) "R. WARWICK"

Cilley & Burpee, for plaintiff.
Dunton & Morse, for defendant.

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

SPEAR, J. This is an action of trespass quare clausum, to recover damages for cutting and carrying away some trees from the

southwestern of the two Ensign Islands in West Penobscot Bay in the County of Waldo.

The vital question involved in the case is that of title. The plaintiff claims under a quitclaim deed from the land agent of the State of Maine, dated January 3, 1879, purporting to convey to her, "all the right, title and interest that the said State may have in any and all the islands hereinafter specified situated in Penobscot Bay in said state of Maine." Among the several islands enumerated were the Ensign Islands, one of which included the locus in quo. Wendell Boardman, one of the defendants, claims title to the same island by virtue of a tax deed from the town of Islesboro dated November 16, 1889, purporting to convey said island to him.

Several defenses are set up, which if all maintainable, would but operate to effect a nonsuit upon technical grounds without necessarily solving the question of title. Inasmuch therefore, as this question, a determination of which will settle the rights of the parties, is put in issue and fully argued, we deem it inexpedient to discuss any of the defenses set up and calculated to work a defeasance only of the present form of action, and advisable to consider the real question at issue, whether the title was in the plaintiff. We shall not attempt to go further than this, as the plaintiff must recover upon the strength of her own title, and, if it appears that she has none, must fail. Where the title of the island may be is another question which we do not undertake to determine.

As already observed, the plaintiff sought to establish her title by the presentation of a quitclaim deed from the State. Assuming that this deed would vest in the plaintiff whatever title the State, at the time, had in the locus, the defendants say it conveyed nothing to the plaintiff, because the State had no title in the island in question, to convey. In support of this contention, they present evidence of the Muscongus Grant, later known as the Waldo Patent, which they say included the island in question, and that therefore the island never became the property of the State. A statement of this grant is found in Farrow's History of Islesboro, as follows: "In 1620 King James I. of England granted about all of the continent of North America to forty noblemen, knights and gentlemen,

who were styled 'The Council of Plymouth, in Devon, England.' This Council surrendered its charter in 1635 (having been outgeneraled by the Massachusetts settlers). Before surrendering it they made several grants of land within the State of Maine, which held good. One of these grants was known as the Muscongus Grant, now known as the Waldo Patent, which had in it, by estimation, nearly one thousand square miles."

It is not claimed that the State acquired any title to any part of the territory or islands included in the Muscongus Grant or Waldo Patent.

It is conceded by counsel upon both sides that the Muscongus Grant or Waldo Patent included the island in question if within three miles of the main land.

It is likewise agreed that the island, if measured by statute miles, is more than three miles from the main land and therefore became the property of the State by the articles of separation from Massachusetts; and, if measured by geographical or marine miles, that it is less than three miles from the main land, and consequently became a part of the Muscongus Grant or Waldo Patent, and was never owned by the State.

The plaintiff contends that inasmuch as the Muscongus Grant was a land grant, it should be measured in statute miles by the surveyor's chain. On the contrary, the defendants claim that inasmuch as the three mile limit was over the sea, it should be measured by the log in the miles adapted to the measurement of the sea. Which measurement did the parties to the grant intend? We find nothing in the grant itself which sheds any light upon this question.

Nearly two hundred years afterwards when some question arose as to the location of Long Island, now called Islesboro, in a petition by certain citizens to the general court of Massachusetts, praying for a survey, they spoke of having had reliable *chain* men sworn to make the survey, that is, the distance from the main land to the center of Islesboro. But the suggested use of the chain by these men who perhaps had never heard of the difference between a statute and marine mile, is entitled to no weight in the determination of this question.

No case was cited and we are unable to find any decision that settles the question before us. Our only criterion therefore for the conclusion at which we arrive, is found in the reason and logic of the situation and the support of an analogous rule promulgated by the court of our own State.

The Plymouth Grant was made in 1620 and the Muscongus Grant sometime between 1620 and 1635. The statute or English mile was adopted as the standard of land measurement in the 35th year of the reign of Elizabeth, 1593. The log was invented about the same time which inaugurated measuring of the sea or marine miles, known as English geographical miles. The statute mile measures 5280 feet on the land; the sea mile, knot, geographical or marine mile measures 6086.7 feet on the sea, on the scale of 60 geographical or sea miles to a degree.

It would therefore appear that the statute mile for measuring the land, and the marine mile for measuring the sea by the use of the log, were established and went into use at about the same time in England, and somewhere from thirty to forty years before the grant in question was made. It is then reasonable to infer that all the parties to these grants, made so soon after the adoption of these different measurements for the land and for the sea, must have been familiar with the purposes for which these different standards were used, and it is not unreasonable to assume that they contemplated these measurements to be practically applied, each kind to be adapted to its own sphere, the statute to the land, the marine to the sea.

In defining the distance to which the grant should extend and cover the islands in the sea, it used simply the word "miles." To interpret the meaning of the word "mile" when its use is capable of two applications, our first inquiry would naturally be as to what subject of measurement it was intended to be applied; if to the land, we should at once say statute miles to be measured by the chain; if to the sea, we should as readily say marine, to be measured by the log. Each kind of measurement being thus adapted to its own sphere.

As a matter of fact and common information all measurements

upon the land and sea, so far as we have any knowlege of them, are made in accordance with the scheme of adaptability. All maps are measured by statute, and all charts by marine, miles. The reason for this is plain. It is impracticable to measure the land by the log or the sea by the chain. It was just as impracticable when the Muscongus Grant was made as it has been during all the intervening years down to the present time. Our conclusion therefore is, that the three mile limit should be measured by the marine mile.

This conclusion we think is fully sustained so far as the reasoning and logic of the opinion are parallel, by *Rockland, Mt. Desert & Sullivan Steamboat Co.* v. *Fessenden*, 79 Maine, 140.

With respect to the suggestion that naturally arises in a case of this kind that the sea mile might be reduced to a land mile, Chief Justice PETERS in the opinion, says: "It is said that the navigator may reduce his sea mile to a land mile and be in accord with that mile in that way. It has not often been done and cannot by ordinary men be easily done. . . . The statute mile is adopted only in England and the United States, while the marine mile is known and acted upon by all the civilized people of the globe," and thus this suggestion was condemned.

Three historical works, Williamson's History of Maine, Williamson's History of Belfast and Farrow's History of Islesboro, were properly used in evidence. McKenzie on Evidence, page 26; Abbott's Trial Evidence, page 833; *State* v. *Wagner*, 61 Maine, 178. These three authorities all concur in locating the island in question within the boundary of the Waldo Patent, therefore so far as the authorities are entitled to any weight, and in our view they have but little upon this question, they are in confirmation of the theory of measurement herein adopted.

In accordance with the stipulation in the report, the court are of the opinion that the entry must be,

Judgment for defendants.

CAPOLA M. HOYT *vs.* INSURANCE COMPANY OF NORTH AMERICA.

SAME *vs.* NORWICH UNION FIRE INSURANCE SOCIETY OF ENGLAND.

Somerset. Opinion December 17, 1907.

Fire Insurance. Verdict. Same will be set aside, when.

Where a plaintiff has recovered a verdict which is manifestly against the weight of evidence, it will not be permitted to stand but will be set aside.

In the case at bar, the plaintiff's hotel property and contents were destroyed by fire. At the time of the loss there was $3000 insurance upon the property, divided equally among three companies two of which were the defendants. One company adjusted its loss, but the two defendants refused to pay and thereupon the plaintiff brought suits against them. The two actions were tried together, and a verdict for $600 against each defendant was returned. It was chiefly contended in defense that the property was very largely over insured and that the plaintiff procured one Reed to burn the same. *Held:* That the verdicts were so manifestly against the weight of evidence that they must be set aside.

On motions by defendants. Sustained.

Two actions of assumpsit, one against each defendant, brought upon fire insurance policies issued by the defendants on the same property which was destroyed by fire June 14, 1905. Plea, in each action, the general issue with brief statement, substantially the same in each case, as follows: "And for brief statement of special matter of defence to be used under the general issue pleaded, the said defendant further say: First: That the plaintiff is not entitled to recover on said policy declared upon, because she attempted to defraud the defendant company by procuring one Otis Reed to burn the property covered by the policy declared upon in this action.

"Second: The policy declared upon is void because the plaintiff the insured, afterwards made or placed other insurance on said property without the assent in writing or in print of the company, which additional insurance was outstanding at the time of the

loss, contrary to the terms, conditions and provisions of said policy declared upon.

"Third: The defendant says that the plaintiff did not, forthwith after the loss, render to the defendant company, a statement in writing signed and sworn to by the insured, setting forth the value of the property insured and the manner in which the fire originated.

"Fourth: Because the entire loss did not exceed twelve hundred dollars.

"Fifth: That the plaintiff never gave the defendant company any legal notice and proof of the loss.

"Sixth: That the plaintiff fraudulently over-valued the property lost."

The plaintiff also filed in each action a counter brief statement, substantially the same in each case, as follows:

"And now comes the plaintiff, and in reply to the brief statement of special matter of defence pleaded by the said defendant, the plaintiff further says;

"First. That she did not attempt to defraud the defendant company by procuring one Otis Reed to burn the property covered by the policy declared upon in this action.

"Second. That the said defendant knew when other insurance was placed upon the said property and that it waived the requirement that the assent of the said defendant, to such other insurance, should be expressed in writing or in print upon said policy; that there were three policies of insurance upon the same property at the time of the fire, in three different companies, and that S. E. Remick was the duly accredited agent of each of the three companies, and that each of the three companies was bound by his knowledge of existing insurance or other insurance afterwards put on by him.

"Third. That the plaintiff did submit a statement in writing to the said defendant company, signed and sworn to by her, setting forth the value of the property insured, and the manner in which the fire originated, as far as she knew, and that said statement was submitted forthwith after the fire, or that the defendant expressly waived in writing the furnishing of such statement by the plaintiff.

"Fourth. That the entire loss exceeded three thousand dollars, the total amount of insurance on said property.

"Fifth. That she did give the defendant legal notice and proof of the loss.

"Sixth. That she did not fraudulently overvalue the property lost."

These two actions were tried together at the September term, 1906, of the Supreme Judicial Court, Somerset County. Verdict for plaintiff for $600 in each action. Each defendant then filed a motion substantially the same in each case, to have the verdict against it set aside for the following reasons:

"1st. Because it is against the evidence.

"2nd. Because it is manifestly against the weight of evidence.

"3rd. Because it is against the law.

"4th. Because the damages were not assessed in the manner directed by the court or under the terms and conditions of the policy or as the law provides.

"5th. Because the attorney for the plaintiff wrongfully and unlawfully argued to the jury the question of the acquittal of the plaintiff at a former trial upon a charge that she conspired to burn the same buildings and that said case was tried upon the same evidence as the civil suit, and urged them to take that matter into consideration in the determination of the issue before them in this case, although no evidence whatever was put into the case as to her acquittal or as to what evidence was introduced at the former trial. All of which was very detrimental to the rights of the defendant company.

"6th. Because the verdict in the light of all the evidence introduced in the case and the law as clearly enunciated by the presiding Justice is so manifestly wrong that it is evident that the jury acted under bias and prejudice against this defendant simply because it is a corporation."

The case fully appears in the opinion.

Forrest Goodwin, for plaintiff.

Merrill & Merrill, for defendants.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, KING, JJ.

KING, J. The plaintiff's hotel property and contents, situated in the village of West New Portland, Maine, were destroyed by fire on the 14th of June, 1905. At the time there was $3000 insurance upon the property, divided equally among three companies. One company adjusted its loss. These actions, against the other two companies, were tried together and a verdict of $600 against each company returned, which the defendants move to have set aside. It was chiefly contended in defense that the property was very largely overinsured and that the plaintiff procured one Otis A. Reed to burn it.

In May 1904, the plaintiff, a young divorced woman, moved with her mother from Mechanic Falls to Wilton in this State, where they remained for a few weeks only. During that brief stay in Wilton the plaintiff formed an intimate acquaintance with Otis A. Reed, an overseer in the woolen mill, having a wife and two children, with whom, however, he was not living. On May 28, 1904, the plaintiff purchased for $450 the property in question, and with Reed and her mother moved there about the first of June.

The condition of the property was very poor and repairs were begun. The first policy of insurance for $1000 was written July 22, 1904, through the agency of S. E. Remick, who solicited the business, and suggested that he would write more when the repairs were completed. The plaintiff claims that she expended in repairs and furnishings, "somewhere about $3000." On the other hand the defendants contend that she did not in fact expend one third of that sum. The character, extent and cost of the repairs actually made, the plaintiff's claims in relation thereto, and the testimony in her behalf in support of those claims, are important because of the light they reflect upon the other vital contention that she procured Reed to burn the property "for the insurance."

No detailed or other satisfactory account of her expenditures was given by the plaintiff. She claimed to have no such account, and no receipts, with few exceptions. But she asserted that she and her

mother had about $3000 in money, all of which she expended upon the property, in addition to the purchase price.

It appears that just before the plaintiff and her mother left Mechanic Falls for Wilton, the mother sold her home for $1000; that there were incumbrances upon it of about $450 which were paid at the time; that the plaintiff had about $900 of her own money; that on the way from Mechanic Falls to Wilton they deposited in a bank in Lewiston $650 of the mother's money, and "$700 or $800" of the plaintiff's; that the plaintiff afterwards drew from the bank the $450 with which to pay for the property in question. But the mother testified, in support of the plaintiff's claim that they had $3000 which was expended upon the property, that before she sold her home she had $1500 in cash. She says: "I had it, part of it mine and part my sister willed me when she died." After admitting on cross examination that no will was probated, and no inventory filed, she stated: "There was nothing only she had the will made out and I got it sealed and signed. She said she owed nobody and nobody owed her and nobody knew she had this money, and it was mine for taking care of her, and I have got the will that shows it." In answer to her counsel afterwards she said that her sister before her death handed her a package of money containing about a thousand dollars. She further testified that another daughter, who with her husband had conveyed the home to her subject to the incumbrances, sent her the $450 at the time of the sale, with which the incumbrances were paid, and, therefore, that she had $2500 in cash when she left Wilton, only $650 of which was deposited in the bank, and the balance of $1850 she kept on her person. "I kept it with me, round my person. I had it in a belt." Thus they account for "somewhere about $3000" claimed to have been expended.

The defendant companies, on the other hand, appear to have made an exhaustive effort to procure from workmen employed, material men, and other dealers of whom the plaintiff claimed to have made purchases, evidence of the expenditures which the plaintiff in fact made. And it is claimed that the amount so accounted for at the trial is $401.57 for repairs to the buildings and $352.84 for furnishings.

It will serve no useful purpose to incorporate here an analysis of the voluminous evidence contained in the record relative to this question. We have examined that evidence with care and it satisfies us that the testimony offered to support the plaintiff's claim that she expended "somewhere about $3000" in repairing and furnishing that property is unreasonable, and unbelievable, when squared with the established facts and circumstances of the case.

It is unreasonable that any one would expend $3000 on property so situated, costing but $450, and with no business whatever to warrant it; unreasonable that the mother acquired the $2500 in the way she claims; unreasonable and unbelievable that when she deposited $650 in the bank for safe keeping she still had $1850 in cash on her person "in a belt," and took it with her among strangers for an indefinite stay, and with no purpose for its immediate use. If the mother had this sum of $1850 in cash on her person, which the plaintiff freely and wholly expended afterwards on this property, why was the $450 drawn from the bank to pay for the property?

The conclusion is irresistible that the amount deposited in the bank (about $1400) was substantially all the money the plaintiff and her mother had at the time, from which the price for the property was paid, leaving a balance practically equal to the amount of the expenditures accounted for; that the plaintiff's claim of $3000 expended was at least unjustifiable, and that her testimony and that of her mother in support of that claim is not credible.

We come now to the real vital question in these cases. Did the plaintiff procure Otis A. Reed to burn the property in question that she might obtain the insurance? Reed confessed the crime. He was called as a witness for the defense and testified that he committed the act for the plaintiff and at her request made of him at a room in the Atwood Hotel in Lewiston on the night of June 8, 1905.

In order to perceive to what extent Reed's testimony is corroborated by unquestioned facts and circumstances, and on the other hand to recognize the utter weakness and irreconcilability of the plaintiff's attempted answer to that testimony, it is necessary to point out briefly the relations between the plaintiff and Reed and their conduct down to the time when the plot was completed at the

Atwood Hotel, and also from that time to the time of the trial.

Reed continued to live with the plaintiff and her mother from the time they moved to the property until the last of February, 1905. He assisted in making the repairs and did the chores, receiving no compensation except his board. The last of February, 1905, he went back to Wilton to work. He and the plaintiff corresponded two or three times a week, and she admits that such terms as "Dear Otis" and "Lovingly Cappie" were used by her in this correspondence. He came back in March and remained over night. On May 7, 1905 the plaintiff wrote Mr. Remick, the insurance agent, that she was ready to have more insurance put on her place. On May 10, 1905 the other two policies of $1000 each were written. There is no evidence that any hotel business was carried on at the property. On June 7 the plaintiff sent a letter by special delivery to Reed at Wilton, requesting him to meet her the next day on the train at Leeds Junction. On the 8th, the plaintiff and her mother left West New Portland, each taking a trunk, leaving no one in the house. The mother went to Strong to visit a son and the plaintiff started for Boston. Reed met the plaintiff on the train at Leeds Junction according to appointment. They went to Lewiston, took a hack to the Atwood Hotel, where Reed registered as "F. H. Jones & wife, Madison, Me.," and procured a room to which they both went. They took supper together at a restaurant, attended the theatre in the evening and returned to the room. Reed says that he remained in the room all night. The plaintiff says he left the room about half past twelve. No other room was assigned to him. In the morning they took breakfast together, went together to the railroad station, and she took the early train for Boston. Reed says that the plaintiff asked him that night in that room if he would burn the buildings so that she could get the insurance, and that she promised when she got the insurance to go to Massachusetts with him and marry him after he got a divorce from his wife. That she gave him the key to the house, told him where to find the kerosene, and wanted him to do the act on Tuesday night.

On the following Wednesday night June 14, (it rained on Tuesday) Reed rode on his bicycle from Wilton to West New Portland

reaching there about midnight and fired the property. He was arrested before he got back to Wilton and committed to jail. The key to the front door of the burned house was found in his pocket. At first he denied all knowledge of the fire, but afterwards, July 29th, made his confession.

On Wednesday night, the 14th of June, the very night that Reed fired the buildings, the plaintiff wrote Reed the following significant letter.

"Dear Otis,—

"I hope everything is all over I have not heard let me know.

"And send me $15.00 sure I have not got only 25c I had the doctor and it took all my money and I half to pay for what I eat so you see I cant get back and I owe Leata seven dollars I borrowed for medison the doctor thinks he can cure me if I can stay under his treatment and I can if I get money.

"This is Wed. night and you will get this Thursday and be sure and send money so I can have it Friday night send it special delivery then I will get it all right Fri. now be sure and get it for me for I must have it.

"If you have not done it yet do as soon as possible You may wait until Sat. night if you rather, but be sure and send me the $15.00 for I cant get along without it any way for Leata needs hers awfully.

"Now don't disappoint me on anything for I am all in

"Lovingly

"Capola Kershner

"Room 15 "Endicott Bldg.

"Care of L. B. Norton" "Beverly, Mass."

This letter did not reach Reed before his arrest. It was afterwards discovered and disclosed in defense.

The plaintiff was notified of the fire by wire and returned from Boston on Saturday, the 17th, when she was informed of Reed's arrest.

On the 27th of the same month the plaintiff married Hastings Hoyt, a young man of West New Portland, to whom she was engaged to be married before leaving for Boston. On the day fol-

lowing the marriage the plaintiff visited Reed at the jail in company with Reed's attorney, who was her attorney afterwards at least. She shook hands with Reed and told him that she was sorry he was there. At that visit a private interview was sought between the plaintiff, Reed and the attorney, which the sheriff did not permit. Reed's confession had not then been made.

On the 6th or 7th of July George E. Macomber, representing the three insurance companies, visited the plaintiff and talked with her concerning the fire. Mr. Macomber testified that he asked her if she stopped in Lewiston on the way to Boston and that she said no.

"I asked her if she had any theory, asked her if she knew that Mr. Reed or anybody had been arrested for setting the fire. She said that she had heard that he had been. I asked her if she thought it was true that he set the fire. She said she did not, did not believe it could be possible. I inquired of her if there was any motive for Mr. Reed to set the fire. She said there was not, they never had had any trouble and got along nicely together."

The plaintiff denies that Mr. Macomber made such inquiries of her or that she made any such statements to him, but admits the interview.

Excepting only the pith of Reed's confession — that she procured him to burn the property — the plaintiff is forced to admit as true all the false, treacherous, and dishonorable conduct and acts on her part as disclosed by the confession. It is significant to note, however, that she admitted none of these acts and circumstances before the confession, but, according to the testimony of Mr. Macomber, denied some of them.

She claims now that Reed was her enemy and committed the crime from motives of revenge. She testified that he was angry because of Hoyt's attentions to her; that long before he left the house at all he had made threats to shoot her, and to burn her and Hoyt in the buildings if they were married and lived there; that she arranged the meeting in Lewiston in order to induce Reed to cease annoying them, and that the conversation there "was about my engagement and his divorce that he wanted to get from his wife, and he promised

to leave the State if I would help him get the divorce, and let us alone." She says that he agreed to consult a lawyer on Tuesday night about the divorce; and she explains the expressions in her letter to him of the 14th, "I hope everything is all over I have not heard let me know," and "If you have not done it yet do as soon as possible You may wait till Sat night if you rather," as referring to his interview with the lawyer about the divorce.

These statements of hers are so improbable, unreasonable, and utterly irreconcilable with her conduct and admitted relations with Reed that they intensify the conviction of the truth of Reed's testimony beyond a reasonable doubt. It is most incredible that Reed had repeatedly threatened her life "long before he left the house at all" when she is forced to admit that after he went away she wrote him loving and endearing letters two or three times a week; that she arranged to meet him at the hotel in Lewiston; that she wrote the letter from Beverly June 14th; that she visited him at the jail and expressed her sympathy for him; that she told Macomber they never had any trouble and she could not believe he did it; and that not until the confession did she make known to any one, even to Hoyt, that any such threats were ever made.

It is to be noted that the plaintiff's testimony is that Reed only threatened to do personal injury to her and Hoyt. She would not admit on cross examination that Reed ever said he would burn the buildings but only that he threatened to burn them in the buildings.

"A. No, sir; he didn't threaten to burn my buildings; he threatened to burn us if we were ever married.

"Q. I thought that you said he threatened to burn your buildings?

"A. He threatened to burn us in the buildings if we were married and lived there." According to her own testimony Reed's act could not have been done to carry out any of these threats, because he knew the act could result in no personal injury to either of them as they were not in the house, and it could not well result in financial loss to her in view of the fact that the property was over-insured as the record clearly shows.

Reed burned the property. He says the plaintiff procured him to do it. He had no other reason or motive to do it. The evidence unmistakably establishes the truth of his statement. It is the opinion of the court that the verdicts are so manifestly against the weight of the evidence that they should not be permitted to stand. The entry in each case must be,

Motion sustained.

ROBERT O. LOUD *vs.* LANE & LIBBY.

Knox. Opinion December 18, 1907.

Master and Servant. Negligence. Fellow Servant.

1. When the master in the work of unloading coal from vessels has furnished his servants with safe and suitable appliances to be set up by them for unloading a particular vessel, he is not responsible to one such servant for the negligence of a co-servant in setting up such appliances.
2. When in such case the appliances thus set up fell to the injury of the plaintiff solely because of the negligence of a co-servant in not making them fast to suitable supports, or in not using preventer stays or other precautions against the giving way of such supports, the master is not liable.
3. One is not the less a co-servant of such negligent servant by having been employed to work with such appliances after they were set up.

On exceptions by plaintiff. Overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant, a corporation, in discharging a cargo of coal from a schooner at the defendant's wharf in Vinalhaven. Plea, the general issue.

Tried at the January term, 1907, of the Supreme Judicial Court, Knox County. After the plaintiff's evidence was closed, the defendant made a motion for a nonsuit. The presiding Justice granted

the motion, withdrew the case from the jury, and made the following ruling and order: "Plaintiff nonsuit, with agreement on the part of the defendant that upon exceptions by the plaintiff the evidence shall be reported and printed ready for use before the Law Court at the expense of the defendant. It is also further stipulated on the part of the defendant, if the Law Court is of opinion that the order of nonsuit should be overruled and that the case should be sent back to a jury for trial, it will consent that the court may enter judgment against it for the sum of fourteen hundred dollars."

The plaintiff then excepted to the "withdrawal of the case from the jury, and the order of nonsuit and rulings."

The case appears in the opinion.

Joseph E. Moore and C. M. Walker, for plaintiff.

Benj. Brooks, Edward C. Stowe and M. O. Garner, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, CORNISH, KING, JJ.

EMERY, C. J. The evidence adduced by the plaintiff shows the following: — The defendant company was engaged in the coal business at Vinalhaven where it owned and occupied a wharf for the unloading and storage of coal from vessels and for other purposes. A vessel, not owned by the defendant, having arrived at this wharf with coal consigned to the defendant and to be unloaded, two men, Young and Dyer, in the employ of the defendant went to the wharf and vessel and set up tackles and other appliances, furnished by the defendant, for hoisting the coal out of the hold of the vessel and conveying it to the coal shed. They rigged up an iron triangle over the hatch and a wheeling platform between the fore and main mast, supported by a rope or span passing through blocks at the head of each mast and down near the foot of the mast. At the foot of the mainmast this supporting rope was made fast around the mast itself. At the foot of the foremast it was passed under a hook or snatch and made fast to a cleat on the mast. This cleat was designed and used to hold the foresail halyards supporting the foresail when hoisted. To this triangle, thus supported, a gin

block was attached through which passed the hoisting rope connecting the hoisting buckets with the hoisting power on the wharf.

After rigging up these appliances as above stated, these two men, with others in the employ of the defendant, began the work of discharging the coal, Dyer going into the hold to shovel coal into the bucket and Young going on the platform to wheel the coal to the shed, as hoisted. The plaintiff was employed by the defendant a few hours later to join this crew and began wheeling coal on the platform along with Young. This work of unloading the coal was begun in the afternoon of one day and at about eleven o'clock of the next forenoon as a bucket of coal was being hoisted it caught under the hatch, and the consequent strain pulled the cleat off the foremast allowing the tackle or triangle to fall upon the plaintiff to his injury.

Nothing but the cleat gave way. None of the ropes, blocks, etc., proved insufficient. The giving way of the cleat was the sole cause of the injury. Upon subsequent inspection the cleat was found to be decayed on the inside next the mast.

It does not directly appear who set the discharging crew at work or who directed Young and Dyer to set up the appliances for unloading, but it is to be presumed that some agent of the defendant having authority did so. It does not appear that any directions were given to any of the men how to set up the appliances or how, where, or to what, to make them fast, or what precautions to take against the giving way of any fastening. The superintendent of the defendant company was about on the wharf occasionally, but there is no evidence that he gave any directions, or that he or any other officer of the defendant company knew how the appliances were arranged or secured. So far as appears that was left to the workmen themselves.

There were available several other supports of greater strength than the cleat to which the ropes sustaining the triangle, etc., could have been fastened. Indeed, Dyer, one of the two men setting up the appliances, suggested another support, but Young, who seems to have been the foreman of that work, nevertheless selected the cleat. There was no allegation nor evidence that either Young or Dyer

was incompetent or too habitually careless to be intrusted with such work.

The plaintiff claims that upon the above statement the defendant company was guilty of negligence toward him, an employee, in not having the sustaining ropes more securely fastened and in not having preventive stays rigged to hold up the triangle, etc., in case anything broke or gave away. No other negligence is alleged or claimed. Granting, arguendo, these omissions to be negligence, it remains to be considered whether the negligence was that of the defendant in the performance of its duty to the plaintiff, or was the negligence of fellow servants of the plaintiff for which the defendant would not be liable.

In this case it was the duty and the whole duty of the defendant to the plaintiff to exercise due care in the supply and maintenance of suitable and sufficiently strong platforms, ropes and other appliances for the discharging coal from vessels with safety to its employees by the exercise of due care on their part, and to exercise due care for the employment of competent and ordinarily careful men for the work. This duty the defendant seems to have performed, or at least there is no evidence of non-performance and hence performance is to be presumed. *Nason* v. *West*, 78 Maine, 253. The platform, the triangle, blocks, pulleys, ropes, etc., necessary for the work proved to be suitable and sufficient. These appliances were not fixed, but were movable,— to be set up and fastened anew to different supports for the discharging of each new cargo of coal as it arrived. The support whether cleat, windlass, rail or mast, to which the appliances, the apparatus, should be fastened for support was not part of them. That would be left behind when these should be taken down and removed.

The setting up and making fast these appliances, including the selection of the place or object to which to make them fast, for the purpose of discharging a particular cargo of coal, was part of the operation or work of discharging coal to be done by the workmen sent to discharge the cargo. Negligence in this setting up, fastening and generally making secure, including securing by preventive stays if necessary, was the negligence of those workmen, for which,

under the settled law of this State, the defendant is not responsible. *Dube* v. *Lewiston*, 83 Maine, 211; *Atkins* v. *Field*, 89 Maine, 281; *Rounds* v. *Carter*, 94 Maine, 535; *Small* v. *Manufacturing Co.*, 94 Maine, 551; *Pellerin* v. *Paper Co.*, 96 Maine, 388; *Amburg* v. *Paper Co.*, 97 Maine, 327; *Lombard* v. *Paper Co.*, 101 Maine, 114.

That the plaintiff's employment to assist in discharging the coal was after the platform, etc., were set up does not make the defendant liable for such negligence. The defendant was for that reason under no greater obligation to him than to the others. *Killea* v. *Faxon*, 125 Mass. 485; *O'Connor* v. *Rich*, 164 Mass. 560. The latter case was cited in *Beal* v. *Bryant*, 99 Maine, 112, where it was said at page 119: "It matters not that the stage was already secured in position before the plaintiff was set to work discharging the coal. An employer under such circumstances owes one who is about to enter his service no duty to inspect all the work which has been done by his servants previously, and which may ordinarily be entrusted to them without liability to their fellow servants."

In *Donnelly* v. *Granite Co.*, 90 Maine, 110, the defendant did not furnish suitable and sufficient ropes for holding up the platform, etc., for loading paving blocks on a vessel, but it was recognized in that case, page 115, that where the "master does not undertake the duty of furnishing or adapting the appliances by which the work is to be performed, but this duty is intrusted to or assumed by the workmen themselves within the scope of their employment, he is exempt from responsibility, if suitable materials are furnished and suitable workmen are employed by him, even if they negligently do that which they undertake;" also at p. 116 that "when the selection of the materials or construction of the appliances to the business is such that it may properly be left to the workmen in their capacity as workmen and within the scope of their employment and it is so left by the master he is relieved from responsibility for their negligence as in the case of a mason or carpenter building a house where in the progress of the work a staging is being frequently changed or enlarged."

In *Beal* v. *Bryant*, 99 Maine, 112, the defendant did not furnish suitable or sufficiently strong ropes for holding up the platform used in discharging coal from a vessel, but the court in that case said by way of caution, "The adjusting and securing the platform in place was incidental to and a part of its contemplated use, one of the ordinary duties of the workmen and a part of the work they were engaged to do. In doing this they acted as fellow servants of the plaintiff and the defendants would not be liable for their negligence in the manner of doing it."

In *Twombly* v. *Electric Light Co.*, 98 Maine, 353, a movable ladder, furnished by the defendant for the plaintiff, its employee, to stand upon while at work, was decayed and fell under his weight.

Had the ladder fallen because not properly set up or properly secured at top or bottom by a fellow workman of the plaintiff, the case would have been like this and it is evident the master would not have been responsible.

It follows that the defendant in this case is not shown to be responsible for the plaintiff's hurt, and that he must look to those whose negligence was the cause. *Atkins* v. *Field*, 89 Maine, 291.

Exceptions overruled.
Nonsuit confirmed.

JAMES HEBERT *vs.* PORTLAND RAILROAD COMPANY.

Cumberland. Opinion December 18, 1907.

Common Carriers of Passengers. Employee may be a Passenger. Payment of Fare. Negligence. Pleadings. General Allegations.

1. Where the assigned place of work of an employee of a street railroad company is at a distance from his home, he may, notwithstanding such employment, be a passenger with the rights of a passenger while riding in the cars of the company from his home to his assigned place of work.
2. Such employee so situated is a passenger while riding on a regular street car of the company from his home to his assigned place of work, if he so rides of his own volition and not by the direction of the company and pays his fare in coupons for fare issued to him by the company as a part of his wages.
3. In an action by a passenger against a street railroad company for injuries received through a derailment of the car, it is sufficient to allege generally that such derailment was caused by the negligence of the company or its servants without more particular specification.

On exceptions by defendant. Overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff caused by the alleged negligence of the defendant company while transporting the plaintiff on one of its street railroad cars.

The action was brought in the Supreme Judicial Court, Cumberland County, and was entered at the April term, 1906, of said court. At the same term, the defendant filed a special demurrer to the declaration. At a subsequent term, the demurrer was sustained and the plaintiff was allowed to file an amended declaration. The defendant then filed a special demurrer to the amended declaration. Upon hearing, the amended declaration was adjudged good and the demurrer thereto overruled. The defendant then excepted.

The amended declaration was as follows:

"In a plea of the case, for that for a long time prior to the twenty-eighth day of June A. D., 1905, and up to the date of this writ the defendant corporation was the owner of and operated a certain street railroad running from the city of Westbrook in said county to the city of Portland in said county, with numerous

branches connecting with said railroad and running to other points in said county, and were and are a common carrier of passengers.

"That one of defendant's branch lines runs to Riverton in said county and connects with its line running between Westbrook and Portland at a place known as Highland Square in said Portland, that the plaintiff lived at said Westbrook and was employed by defendant as a laborer at said Portland; that on said twenty-eighth day of June he took one of defendant's cars at said Westbrook to be transported to Woodfords, a point in said Portland upon defendant's line beyond said Highland Square from said Westbrook. That he gave to the conductor in charge of said car a coupon ticket, which he had received from said defendant corporation and for which he had paid a valuable consideration to said defendant and which entitled him to a passage over said defendant road in said car from Westbrook to said Woodfords, whereby it became and was the duty of defendant to convey said plaintiff safely to his destination at said Woodfords without injury or damage to him.

"That while on said car and while being so conveyed and while he was in the exercise of proper care and without fault on his part, when said car arrived at said Highland Square, because of the carelessness and negligence of said defendant corporation and because of the unsound condition of its tracks over which said car was operated said car in which said plaintiff was then traveling was suddenly and violently derailed and came to a very sudden stop, and said car was derailed as aforesaid by reason of a defect in the ways, works and machinery of defendant which arose from or had not been discovered or remedied owing to the neglect or want of care of some person in the employ of said defendant and entrusted by it with the duty of seeing that the ways, works and machinery were in proper condition, and that plaintiff had no knowledge of the dangerous conditon, of the ways, works and machinery of defendant. And the plaintiff was thereby violently and with great force thrown from said car and was thereby seriously injured, receiving serious and dangerous bruises to his back, limbs and to other parts of his body: and was thereby severely wrenched strained and injured internally and received serious injuries to his spine.

"That by reason of said injuries, plaintiff was wholly disabled from all manual labor and said disabilities have continued until the present time and said injuries are permanent; in consequence of said injuries plaintiff has suffered great pain both of body and mind and has been put to great expense for the necessary medical attendance and medicine.

"And plaintiff avers that said injuries were caused wholly by the carelessness and negligence of said defendant and without fault on his part.

"Second Count.

"For a long time prior to the twenty-eighth day of June A. D. 1905, and up to the date of this writ the defendant corporation was the owner of and operated a certain street railroad, running from the city of Westbrook in said county to the city of Portland in said county with numerous branches connecting with said railroad and running to other points in said county, and were and are a common carrier of passengers, that plaintiff had for some years prior to the said twenty-eighth day of June been employed by said defendant as a greaser and that some months prior to said twenty-eighth day of June, his work being then on a branch of said defendant's line running from Woodfords in said Portland through Morrill's Corner in said Portland, he traveled over defendant's line from said Westbrook to said Woodfords, paying his fare in cash, at which time he notified defendant that the expense of his transportation to his work was so great that he could not afford to work for said defendant at the wages he was then receiving, that thereupon defendant promised and agreed with plaintiff, if he would continue in its employ at the same place at the same rate of wages it would furnish him transportation from said Westbrook to said Woodfords. And in consideration of said increase in pay by the addition of transportation, plaintiff entered into such agreement with defendant, whereupon and as a part consideration for his continuing in its employ, the defendant issued and delivered to plaintiff a book of coupons, each coupon entitling him to a passage on defendant's cars between Westbrook and Woodfords, that on said twenty-eighth day of June, A. D. 1905 plaintiff took defend-

ant's car at Westbrook to be transported on said car to Woodfords and on entering said car he gave to the conductor in charge of said car one of said coupons and which entitled him to a passage over defendant's road in said car from said Westbrook to said Woodfords whereby it became and was the duty of said defendant to convey the plaintiff safely to his destination at said Woodfords without injury or damage to him.

"That while on said car and while being so conveyed and while he was in the exercise of proper care and without fault on his part, when said car arrived at said Highland Square because of the carelessness and negligence of said defendant because of the unsound condition of the tracks over which said car was operated said car in which said plaintiff was traveling was suddenly and violently derailed and came to a very sudden stop and caused the plaintiff to be violently and with great force thrown from said car and he was thereby seriously injured receiving serious and dangerous bruises to his back, limbs and to other parts of his body and was thereby seriously wrenched, strained and injured internally and received serious injuries to his spine.

"That by reason of said injuries plaintiff was wholly disabled from all manual labor and said disabilities have continued till the present time and said injuries are permanent in consequence of said injuries plaintiff has suffered great pain both of body and mind and has been put to great expense for necessary medical attendance and medicine.

"Plaintiff avers that said injuries were caused wholly by the carelessness and negligence of said defendant and without fault on his part."

The special demurrer to the amended declaration alleged that the amended declaration was insufficient for the following reasons:

"First. Because the plaintiff in the first count of said declaration alleges that he was employed by the defendant, but does not allege in said count whether or not he was acting in the employ of defendant at the time of the alleged accident.

"Second. Because the first count of said declaration is uncertain, doubtful, ambiguous and repugnant, and does not apprise the

defendant in what capacity the plaintiff was on the car of defendant at the time of the alleged accident, whether as a servant of defendant, or as a passenger for hire; in that the plaintiff alleges in said count that he was in the employ of the defendant and yet the plaintiff further alleges in said count that the defendant is a common carrier of passengers, that the plaintiff gave to the defendant's conductor a ticket for which said plaintiff had paid a valuable consideration, that said ticket entitled him to a passage over defendant's railroad for a specified distance, viz: from Westbrook to Woodfords, and that it thereby became defendant's duty to carry him safely to said Woodfords.

"Third. Because in the first count of said declaration the plaintiff does not allege or set forth facts sufficient to apprise the defendant at the time of the alleged accident, whether as servant of the defendant or as passenger for hire, or in some other capacity.

"Fourth. Because the legal duty of the defendant towards the plaintiff set forth in said first count is neither the duty of a common carrier to a passenger for hire nor that of a master to its servant; in that said count alleges that the plaintiff took passage upon the defendant's car and that 'it became and was the duty of defendant to convey said plaintiff safely to his destination at said Woodfords without injury or damage to him.'

"Fifth. Because in the first count of said declaration the plaintiff alleges that he was injured because of the carelessness and negligence of the defendant and because of the unsound condition of its tracks and by reason of a defect in its ways, works and machinery; and yet the plaintiff does not set forth or allege how or in what particular the defendant was careless or negligent and how or in what particular said tracks were unsound or said ways, works and machinery were defective.

"Sixth. Because the plaintiff in the second count of said declaration alleges that he was employed by the defendant, but does not allege in said count whether or not he was acting in the employ of defendant at the time of the alleged accident.

"Seventh. Because the second count of said declaration is uncertain, doubtful, ambiguous and repugnant and does not apprise

the defendant in what capacity the plaintiff was on the car of the defendant at the time of the alleged accident, whether as a servant of defendant, or as a passenger for hire; in that the plaintiff alleges in said count that he was in the employ of the defendant and yet the plaintiff further alleges in said count that the defendant is a common carrier of passengers, that the plaintiff gave to the defendant's conductor a ticket for which said defendant had paid a valuable consideration, that said ticket entitled him to a passage over defendant's railroad for a specified distance, viz: from Westbrook to Woodfords, and that it thereby became defendant's duty to carry him safely to said Woodfords.

"Eighth. Because in the second count of said declaration the plaintiff does not allege or set forth facts sufficient to apprise the defendant in what capacity the plaintiff was on the car of the defendant at the time of the alleged accident, whether as servant of the defendant or as a passenger for hire, or in some other capacity.

"Ninth. Because the legal duty of the defendant toward the plaintiff set forth in said second count is neither the duty of a common carrier to a passenger for hire nor that of a master to its servant; in that said count alleges that the plaintiff took passage upon the defendant's car and that 'it became and was the duty of defendant to convey said plaintiff safely to his destination at said Woodfords without injury or damage to him.'

"Tenth. Because in the second count of said declaration the plaintiff alleges that he was injured because of the carelessness and negligence of said defendant and because of the unsound condition of its tracks; and yet the plaintiff does not set forth or allege how or in what particular the defendant was careless or negligent, and how or in what particular said tracks were unsound."

Frank P. Pride and John O. Winship, for plaintiff.
Libby, Robinson & Ives, for defendant.

SITTING: EMERY, C. J., STROUT, PEABODY, CORNISH, KING, JJ.

EMERY, C. J. On exceptions to the overruling a demurrer to the declaration. The case stated in the declaration is substantially

this: —The defendant company was a common carrier of passengers and as such was owning and operating a street railroad in Westbrook and Portland and between the two cities. The plaintiff was in the employ of the company as a "greaser." He lived in Westbrook but his assigned place of work was at a point in Portland. In addition to his cash wages the company gave him tickets good for passage upon its railroad between his residence in Westbrook and his place of labor in Portland. One day the plaintiff boarded a regular street car of the defendant company at Westbrook for passage to his place of work in Portland, and for such passage gave up to the conductor one of the tickets given him by the company as above stated. While thus upon the car and himself in the exercise of due care and before reaching his destination he was injured by the sudden derailment of the car through the fault of the company in not maintaining its track, way, works and machinery in safe condition.

The defendant company claims that the declaration is insufficient in that it does not contain enough to show what was the relation between the parties and the consequent duty of the one to the other at the time of the injury.. We think it clear, however, that upon the statements in the declaration, the plaintiff at the time of his injury was a passenger with the rights of a passenger against a common carrier.

In a sense of course, in the popular sense of the term, the plaintiff was in the defendant's employ. There was between them a then existing contract, implied at least, by which he was to render certain services to the company from day to day; but his work, his then assigned post of duty, was in Portland and not in Westbrook where he boarded the car, nor upon the line of the road between his residence and his place of work. It is to be assumed that he was to report each working day at a given hour at his assigned post of duty in Portland and that during the working hours of each such day he was under the company's orders within the line of his employment. It is also to be assumed that outside those hours and while going to and from his work he was under his own direction. It is not a case where the railroad company directs a servant to proceed on its cars

from one place to another in the prosecution of his work, nor is it a case where a servant of a railroad company is riding on its cars in the prosecution of his work during hours of work. In the case stated the plaintiff selected his own means of transportation. It was no concern of the company how he got to his work, if he got there. In availing himself of the company's railroad to get to his work he was acting in his own interest and of his own volition. He was not working for the company in thus riding on its railroads. The company did not pay him for so riding; he paid the company for his ride.

True, the plaintiff paid his fare by a ticket given him by the company for that ride, but he paid for the ticket by his services. It was a part of his wages and delivered to him as such. It could make no difference in his status as a passenger whether he paid his fare in cash or in tickets thus earned.

We find that several courts in other jurisdictions have held the contrary of our decision of this question. Some of these contrary decisions seem to be based upon the circumstance that the plaintiff was riding on his way to his work, and not riding home, or to his luncheon or elsewhere. We cannot see any difference in principle. He was as much his own man while riding to his work, as in riding from it. So far as we can learn, however, the precise question here has never been decided by this court, and hence we are free to follow what we think the better reason. Moreover, our contention is supported by respectable authority. *Doyle* v. *Fitchburg R. R. Co.*, 162 Mass. 66; *Same* v. *Same*, 166 Mass. 492; *Dickinson* v. *West End St. Ry. Co.*, 177 Mass. 365; *L. & N. R. R. Co.* v. *Weaver*, 22 Ky. L. Rep. 30, 50 L. R. A. 381; *Gillenwater* v. *M. & T. R. R. Co.*, 5 Ind. 339, 61 Am. Dec. 101; *N. Y., L. E. & W. R. R. Co.* v. *Burns*, 51 N. J. L. 340; *O'Donnel* v. *Valley R. R. Co.*, 59 Pa. St. 239; *McNulty* v. *Penn. R. R. Co.*, 38 At. Rep. 524, 182 Pa. 479.

But the defendant further claims that, even if the declaration does state a case of injury to a passenger, it does not set out with sufficient particularity wherein the defendant company was negligent, though it does charge that the injury resulted from a derailment of the car

through the defendant company's negligence. In actions of this kind where the relation between the parties is that of passenger and carrier a general allegation of negligence on the part of the company is sufficient without particular specification. *Ware* v. *Gay*, 11 Pick. 106; *Clark* v. *C. B. & Q. R. R. Co.*, 15 Fed. 588; *Lavis* v. *Wisconsin Cent. R. R. Co.*, 54 Ill. App. 636; *Breese* v. *Trenton R. R. Co.*, 52 N. J. L. 250; *Gulf C. & S. F. R. R. Co.* v. *Smith*, 74 Tex. 276. It is not ordinarily within the power of the passenger to specify in what particular the carrier was negligent. Again, while the plaintiff passenger must allege and prove negligence of the carrier as the cause of his injury he does allege and prove it in this case by alleging and proving (if he does prove it) the derailment of the car and his consequent hurt. The negligence of the company is to be presumed from that circumstance alone and it will be for the company to rebut that presumption by showing that the derailment of the car did not result from any negligence on its part. "Cars can ordinarily be run with safety, and when they are not, that fact itself is evidence of fault or defect somewhere, requiring an explanation. The maxim res ipsa loquitur applies in such a case." *Stevens* v. *E. & N. A. R.*, 66 Maine, 74. The general allegation of negligence in this declaration is sufficient.

It follows that the exceptions should be overruled. We have of course examined every case cited by the defendant, but those cited from our own reports will be found not applicable to a case like this, an action for an injury caused by the derailment of a street car to one riding on the car.

Exceptions overruled.

ESTHER E. COSTELLO,
Appellant from decree of Judge of Probate,

vs.

KATHERINE A. TIGHE, Admx.

York. Opinion December 18, 1907.

Practice. Exceptions. Finding of Facts by Presiding Justice.

On an appeal from the decree of the Judge of Probate refusing to grant letters to the plaintiff as surviving partner to close up the partnership affairs of the firm of John H. Tighe, deceased, and the plaintiff, the question submitted to the determination of the presiding Justice was whether or not the partnership between the said Tighe and the plaintiff was dissolved during the lifetime of the said Tighe or continued until his death. The presiding Justice found that no partnership existed between the said Tighe and the plaintiff at the time of the death of said Tighe. The plaintiff then excepted.

Held: (1) That the plaintiff's exceptions only raised the question whether there was any evidence upon which the finding and ruling of the presiding Justice could be based. (2) That the question submitted to the decision of the presiding Justice involved an issue of fact, not simply an inference of law from facts admitted or proved. (3) That there was evidence to support the finding of the presiding Justice. (4) That the sufficiency of such evidence was a question of fact upon which the finding of the presiding Justice is conclusive.

On exceptions by plaintiff. Overruled.

The plaintiff filed a petition in the Probate Court, York County, praying that letters be granted to her as surviving partner to close up the partnership affairs of the firm of John H. Tighe, deceased, and herself. After a hearing on the petition, it was decreed by the Judge of Probate that no partnership existed between the said John H. Tighe and the plaintiff. The plaintiff then appealed to the Supreme Judicial Court sitting as the Supreme Court of Probate. A hearing on the appeal was had in the Supreme Court of Probate and after the hearing, the presiding Justice found and decreed as follows:

"Only one question is raised by the reasons of appeal. After hearing and considering the evidence and arguments of counsel I find that there was no partnership existing between the said John H. Tighe and the said Esther E. Costello at the time of the death of the said John H. Tighe.

"It is therefore ordered and decreed, that the decree of the Probate Court be affirmed, with costs against the appellant."

The plaintiff then excepted to the ruling, order and decree of the presiding Justice.

The case appears in the opinion.

Anthony Dwyer, for plaintiff.

Cleaves, Waterhouse & Emery, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, SPEAR, CORNISH, JJ.

WHITEHOUSE, J. This was a petition to the Probate Court of York County asking that letters be granted to Esther E. Costello as surviving partner, to close up the partnership affairs of the firm of John H. Tighe, deceased, and the petitioner. It was decreed by the Probate Court that no partnership existed between John H. Tighe and Esther E. Costello, at the time of the death of the former. From this decree an appeal was taken to the Supreme Judicial Court sitting as the Supreme Court of Probate. A hearing was had on this appeal and the following decree entered by the presiding Justice, namely:

"Only one question is raised by the reasons of appeal. After hearing and considering the evidence and arguments of counsel, I find that there was no partnership existing between the said John H. Tighe and the said Esther E. Costello, at the time of the death of the said John H. Tighe."

The decree of the Probate Court was accordingly affirmed with costs against the appellant. The case comes to the Law Court on exceptions to this ruling.

It was not in controversy that a partnership between the appellant and Tighe was formed by articles of agreement dated February 8,

1899 to continue for a term of five years. It is contended by the plaintiff that at the expiration of that period, Tighe continued to carry on the same business in the same store; that there was no settlement of the affairs of the partnership or other evidence of a dissolution at that time and that in fact the partnership was only dissolved by the death of Tighe March 14, 1906, nearly two years later.

On the other hand it is contended by the defendant that the evidence disclosed by the entries in the account books of the firm, strongly tends to show a termination of the partnership by mutual consent at the expiration of the time limited in the articles of agreement. The entries show monthly payments to the appellant on account of her share of the profits from November 14, 1899 to February 19, 1903, but no such monthly payments appear on the books after that date. On the third day of May, 1904, however, nearly three months after the expiration of the five years, there is an entry of a payment of $700 to some one whose name appears to have been erased. It is claimed by the defendant that this payment was made to the appellant in settlement of the partnership affairs.

Whether the partnership was dissolved in Tighe's lifetime or continued until his death, was a question submitted to the decision of a single Justice. It involved an issue of fact. It was not simply an inference of law from facts proved or admitted. The presiding Justice found in favor of the defendant and affirmed the decree below. There was evidence to support this conclusion. The plaintiff's exceptions can only raise the question whether there was any evidence upon which the finding and ruling of the presiding Justice could be based.

"If there was any such evidence its sufficiency was a question of fact upon which the finding of the court is conclusive, not to be reviewed by the Law Court." *Eacott, Executor, Appellant*, 95 Maine, 522; *Hazen* v. *Jones*, 68 Maine, 343; *Brooks* v. *Libby*, 89 Maine, 151; *Pettengill* v. *Shoenbar*, 84 Maine, 104.

Exceptions overruled.

STATE OF MAINE *vs.* CLARENCE PEABODY.

Knox. Opinion December 19, 1907.

Fish and Fisheries. Penal Statutes. Construction. Clams. Towns. Invalid Clam Regulations. Statute (Mass.) 1889, chapter 391. Public Statutes (Mass.) 1882, chapter 91, section 68. Statute 1901, chapter 284, section 37; 1905, chapter 161, section 1. R. S., chapter 41, section 34.

It is a well settled principle of the common law that the fish in the waters of the State including the sea within its limits as well as the game in its forests belong to the people of the State in their collective sovereign capacity.

It is also well settled that the legislature of each State representing the people possesses full power to regulate and control such fisheries by appropriate enactments designed to secure the benefits of this public right in property to all its inhabitants.

It is a familiar principle of construction that the operation of a penal statute cannot be extended by implication so as to embrace cases which are not plainly included in the express terms and obvious import of the language of the enactment.

Revised Statutes, chapter 41, section 34, as amended by chapter 161 of the Public Laws of 1905 contains no provision expressly prohibiting a person from digging clams within the limits of a town of which he is not a resident, nor does it contain any provision authorizing the inhabitants of a town to adopt any by-law or regulation excluding non-residents from the privilege of applying to the municipal officers for a written permit to take clams in such town.

The inhabitants of the town of Cushing at the annual meeting of said town held in March, 1906, under an article therefor in the warrant, voted as follows: "To have a clam law as per chapter 161, Public Laws, 1905 and to issue 150 licenses to expire April 1, 1907, price for licenses to be $.25 and not to issue licenses to non-residents." *Held:* That this regulation is invalid as to non-residents, and since it cannot be enforced against the inhabitants of the town without defeating the purpose of the voters in adopting it, the whole regulation is void.

On report. Judgment for defendant.

Complaint against the defendant, a resident of the town of Friendship, for digging clams within the limits of the town of Cushing without first obtaining a written permit therefor from the municipal officers of Cushing according to the requirement of the

regulations established by said town of Cushing at its annual meeting held in March, 1906. Heard at the April term, 1907, of the Supreme Judicial Court, Knox County. An agreed statement of facts was then filed and the case was sent to the Law Court on report. The material parts of the "agreed statement" are as follows:

"The annual town meeting of the town of Cushing was held March 12, 1906 at which meeting the town acted upon the following article in the warrant—'To see if the town will vote to have a clam law and if so, the number of licenses to be issued, price of same and whether they shall be issued to non-residents.' Under the foregoing article it was voted as follows: 'To have a clam law as per chapter 161, Public Laws 1905 and to issue 150 licenses to expire April 1, 1907, price for licenses to be $.25 and not to issue licenses to non-residents.'

"It is admitted that the defendant dug as alleged and that he was a resident of Friendship at that time.

"Also that he had no license to dig clams and that the clams were not for the consumption of himself or family or for the consumption or use of the inhabitants of the town of Cushing or any person temporarily a resident therein.

"Upon the foregoing statement, the Law Court is to render such judgment as the law requires."

Presumably the case reached the Supreme Judicial Court on appeal from some lower court.

Note. The "clam statute," R. S., chapter 41, section 34 as amended by Public Laws, 1905, chapter 161, section 1, was also before the Law Court for construction on another point in *State* v. *Wallace*, 102 Maine, 229.

Phillip Howard, County Attorney, for the State.

Rodney I. Thompson, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, CORNISH, KING, JJ.

WHITEHOUSE, J. This is a complaint against the respondent, a resident of the town of Friendship, for digging clams within the

limits of the town of Cushing without first obtaining a written permit therefor from the municipal officers of that town, according to the requirement of the regulations established by the town at its annual meeting held in March 1906.

The case comes to this court on report, and the following material facts appear from the agreed statement certified by the Justice presiding.

At the annual meeting above named the town acted upon the following article in the warrant: "To see if the town will vote to have a clam law and if so, the number of licenses to be issued, price of same and whether they shall be issued to non-residents." Upon this article the following action was taken.

"Voted, to have a clam law as per chapter 161, Public Laws of 1905 and to issue 150 licenses to expire April 1, 1907; price for licenses to be $.25 and not to issue licenses to non-residents."

It is admitted that the defendant dug the clams as alleged; that he was a resident of the town of Friendship at that time; that he had no license therefor from the municipal officers of the town of Cushing; and that the clams were not for the consumption of himself or family or for the consumption or use of the inhabitants of the town of Cushing or any person temporarily a resident therein.

Section 34 of chapter 41 of the Revised Statutes as amended by section 1 of chapter 161 of the Public Laws of 1905 is 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 towns, 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 a resident therein. Whoever takes clams contrary to the provisions of this section, shall for each offence, be fined not more than ten dollars, or imprisoned not more than thirty days."

It is contended in behalf of the defendant that this statute does not authorize the vote of the town excluding non-residents from the privilege of obtaining such license, but if it is to be deemed broad enough to authorize such a regulation, the statute must itself be held unconstitutional and void because in contravention of the Fourteenth amendment of the Federal Constitution.

It is a well settled principle of the common law that the fish in the waters of the State including the sea within its limits as well as the game in its forests belong to the people of the State in their collective sovereign capacity. Equally familiar and well recognized is the corollary of this proposition that the legislature of each State representing the people possesses full power to regulate and control such fisheries by appropriate enactments designed to secure the benefits of this public right in property to all its inhabitants. This doctrine has frequently been affirmed by the legislatures and repeatedly declared by the judicial decisions of this and other States. It has also been approved by the Supreme Court of the United States. *Moulton* v. *Libbey*, 37 Maine, 472; *State* v. *Snowman*, 94 Maine, 99; *State* v. *Rodman*, 58 Minn. 393; *Ex parte Maier*, 103 Cal. 476; *Com.* v. *Hilton*, 174 Mass. 29; *Geer* v. *State of Connecticut*, 161 U. S. 519.

In *Moulton* v. *Libbey*, supra, it was held in an elaborate opinion that shell fisheries including the digging of clams, are embraced in the common right of the people to fish in the sea, creeks and arms thereof, and that the State as representing the people has authority to regulate the common rights and privileges of fishing.

In *Com.* v. *Hilton*, supra, it was held that under the statute and vote of the town there in question, the selectmen had authority to make a regulation forbidding the taking of clams without a permit except for the purposes and in the quantities specified by the statute and providing that permits should be granted only to inhabitants of the town. It was also held that the statute authorizing such action on the part of the town was constitutional.

In that case the vote of the town was based upon the Public Statutes of Massachusetts, chapter 91, section 68, as amended by chapter 391 of the Laws of 1889. That act provided that the

mayor and aldermen of cities and the selectmen of towns when so instructed by their cities and towns, may control and regulate or prohibit the taking of eels, clams, quahaugs and scallops within the same; and may grant permits prescribing the times and methods of taking eels and the shell fish above named, within such cities and towns "and make such other regulations in regard to said fisheries as they may deem expedient."

In accordance with the vote of the town taken by virtue of this statute, the selectmen made a regulation "prohibiting all persons from taking clams on Salisbury Flats to sell, except those having a permit from the selectmen. The permit only to be granted to a resident of the town."

It was held by the court that the language of this statute is broad enough to authorize a regulation which thus preferred the inhabitants of the town in issuing permits to take fish for sale.

In the case at bar it has been seen that the statute upon which the vote passed by the town of Cushing purports to have been based, not only fails to authorize in express terms a regulation excluding non-residents from the privilege of applying for permits, but it contains no general provision like that of the Massachusetts statute above quoted, authorizing the selectmen to "make such other regulations in regard to said fisheries as they may deem expedient."

In *State* v. *Bunker*, 98 Maine, 387, the regulation in question preferring the inhabitants of the town of Lamoine was based upon section 37 of chapter 284 of the Laws of 1901, (section 34, chapter 41, R. S.) which in part reads as follows:

"Any town may at its annual meeting fix the times in which clams may be taken within its limits, and the prices for which its municipal officers shall grant permits therefor; and unless so regulated by vote, residents of the town may take clams without written permit. But without permit any inhabitant within his own town, or transient person therein, may take clams for the consumption of himself and family. This section does not apply to hotel keepers taking clams for the use of their hotels, nor does it interfere with any law relating to the taking of shell fish for bait by fishermen.

Whoever takes clams contrary to municipal regulations authorized by this section, shall, for each offence, be fined not more than ten dollars, or imprisoned not more than thirty days."

It was there held that this statute "contains no prohibition against a person taking clams within the limits of the town of which he is not a resident, nor does it authorize the inhabitants of a town to adopt any by law or regulation prohibiting a non-resident taking clams within the limits of their town."

It will be seen from a comparison of the two statutes that the Act of 1905 upon which the regulation in the case at bar purports to have been based, contains no more specific provisions on the one hand and no more comprehensive language on the other with reference to the exclusion of non-residents than the statute of 1901, which was construed in *State* v. *Bunker*, supra; and it is a familiar principle of construction that the operation of a penal statute cannot be extended by implication so as to embrace cases which are not plainly included in the express terms and obvious import of the language of the enactment. *Campbell* v. *Rankins*, 11 Maine, 103; Endlich on Int. of Stat. sec. 329; *State* v. *Bunker*, supra.

It is accordingly the opinion of the court that the vote of the town of Cushing "not to issue licenses to non-residents" was not authorized by the statute of 1905 upon which it purports to have been based.

It is suggested, however, that no question can be made respecting the validity of the remaining portion of the regulation adopted by the town of Cushing, inasmuch as the statute of 1905 upon which it was based, expressly authorizes towns to fix the times in which clams may be taken within their limits, the prices for which licenses therefor may be granted and the number to be issued. And it has not been forgotten that the statute itself also declares that "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," etc.

It is true that a by-law or regulation adopted by a town, as well as a statute enacted by the legislature may be valid in part and void in part. *State* v. *Robb*, 100 Maine, 180, and cases cited. "If

when the unconstitutional portion is stricken out that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained." Cooley's Const. Lim., 211. But this cannot be done when it would violate the legislative intent. *State* v. *Mitchell*, 97 Maine, 66.

In the case at bar it is not in controversy that the statute of 1905 authorized the vote of the town to "issue 150 licenses" and to fix the "price for licenses at 25 cents." But it is manifest that this regulation was not adopted for the purpose of obtaining the revenue to be derived from such small license fees. One of the leading purposes of it undoubtedly was to prohibit non-residents from taking clams in that town by depriving them of the privilege of applying for a license and thus subjecting them to the statutory penalty for digging clams without a permit from the selectmen of the town. But the regulation is invalid as to non-residents. They may take clams in the town of Cushing without a permit from the selectmen and without incurring any statutory penalty. The enforcement of the regulation against the inhabitants of the town, under such circumstances, would undoubtedly defeat the purpose of the voters in adopting it. It would work a practical discrimination against the inhabitants of the town and in favor of non-residents. The prohibition against non-residents was an essential element in the scheme, and when that is stricken out the remainder cannot be executed so as to effectuate the intention of the voters of Cushing. *State* v. *Montgomery*, 94 Maine, 192. The regulation being unauthorized and void, there is no legal support for this prosecution, and the entry must be,

Judgment for the defendant.

In Equity.

W. R. LYNN SHOE COMPANY

vs.

THE AUBURN-LYNN SHOE COMPANY.

Androscoggin. Opinion December 19, 1907.

Findings of Fact by Master in Chancery. Conclusiveness of Same. Unfair Competition. Infringement of Trade Marks. Accounting. Ascertainment of Profits and Losses. Rules relating to.

1. Upon all questions of fact the finding of a master in chancery has all the weight of a jury verdict, not to be set aside or reversed unless the evidence reported shows the finding to be clearly wrong.
2. In taking an account of the profits made by the defendant in unlawful competition with the plaintiff by infringement of the latter's trade-marks, trade-name, etc., it is not to be assumed that all the profits of the defendant in his business were through such unlawful competition, and a finding by the master that certain profits were not so made will not be set aside in the absence of convincing evidence to the contrary.
3. Sales made by the defendant under a trade name resembling that of the plaintiff to persons who knew the goods were manufactured by the defendant, and also sales made to persons at a distance who had no knowledge of the plaintiff's existence, cannot be assumed to be injurious to the plaintiff if the goods themselves are not impressed with deceptive marks.
4. In determining the profits made by a defendant corporation in unfair competition with the plaintiff, it is ordinarily proper to include in the cost of manufacture and sale reasonable sums paid in good faith, as salaries to managing officers; but where such managing officers are practically the corporation and are the parties really guilty of the unfair competition, sums drawn by them as salaries should not be included in the cost of manufacture and sale.
5. In addition to the profits made by the defendant in unfair competition with the plaintiff by the use of the latter's trade-marks, trade name, etc., the plaintiff may also recover for losses in his own business caused by such unfair competition. If such loss results partly from such unfair competition and partly from other causes independent of the defendant and his acts, the plaintiff can recover only for so much of the loss as he shows to have resulted from the defendant's unlawful acts. It is not necessary,

however, for him to prove such loss, in separation from the rest, with precision or definiteness. It is sufficient for him to adduce enough evidence to enable the tribunal to make a reasonable probable estimate by the exercise of intelligent judgment.

6. If the master in chancery in such case rules that he cannot allow for any such loss because the evidence does not enable him to draw a definite line between the loss resulting from the unlawful acts of the defendant and that resulting from concurrent causes for which the defendant is not responsible, such ruling is erroneous as being too strict, and the case should be recommitted to him to make if possible, a reasonably probable estimate of such loss.

In equity. On report. Master's report re-committed.

Bill in equity. This cause has been before the Law Court once before and the decision and report of the same can be found in 100 Maine, 461, and reference to that report is made for a statement of the original contentions between the parties. After the opinion and decision in 100 Maine, 461, a decree for an injunction and an accounting was made, and the case committed to a master with instructions as stated in the present opinion. By the same decree the bill was dismissed without costs as to Ralph M. Lunn and John L. Reed who originally were made parties defendant. The master heard the parties and then made and filed his report. Both parties took exceptions to the report.

The cause then came on for hearing before a Justice of the Supreme Judicial Court "on the question of the acceptance of the report of the master, and the consideration of the exceptions of both parties thereto, and was argued by counsel. And thereupon, questions of law having arisen of sufficient importance to justify it, and the parties agreeing to it," the cause was "reported to the Law Court for its determination," with the following stipulations: "If the Law Court is of the opinion that the master's report should be accepted as it stands, a final decree is to be directed for the plaintiff accordingly. Otherwise the Law Court is to direct such orders and decrees as the rights of the parties require."

The case appears in the opinion.

Oakes, Pulsifer & Ludden, and Enoch Foster, for plaintiff.

George C. Wing, George C. Wing, Jr., and White & Carter, for defendant.

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

EMERY, C. J. There has been much litigation between these two shoe manufacturing corporations, culminating in an opinion and decision that the defendant, a newer corporation, was and had been unlawfully endeavoring to draw to itself the trade of the plaintiff, an older corporation, by using trade-marks more or less resembling those of the plaintiff, and by unfair competition through the use of a corporate name, bill heads, letter heads, etc., calculated to give the impression that it was the plaintiff corporation or its successor, or that its shoes were the product of the plaintiff corporation. After the opinion and decision in 100 Maine, 461, a decree for an injunction and an accounting was made, and the case committed to a master with the following instructions among others:

a. To take an accounting of all the profits of the business of the defendant corporation realized from the sale of shoes upon which was impressed the trade-mark of the Auburn-Lynn Shoe Co., or any similar trade-mark using the name "Auburn-Lynn," between July 9, 1903, and the date of the decree, Jan'y 15, 1906.

b. To take an accounting of all the profits of the defendant's business during the same period resulting from the wrongful acts committed by the defendant company in unfair competition with the plaintiff through similarity of name, etc.

c. To ascertain the amount of all such profits of both classes (a and b) during that period.

d. To ascertain the damages sustained by the plaintiff resulting from the wrongful use by the defendant of the plaintiff's trade-marks, and from other wrongful acts committed by the defendant in unfair competition with the plaintiff during the same time.

Under this commission the master heard the parties, their evidence and arguments, examined their books and papers, and made to the court a report of his findings and conclusions under each head and covering all the matters committed to him, but he did not report the evidence except so far as recited in his report, nor was he requested to do so. It was stipulated, however, that the facts found

by the Justice hearing the cause in the first instance, and those found by the Law Court on the appeal, (100 Maine, 461) should be considered as evidence reported. Each party filed exceptions to the report, and those exceptions and the whole question of the acceptance of the report were reported to the Law Court to direct such orders and decrees as the rights and duties of the parties require.

Upon all questions of fact the finding of the master has all the weight of a jury verdict, not to be set aside or reversed unless the evidence reported shows the finding to be clearly wrong. *Paul* v. *Frye*, 80 Maine, 26; *Tilghman* v. *Proctor*, 125 U. S. 136, 149. This principle is to be borne in mind in considering and determining questions of fact raised by the exceptions to the report.

Plaintiff's exceptions.

1. Upon recurring to the instructions to the master, it will be seen that he was to ascertain the damages resulting to the plaintiff from two sources: (1) the damages resulting from the wrongful use of the plaintiff's trade-marks, and (2) the damages resulting from the defendant's unfair competition in other ways. As to some of the sales of shoes made by the defendant during the period in question, from July 9, 1903, to Jan'y 15, 1906, the master refused to include the profits on those sales in his assessment of damages for the reason stated in his report, that "the evidence wholly fails to show any unfair competition or any ground for the inference that the plaintiff was injured thereby." To this finding and refusal the plaintiff excepted.

No evidence is adduced that any of the shoes in these particular transactions were so marked or advertised as to indicate that they were manufactured by the plaintiff. It is claimed, however, that the evidence does show that the defendant through all that period was persistently endeavoring by various unlawful devices, such as similarity of corporate name, of bill heads, letter heads, etc., to appropriate the plaintiff's customers, business and business reputation, &c., and hence that all its transactions during that time were at the expense of the plaintiff, and the profits on them should therefore be included in the damages.

The master considered this claim, and yet found that these particular transactions did not appear to be at the expense of, or in any way injurious to, the plaintiff. The transactions themselves are not stated, and since it was possible and even feasible for the defendant to sell some shoes of such kind and under such circumstances as not to affect injuriously the plaintiff's trade, the finding of the master is not shown to be clearly wrong. Granting the general fraudulent character, as to the plaintiff, of the defendant's business conduct, we should not assume that none of its business transactions were free from that fraud. The exception cannot be sustained.

2. The master also excluded from his computation of damages the profits on certain sales made by the defendant to local dealers in Lewiston and Auburn after the change of its name from "Auburn-Lynn Shoe Co.," to "Lunn & Lynn Shoe Co.," because of his finding as a fact that these local dealers knew that the shoes purchased by them were not the product of the plaintiff company. He also excluded the profits on sales made to parties who (as he affirmatively found) never had purchased any goods of the plaintiff and did not appear to have known of the plaintiff's existence. It does not appear that the shoes thus sold were impressed with any deceptive trade-mark.

The evidence before us is not sufficient to overcome the master's findings of fact as to these two classes of sales. Indeed, the plaintiff does not claim so much, but urges that nevertheless the profits on these sales also should be included in the computation of its damages on the ground that the sales were in pursuance of the defendant's fraudulent purpose condemned by the court, and were therefore unlawful, and also affected the market to the detriment of the plaintiff. But by the terms of his commission the master was not authorized to assess any punitive damages, but only such as were actually sustained by the plaintiff and resulted from the unlawful acts of the defendant in unfair competition. The burden was on the plaintiff to prove the fact that it sustained damage from those particular sales. The master reports, however, that there was no evidence that any purchasers, or the public, were misled by these particular sales, and no evidence is adduced that those sales crowded

out any sales the plaintiff could have made but for them. In the absence of such evidence, it should not be assumed that every sale by the defendant of shoes not impressed with a deceptive trade-mark deprived the plaintiff of a sale, or injured its reputation, or even narrowed its market. It should not be assumed that any purchaser of the defendant's shoes in these cases would have purchased shoes of the plaintiff if the defendant company had never existed. This exception also must be overruled.

3. The master had the task of ascertaining the defendant's profits on such sales as he did find to have been made by the defendant to the detriment of the plaintiff from unfair competition within the opinion of the court and his commission. The defendant presented a statement of its business compiled from its books by an expert accountant accompanied by copies of an actual inventory of shoes finished and in process, and of stock and merchandise on hand. The plaintiff also presented a statement compiled by its treasurer, also an expert accountant, from the defendant's books. This latter statement shows a much larger profit on the business than did the former statement. The master reported that the discrepancy was in the items of shoes and merchandise on hand, also that the defendant's inventory was correct and supported its statement. He thereupon found the profits to be as shown by the defendant's statement. The plaintiff excepted to this finding, but as neither statements nor inventory accompany the report of the case, we have not the evidence to show that the matter was clearly wrong in so finding.

Before considering further the exceptions by the plaintiff we take up the exception of the defendant viz:

The defendant corporation claimed that in determining its profits made in unfair competition with the plaintiff there should be included in the cost of manufacture and sale the sums paid as salaries for services to Mr. Lynn, its president and one of its three directors, and to Mr. Lunn, its treasurer and another of its three directors. These salaries were fixed by the board of directors, Lynn and Lunn being a majority thereof. The master declined to allow these salaries in reduction of profits, and the defendant excepted.

If the bill and the claims made under the bill were against Lynn and Lunn as a firm or partnership, it is clear that the value of their time, talent and services expended in wronging the plaintiff by unfair competition should not be deducted from the plaintiff's damages. To do so would compel the plaintiff to pay them for wronging it. *Callaghan* v. *Myers*, 128 U. S. 617. But the counsel for the defendant corporation claims that Lynn and Lunn were merely its servants, that the sums paid them for carrying on the business must have been paid to other servants if not to them, and hence were a necessary and legitimate part of the cost. *Rubber Co.* v. *Goodyear*, 9 Wall. 788, is cited, where the master allowed as part of the cost of the infringing goods "the usual salaries of managing officers." If Lynn and Lunn were nothing more than servants, or even managing officers of the corporation acting under the directors, and had no other connections with the wrongs done the plaintiff, there might be some force in the argument. But the record before us discloses that in fact the corporation was practically the servant of Lynn and Lunn, not they its servants. They organized it, directed it, set it and kept it in unfair competition with the plaintiff. The wrong to the plaintiff was conceived, brought forth and nurtured by them. Whether they wrought the wrong as individuals, or as a partnership, or as a corporation, they were the real wrong doers. The court should penetrate through the form to the substance. The exception must be overruled.

Returning to the plaintiff's exceptions: The master included in his assessment of damages sustained by the plaintiff resulting from the wrongful acts of the defendant in its unfair competition, the profits made by the defendant on goods manufactured and sold by it in what the master found to be unfair competition with the plaintiff during the period named from July 9, 1903, to Jan'y 15, 1906. He further found at the request of the plaintiff that during the same period the plaintiff made no profit but suffered a loss on the product of its own factories, and that this loss was attributable to an interruption of the plaintiff's business during that time. He found that this interruption of business was caused partly by the

plaintiff's own acts and omissions, partly by other events for which the defendant company was not responsible, and partly by acts of the defendant.

He says in his report "By interruption of the plaintiff's business, I refer to the succession of events breaking in upon and affecting the plaintiff's business immediately prior to the organization of the defendant corporation and continuing until January 15, 1906, including the discharge of Mr. Lynn, the discharge of Mr. Lunn, Mr. Reed and other employees from the service of the plaintiff, the change in the plaintiff in the method of selling its goods, and the acts wrongful and otherwise of the defendant corporation in connection with the establishment and conduct of its business." He further reported that no evidence was submitted to him by which he could determine how much of his loss was attributable to the wrongful acts of the defendant, and for that reason did not include any of that loss in his assessment of damages. To this the plaintiff excepted.

The plaintiff claims that if it be impossible to determine how much of this loss resulted from the wrongful acts of the defendant, it should be charged with the whole loss as it, the defendant, appeared to be the only wrong doer in the premises. This contention cannot be sustained. Even a wrong doer is responsible only for the damages he causes, for the damages resulting naturally from his acts either directly, or from forces he releases and sets in motion by his wrongful acts. For damages sustained concurrently, at and through the same period of time, from acts or events of which the wrong doer is neither the cause nor the 'causa causans,' he is not responsible. If the plaintiff fails to furnish evidence affording some basis for an intelligent judgment, for at least a probable estimate as to how much of his damage resulted from the wrongful acts of the defendant, he fails to prove a necessary element in his case. It is for the plaintiff to prove the resulting damages as well as the wrongful act. They are not to be determined by haphazard guess, as by throw of dice.

It is not necessary, however, for the plaintiff in such case to prove the resulting damages in separation from other damages with

mathematical certainty or anything like it. He is not to be held to precision, to the exact pound, neither more nor less, nor even to show a distinct separation in time and circumstance. It is enough if he furnishes evidence upon which the tribunal can make a reasonably probable estimate through the exercise of intelligent judgment. Mere difficulty in making such an estimate does not authorize the tribunal to turn the plaintiff away without any damages. Of course in a given case the estimate may be too large or too small, as it may be and undoubtedly often is in that large class of cases in which damages cannot be calculated but necessarily have to be estimated. Certainty, precision is undoubtedly very desirable in the assessment of damages in such cases, but it is practically unattainable, and there is less danger on injustice in awarding judgment upon reasonably intelligent estimates than in refusing it wholly. See *Allison* v. *Chandler*, 11 Mich. at p. 554.

In connection with his report that there was no evidence from which he could determine how much of the loss in question was attributable to the defendant's wrongful acts, the master stated that he construed his commission as limiting him in the assessment of damages to such damages as he could find resulted "solely" from the defendant's wrongful acts. If under that construction, he sought to make a probable, intelligent estimate without insisting on certainty, to reach an approximately fair apportionment between the defendant's wrongful act and other independent causes of the damage without insisting on precision and found even that impossible, his report would have to be accepted as not enough appears to show that he was unmistakably wrong in such a conclusion.

A majority of the Justices, however, are of the opinion that the master had in his mind as shown by his language a more narrow and strict construction of his commission, that he understood he was to find the amount of such damages only as were caused by the defendant's wrong doing, separable and distinct in time and circumstance from other independent causes, that he was to find a definite, distinct line of cleavage between the damages resulting from the defendant's wrongful acts and those resulting from other, perhaps concurrent, but independent causes.

It follows from all the foregoing that the report should be recommitted to the master, solely, however, for further hearing and report upon the question of what damages, if any, should be awarded to the plaintiff for the losses in its own business, in the production and sale of its own goods, caused by the wrongful acts of the defendant. As in the opinion of a majority of the Justices this question was before considered and determined upon a too narrow construction of his commission, the master should give a further hearing both of evidence and argument to the parties upon the question submitted and make if possible a reasonably probable estimate of the damages recoverable according to the principles enunciated in this opinion.

So ordered.

HANNIBAL E. HAMLIN,

Attorney General, by Information,

vs.

"PERTICULER BAPTIST MEETING HOUSE," et als.

Cumberland. Opinion December 20, 1907.

Deed. Construction. Estate. Fee. Amicus Curiae. Appeal. Statute (Mass.) 1811, chapter 6, section 3. R. S., chapter 16, section 33.

True Lovett of Bridgton, by deed dated April 12, 1814, in consideration of the sum of nineteen dollars paid by Samuel Andrews and Jedediah Kimball "a committ of the Society cald Perticuler Baptist in said Town of Bridgton, or their successors in that office for the time being," gave, granted, sold and conveyed "Unto the said Samuel and Jedediah" a certain tract of land in said town, "to have and to hold, the aforegranted premises to the said Samuel and Jedediah and to their successors in office to their use and behoof forever," the covenants being in the following terms: "And I do covenant with the said Samuel and Jedediah and their

successors in office, that I am lawfully seized in fee of the aforegranted premises; that I have good right to sell and convey the same to the said Samuel and Jedediah and to their successors; and that I will warrant and defend the same premises to the said Samuel and Jedediah, their assigns forever, against the lawful claims and demands of all persons."

Held: (1) That it was the intention of the grantor to convey the property to the grantees, not in their individual right, but as trustees for the Perticuler Baptist Society, the word "committ" meaning committee, and being equivalent to trustees, and the words "successors in office" providing for a continuance of the trust.

(2) That the deed contains no words of qualification or limitation, nothing to indicate that under any circumstances the estate is to determine. There is no mention of any restricted purpose for which the property is to be used. It is a conveyance to the committee named and to their successors in office, to their use and behoof forever, and a fee simple in trust was granted, although no words of limitation to heirs were used.

The term amicus curiae implies the friendly intervention of counsel to remind the court of some matter of law which might otherwise escape its notice and in regard to which it might go wrong. Such an intervention is granted not as a matter of right but of privilege and the privilege ends when the suggestion has been made.

An amicus curiae has no control over the suit, and has no right to bring the case from one court to another or from a single Justice to the Law Court by exceptions, appeal or writ of error.

In the case at bar, Addie E. Pingree, was not named as a party defendant in the bill and when, without title or interest, she voluntarily appeared to resist it, she could be regarded, at best, simply as amicus curiae, and in that capacity her privilege ended when through her counsel she called the attention of the court below to certain suggestions in matters of law. It is true that as claimant of title she had a right to be heard on that single question and the appeal was properly entertained for the purpose of settling that question, but as that has been settled adversely to her rights, there is no longer any party in the Law Court to be heard. As amicus curiae she has had her hearing in the lower court. All the points raised in the Law Court were raised before the chancellor and from his decision she cannot as amicus curiae, appeal.

In equity. On appeal by defendant Addie E. Pingree. Appeal dismissed. Decree below affirmed.

Bill in equity in the nature of an information brought in the Supreme Judicial Court, Cumberland County, by "Hannibal E. Hamlin, Attorney General, Farragut Post, No. 27 of Bridgton, Grand Army of the Republic, Department of Maine" against "The Property in Bridgton Maine, known as the 'Old Baptist Meeting

House,' or 'Perticuler Baptist Meeting House,' Julia Kimball of Boston, Mass., Almira H. Hall of Winnebago, Minn., and all persons interested therein." This bill was brought under the provisions of Revised Statutes, chapter 16, section 33, which provides as follows: "Where any property in the state, dedicated and ordained for pious uses, has no proper or legal custodian, so that it is becoming wasted and the utility thereof is lost, upon the application of any person, patriotic or religious society interested in having such property preserved and applied to the uses for which it was originally intended, or for some public or patriotic purpose, the attorney general shall file a bill in equity, in the nature of an information, against such property and all persons interested therein, praying for the appointment of trustees to care for such property and for the proper application and disposal thereof, and the court may order such notice as seems proper, and may appoint receivers or trustees therefor, and upon final decree, may order the care, custody, sale, application or disposal of such property as will best serve the purposes for which it was originally intended, or some public or patriotic purpose. The court may convey or transfer such property to any religious or patriotic body, to be held and applied for the purposes of such trust as the court may declare; and it shall have power to treat, care for and dispose of the same in furtherance of such pious, public or patriotic uses as may seem best suited to the case and situation."

At the proper time, Addie E. Pingree of Boston, Mass., who was not named as a party in the bill, but who claimed title to the property, appeared and filed an answer with a demurrer inserted therein. A hearing was first had on the bill, answer, demurrer and replication, and the demurrer was overruled pro forma. A hearing was then had on bill, answer and proofs after which the Justice hearing the cause made the following decree:

"It is hereby ordered, adjudged and decreed that the plaintiff's bill be sustained, and Henry A. Shorey, Samuel Knight and J. Louville Bennett of Bridgton, County of Cumberland, State of Maine, are hereby appointed Trustees to care for said property described in paragraph first of the bill.

"It is hereby further ordered, adjudged and decreed that said Trustees shall at once sell the meeting house, located on said land, and after said sale deliver a deed of trust of said property described in said paragraph first of this bill to Farragut Post No. 27, of Bridgton, Grand Army of the Republic, Department of Maine, its successors and assigns for the purpose of converting the same into a Memorial Square or Park upon which shall be reared a soldier's monument or other structure, to the memory of the sons of Bridgton who fought in behalf of the cause of National Unity in the War of the Rebellion."

From this decree the said Addie E. Pingree took an appeal to the Law Court.

The original deed of the "Old Baptist Meeting House Lot" as shown by a copy personally verified from record by the late Benj. C. Stone, Clerk of Courts, Cumberland County, is as follows:

"Know All Men By These Presents, That I True Lovett of Bridgeton, County of Cumberland and Commonwealth Massachusetts, Gentleman, in consideration of the sum of nineteen dollars, paid by Samuel Andrews Esqr and Jediah Kimball, both of the town, County and Commonwealth aforesaid, a committ of the society cald perticuler Baptist, in said town of Bridgeton, or their successors in that office for the time being, the receipt whereof I do hereby acknowledge, do hereby give, grant sell and convey unto the said Sam'l & Jedediah, a certain peace of land situated in said Bridgeton and being a part of the lot numbered seven in the twelveth Range of lots in said town, beginning on the range line by Abner Smith land at a stake and stones, thence North forty two degrees West nine rods and one ninth of a rod to a stake and stones, by said Smith's land, thence South sixty five degrees West, eleven rods and one half to a stake and stones by the side of the rode lately laid out, thence by the said road forty one degrees east of South, nine rods and one ninth of a rod to the range line, to a stake and stones, thence on said Range line, North sixty five degrees east twelve rods to the first bounds, containing one hundred square rods be the same more or less.

"To Have and to hold, the aforegranted premises to the said Samuel and Jedediah and to their successors in office to their use and behoof forever; and I do covenant with the said Sam'l and Jedediah and their successors in office, that I am lawfully seized in fee of the aforegranted premises: that I have good right to sell and convey the same to the said Saml & Jedediah and to their successors: and that I will warrant and defend the same premises to the said Sam'l and Jedediah, their assigns forever, against the lawful claims and demands of all persons.

"In Witness Whereof, I the said True Lovett have hereunto set my hand and seal this, the twelveth day of April in the year of our Lord one thousand eight hundred and fourteen.

"Signed, Sealed and delivered in
presence of us
"Jacob Ellsworth Wm. Hazen True Leavit (Seal)"

"Cumberland ss April 12, 1814. Then the above named True Leavit acknowledged the above instrument to be his free act and deed.

"Before Me, Isaiah Ingalls, Justice of the Peace."

The case appears in the opinion.

William H. Looney, for plaintiff.

Peabody & Peabody and Robert Treat Whitehouse, for defendant, Addie E. Pingree.

SITTING: EMERY, C. J., PEABODY, SPEAR, CORNISH, KING, JJ.

CORNISH, J. On April 12, 1814, True Lovett of Bridgton, in consideration of the sum of nineteen dollars paid by Samuel Andrews and Jedediah Kimball "a committ of the Society cald Perticuler Baptist in said Town of Bridgton, or their successors in that office for the time being," gave, granted, sold and conveyed "unto the said Samuel and Jedediah" a certain tract of land in said town, "to have and to hold, the aforegranted premises to the said Samuel and Jedediah and to their successors in office to their use and behoof forever," the covenants being in the following terms: "And I do covenant with the said Samuel and Jedediah and their successors in

office, that I am lawfully seized in fee of the aforegranted premises; that I have good right to sell and convey the same to the said Samuel and Jedediah and to their successors; and that I will warrant and defend the same premises to the said Samuel and Jedediah, their assigns forever, against the lawful claims and demands of all persons."

It is admitted that on October 24, 1807, "the First Perticuler Baptist Church in Harrison and Bridgton" was organized with nine members, not as a corporation, but as a voluntary association for religious purposes. The word "Perticuler" in that connection is supposed to mean regular or straight, in the same sense as these adjectives are sometimes applied to one wing of a political party in distinction from those who have seceded from the regular organization. The membership increased in 1812 to thirty and in 1815 they erected a house of worship on the premises purchased the year before. In 1827, the Harrison members withdrew and formed a society of their own. The present building was erected in 1853 and up to 1870 regular services were maintained, but the society had begun to decline and the last church record bears date 1873. The pew owners leased the building to the Christian Denomination in 1873 and to the Free Will Baptist Society in 1880, by which society it was occupied for five or six years. The last survivor of the church was Rev. Jacob Bray, who combined in himself pastor, clerk and sole surviving member. He died in 1882. During the twenty years following 1885 the property was unoccupied and was becoming wasted. The original trustees had died, no successors had been appointed, the church for whose benefit it was purchased, had become extinct, and there was no one to care for the property.

Under these circumstances this bill in equity was filed on October 14, 1905, by the Attorney General on relation of Farragut Post, G. A. R. of Bridgton, in accordance with the provisions of Revised Statutes, chapter 16, section 33, praying for the appointment of trustees and the conveyance of said property by the trustees, so appointed, to said Grand Army Post in trust, for the purpose of converting said property into a Memorial Square or Park upon which a soldier's monument could be erected.

Notice was duly ordered by publication but no one appeared to object to the proceedings except Addie E. Pingree who claimed title to the property by deed of April 16, 1888, from Naomi Trumbull the daughter and sole heir at law of True Lovett, the original grantor who died in 1865. The pew owners made no objection and so far as known favored the proposed disposition of the property. The Justice before whom the case was heard after full hearing and argument, sustained the bill, and appointed trustees with power to make the conveyance prayed for, and from this decree said Addie E. Pingree appealed.

The first question involved is the title of Addie E. Pingree, who by demurrer and answer resists these proceedings, and that involves the construction of the original deed of April 12, 1814. She claims that this deed conveyed not a fee simple, but a qualified, base or determinable fee and that when the Perticuler Baptist Society ceased to exist and the property ceased to be used for religious purposes, the title reverted to the original grantor True Lovett, or to his heir at law, from whom she claims.

Such is not our construction of this deed.

"A base or qualified fee is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. . . . . This estate is a fee; because by possibility it may endure forever in a man and his heirs; yet as that duration depends upon the concurrence of collateral circumstances which qualify and debase the purity of the donation, it is therefore a qualified or base fee." 2 Black Com. 109, and see 4 Kent Com. 5th Ed. 91.

This definition and its application to concrete grants are found in numerous cases, but in all, the qualification is "subjoined" and "annexed" to the grant. It must be, not a matter of strained inference, but of clearly expressed intention. The following are illustrations of such a determinable estate:

"As long as the Church of St. Paul shall stand," Walsingham's Case, 2 Plowd. 557, "As long as used for said canal," *State* v. *Brown*, 27 N. J. L. 1, "So long as the same shall be used and employed for the uses and purposes of the Ohio and Mississippi

R. R. even forever," *Wiggins Ferry Co.* v. *R. R. Co.*, 94 Ill. 83. "So long as said corporation shall keep pipes in his land and no longer," *Jamaica Pond Acq. Co.* v. *Chandler*, 9 Allen, 159. "So long as said real estate shall by said society or its assigns be devoted to the uses, interests and support of certain religious doctrines," *First Universalist Society* v. *Boland*, 155 Mass. 171. "As long as said Trafton occupies said privilege with mills," *Moulton* v. *Trafton*, 64 Maine, 218.

These decisions are in harmony with the quaint maxim found in Shep. Touchstone, 126, "To every good condition is required an external form," and also with the elementary principle that conditions are not viewed with favor by the law. In *Rawson* v. *Inhs. of School District*, 7 Allen, 125, a grant of land to a town "for a burying place forever" was held not to be a grant upon a condition subsequent. See also *Packard* v. *Ames*, 16 Gray, 327.

In the case at bar there are no words of qualification or limitation, nothing to indicate that under any circumstances the estate is to determine. There is no mention of any restricted purpose for which the property is to be used. It is a conveyance to the committee named and to their successors in office, to their use and behoof forever, and a fee simple in trust was granted, although no words of limitation to heirs were used. *Packard* v. *Old Colony R. R. Co.*, 168 Mass. 92; *Craig* v. *Inhs. of Franklin Co.*, 58 Maine, 479.

It was plainly the intention of the grantor to convey the property to the grantees, not in their individual right, but as trustees for the Perticuler Baptist Society, the word "committ" meaning committee, and being equivalent to trustees, *Sawyer* v. *Skowhegan*, 57 Maine, 500, and the words "successors in office" providing for a continuance of the trust. No particular words are required to create a trust. It is a matter of intention gathered from the whole instrument and here that intention is clear. All the necessary elements exist, the trustees, the beneficiary and the property to be held. The trustees had no duty to perform, they were clothed with no power, it was a naked trust. It is true that the beneficiary was not an incorporated society or a parish organization, but three years

before this deed was given, the Commonwealth of Massachusetts by Statute of 1811, chapter 6, section 3, provided that an unincorporated religious society could acquire, use and enjoy property in the same manner as if incorporated, and could elect suitable trustees, agents or officers in connection therewith. *First Baptist Church of Sharon* v. *Harper*, 191 Mass. 196. True Lovett therefore, conveyed an absolute fee simple in trust, the legal title vesting in the committee named and their successors in office, and the equitable title or beneficial interest in the unincorporated religious society known as the Perticuler Baptist. He intended to and did part with all title to the premises, without any right of reversion whatever, and therefore Addie E. Pingree has no title as grantee from the heir of True Lovett because her grantor had none.

But said Addie E. Pingree also sets up a claim of title by adverse possession through herself and said Naomi Trumbull from whom she obtained a deed on April 16, 1888. Without reviewing the testimony it is sufficient to say that the evidence falls far short of sustaining such a contention. Occasional acts, which savored more of trespass than of ownership, were proved but they negatived that uninterrupted and continuous, as well as open and adverse possession which the law requires.

Upon both points the claims of Addie E. Pingree fail and in our opinion she had no title or interest in this property, nothing which would warrant her appearance and defense. She was a mere stranger.

This being so, this appeal must be dismissed without further consideration by this court of any of the points raised in the court below by said Addie E. Pingree in her demurrer and answer either as to the constitutionality or construction of the statute in question. She was not named as a party defendant in the bill and when, without title or interest, she voluntarily appeared to resist it, she could be regarded, at best, simply as amicus curiae, and in that capacity her privilege ended when through her counsel she called the attention of the court below to certain suggestions in matters of law.

The term amicus curiae implies the friendly intervention of counsel to remind the court of some matter of law which might otherwise escape its notice and in regard to which it might go wrong. Such an intervention is granted not as a matter of right, but of privilege and the privilege ends when the suggestion has been made. He has served his purpose and has no further standing in court. It is not the function of an amicus curiae to take upon himself the management of the cause. *Taft* v. *Transportation*, 56 N. H. 414. A demurrer cannot be filed by him, ex parte Henderson, 89 Ala. 36, nor exceptions, *Birmingham L. & A. Co.* v. *First Nat. Bank*, 100 Ala. 249, 46 Am. St. Rep. 45; nor a motion to dismiss, *Piggott* v. *Kirkpatrick*, 31 Ind. 261.

"An amicus curiae is heard only by the leave and for the assistance of the court and upon a case already before it. He has no control over the suit and no right to institute any proceeding therein, or to bring the case from one court to another or from a single judge to the full court by exceptions, appeal or writ of error." *Martin* v. *Tupley*, 119, Mass. 116; In re Columbia R. R. Co. 101 Fed. Rep. 965. It is true that Addie E. Pingree, as claimant of title, had a right to be heard in this court on that single question and the appeal is properly entertained for the purpose of settling that question, but as that has been settled adversely to her rights, there is no longer any party in this appellate court to be heard. As amicus curiae she has had her hearing in the lower court. All the points raised here were raised before the chancellor and from his decision she cannot as amicus curiae, appeal. The decision of the court below stands, and the entry must be,

Appeal dismissed.
Decree below affirmed.

In Equity.

JOHN L. HERRICK *vs.* CLARENCE E. LOW et als.

Opinion. December 20, 1907.

Wills. Construction. Trust. Appointment of Trustee. Widow. Heirs.

A testator's will contained, among other things, the following paragraph:

"I will that John L. Herrick shall have the rent of my farm free of cost for the term of ten years for paying the taxes. This is for improvement that he has made and will make before my decease. The said John L. Herrick shall have the privilege of purchasing the farm at the end of ten years for $1000; and at the end of ten years from my decease, I will that the farm or the $1000, if sold, shall be divided one half to my brother Benjamin E. Low and his heirs; and the other half equally divided between Evans A. Lamson, Addie E. Ames and John L. Herrick and their heirs."

The said term of ten years having expired and the executor named in said will having died before the expiration of said term, and no person having succeeded to said trust and the said Benjamin E. Low having died leaving a son and a daughter as his only heirs and the said Evans A. Lamson having died without issue leaving a widow, and one sister as his only heir. *Held:* 1. That a trust was created by the aforesaid paragraph of said will. 2. That the executor having died, it is unnecessary to decide whether or not he could have acted as trustee in the premises. 3. That as a trust should not fail for want of a trustee, the case should be remanded for the appointment of a trustee to carry into effect the provisions of said paragraph. 4. That the widow of the said Evans A. Lamson was neither a donee under the will nor a heir of any of those named therein.

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

Bill in equity brought by the plaintiff John L. Herrick of Charleston, in the County of Penobscot, against Clarence E. Low of Madison, Lake County, South Dakota, Cora V. Mitchell of Avoca, Murray County, Minnesota, Addie E. Ames of Bradford, and Nancy L. Lamson of Charleston both in said Penobscot County, asking for the construction of paragraph three, clause two of the will of Nancy L. Bridgham late of said Charleston.

This cause came on to be heard on bill and answers at the April term, 1907, of the Supreme Judicial Court, Penobscot County, and

it appearing to the Justice presiding that questions of law were involved of sufficient importance and doubt to justify the same, and by consent of the parties, the cause was reported to the Law Court, for hearing and decision.

The case appears in the opinion.

C. A. Bailey, for plaintiff.

A. L. Blanchard, for defendants.

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

SPEAR, J. This is a bill in equity asking for the construction of paragraph three, clause two of the will of Nancy L. Bridgham late of Charleston in the County of Penobscot, to wit:

"I will that John L. Herrick shall have the rent of my farm free of cost for the term of ten years for paying the taxes. This is for improvement that he has made and will make before my decease. The said John L. Herrick shall have the privilege of purchasing the farm at the end of ten years for $1000; and at the end of ten years from my decease, I will that the farm or the $1000, if sold, shall be divided one half to my brother Benjamin E. Low and his heirs; and the other half equally divided between Evans A. Lamson, Addie E. Ames and John L. Herrick and their heirs."

The term of ten years for which the plaintiff was to have the free use and occupancy of said farm by paying the taxes aforesaid, expired Jan. 3, 1907, and the plaintiff in the exercise of the right given him by the will then claimed and now claims the privilege of purchasing the farm as specified in the will, and was then ready and has ever since been and is now ready to pay said sum for the conveyance in fee of the same. The executor named in the will was duly appointed and qualified and entered upon the discharge of his duties, but died April 19, 1906, and no person has succeeded to said trust. The persons named in the will among whom the said $1000 is to be divided when paid, Benjamin E. Low, designated to receive one half, has deceased, leaving as his only heirs, a son Clarence E. Low and a daughter Cora V. Mitchell; Evans A. Lamson designated to receive one sixth has also deceased without issue,

leaving a widow Nancy L. Lamson named as a respondent herein and as his only heir a sister Addie E. Ames who also is designated to take one sixth in her own right; and the plaintiff John L. Herrick by name, is designated to receive the remaining one sixth.

By the terms of the will, no person is appointed to make a conveyance of the farm and distribute the money received therefor, and the plaintiff avers that he is in doubt as to whom he should pay the $1000 and by whom the conveyance should be made that will transfer the title to him, wherefore he prays that the court will construe and interpret the provisions of said will and particularly the clause set forth in the second paragraph of the bill which is the clause above quoted. And also determine whether Nancy L. Lamson widow of Evans A. Lamson, is entitled by descent to any part of said estate.

Upon the above state of facts the court are of the opinion that a trust was intended to be created by the clause of the will above quoted and that the trustee, whether he be the executor by virtue of his office or some person specially appointed, should have authority to execute and deliver a sufficient deed of the farm mentioned, to John L. Herrick, and also to receive and divide among the parties entitled thereto, the $1000 to be paid therefor.

The executor of the will having deceased, it now becomes unnecessary to decide whether he could have acted as trustee in the premises. As a trust should not fail for want of a trustee the case should now be remanded for the appointment of a trustee to carry into execution the provisions of paragraph three, clause two, of the will.

The court are also of the opinion that Nancy L. Lamson, widow of Evans A. Lamson, is not entitled by descent to any part of said estate. It is clear from the clause of the will under consideration that the testatrix intended that the proceeds of the sale of the farm should be divided among the persons therein named or their heirs. Nancy L. Lamson was neither a donee under the will, nor an heir of any of those named. *Golder* v. *Golder*, 95 Maine, 259.

Decree in accordance with this opinion.

HARRY O. GURDY, Appellant
from decree of Judge of Probate.

Knox. Opinion December 24, 1907.

Probate Appeal. Adverse Judgment. Same no Bar, when. Entry of Appeal. "Accident or Mistake." Judicial Discretion. Jurisdiction. Practice. Procedure. R. S., chapter 65, section 30.

1. When an appeal from the decree of the Probate Court refusing to issue letters testamentary is decided adversely to the appellant, on the ground that it did not appear in the appeal or in the reasons therefor that the will had been allowed or admitted to probate, that judgment is not in law a bar to a petition, filed during the pendency of the appeal proceedings, for leave to enter and prosecute an appeal from the decree refusing to admit the will to probate.
2. On the hearing of a petition for leave to enter and prosecute an appeal from a decree of the Probate Court, the question whether previous appeal proceedings and the judgment thereon are a bar to the petition is a question of law, to the decision of which by a Justice of the Supreme Court of Probate exceptions will lie. If no exceptions are taken, the ruling is conclusive on the parties, if the court had jurisdiction.
3. On the hearing of a petition for leave to enter and prosecute an appeal from a decree of the Probate Court, the questions whether the failure seasonably to claim or enter the appeal was through accident or mistake, whether it was without the fault of the petitioner, and whether justice requires a revision of the decree, present issues of fact. The determination of the Justice thereon and the exercise of the judicial discretion conferred on him are final and conclusive.
4. When leave is granted to enter and prosecute such an appeal, by a Justice having jurisdiction, matters of fact or law which were heard and determined by him cannot be heard again upon a motion to dismiss the appeal which he granted.
5. The only question which can be open on such a motion is whether the Justice had jurisdiction to grant leave.
6. If a Justice hear such a petition in vacation by agreement of the parties, and enters his decision on the docket as of the last day of the preceding term which he held, the parties are concluded by the entry.
7. The Supreme Court of Probate has jurisdiction to hear such a petition at a term later than the first one after the petition is filed. Whether the petitioner has used due diligence in prosecuting his appeal, and giving notice, and whether, for want of diligence, he should be refused relief, are questions addressed to the judicial discretion of the presiding Justice.

8. A decree on such a petition that an appeal be allowed and prosecuted is equivalent to a decree that an appeal may be entered and prosecuted.

9. If the decree granting leave to enter and prosecute an appeal fails to designate the term to which the appeal is to be entered, the entry of the appeal at the next term of court is seasonable and authorized.

On exceptions by appellee. Overruled.

Appeal from the decree of the Judge of Probate, Knox County, refusing to admit to probate a copy of a certain instrument as the last will and testament of Harrington Osgood, late of Rockland in said county, deceased.

The case fully appears in the opinion. Also see *Gurdy, Appellant*, 101 Maine, 73.

Arthur S. Littlefield, for appellant.

J. H. Montgomery, for appellee.

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

SAVAGE, J. The appellant in 1904 sought upon his own petition to obtain the probate of the will of Harrington Osgood. After the hearing, the Probate Court made a decree disallowing the will. This appellant claimed an appeal on the ground that the Probate Court had refused to issue letters testamentary, and filed his reasons therefor. Proper notice was given. The appeal was entered in the Supreme Court or Probate at the January term, 1905, and after various proceedings went to the Law Court upon the appellant's exceptions, and was there argued. The exceptions were overruled by the Law Court December 29, 1905, on grounds not touching the merits of the original question of the allowance or disallowance of the will. See *Gurdy, Appl't*, 101 Maine, 73.

Meanwhile on November 14, 1905, and within one year from the filing of the original decree in Probate Court, the appellant, apparently apprehending an unfavorable disposition of his first appeal, filed a petition for an appeal from the decree disallowing the will and prayed for leave to enter and prosecute it. He alleged in substance that the former failure to prosecute an appeal on that ground was through accident or mistake or otherwise, and that it

was wholly without his fault, and that justice required a revision of said decree.

At the January term of court following, notice was ordered on the petition, and not having been given, a new order of notice was issued at the April term, 1906. At the September term following, service of notice having been made on a part only of the persons interested, another order was made for service on the remainder, and was duly served. No hearing was had during the succeeding January term, 1907, but by agreement, the matter was heard in vacation by a Justice of this court, and his decree granting the petition was filed as of the last day of the January term.

Thereupon, this appellant, on March 15, 1907, filed in the Probate Court his appeal and reasons therefor, service was made on the adverse parties, and the appeal was entered at the April term, 1907, and continued. At the September term, 1907, C. W. Hussey, who had been appointed administrator of the estate of Mr. Osgood, filed a motion to dismiss the appeal, for the following reasons:

"1. That from the decree of the Judge of Probate mentioned in said appeal, an appeal was had by said Harry O. Gurdy within the time allowed for appeals, and the same has been heard and determined by this court.

"2. That if no appeal was taken by the said Harry O. Gurdy within the time allowed, it was not by reason of any accident, mistake, defect of notice or otherwise without fault on his part, as alleged in his said appeal.

"3. That the above entitled appeal is irregular, unauthorized and insufficient."

At the hearing upon this motion the appellee offered to prove the facts in substance, as hereinbefore set forth in the history of the prior proceedings in this case, and that at the hearing on the petition for leave to enter an appeal, he had opposed it for those reasons. He claimed that the decision and judgment in the first appeal proceedings were a bar to the present appeal. The court ruled that the evidence offered, even if admissible, would furnish no sufficient ground for sustaining the motion to dismiss, and denied

the motion. The case is now before us on the appellee's exceptions to this denial.

As to the claim made under the first ground in the motion to dismiss, namely, that the judgment in the prior appeal is a bar to these proceedings, it is sufficient to say that the issue presented by this appeal was not heard or determined in the prior case. It there appeared that the appeal and reasons were imperfectly and inartificially taken and drawn, and did not present the only ground upon which an appeal could have been taken. There was, in terms, no appeal from the refusal to probate the will. It was only an appeal from the refusal to grant letters testamentary. It is not necessary to cite authorities to the effect that a judgment which did not and could not decide a particular issue is not a bar to a subsequent proceeding brought to decide that issue.

But there is another answer to this ground in the motion to dismiss, and it applies as well to the second ground. They both relate to matters which were determined and decided by the Justice who heard the petition for leave to appeal. The first ground involved a question of law. The Justice decided it adversely to the appellee. To such a ruling exceptions lie, and the appellee might have preserved his rights by taking exceptions. This he failed to do. The point is not now open to him. He cannot do now under a motion to dismiss, that which he might and should have done, if he felt aggrieved, in the earlier proceeding. The decision of the Justice is binding upon him, if the Justice had jurisdiction.

The second ground of his motion to dismiss relates to the decision by the Justice of questions of fact and the exercise of a judicial discretion. These questions were determined by the Justice and to his determination exceptions did not lie. This court can neither review nor revise his exercise of the discretion which the statute conferred on him. *Sawyer* v. *Chase*, 92 Maine, 252. If he had jurisdiction, his determination is binding upon the appellee. In no event can matters, within the jurisdiction of the Justice, which were heard and determined by him, be heard again upon a motion to dismiss the appeal which he granted.

It follows that the only question open on the motion to dismiss,

so far as the first two grounds are concerned, is, — whether the Justice had jurisdiction to act.

It is not denied that when an interested party, from accident, mistake, defect of notice or otherwise without fault on his part, omits to claim or prosecute an appeal, the Supreme Court of Probate has authority to allow an appeal to be entered and prosecuted with the same effect as if it had been seasonably done. R. S., chap. 65, sect. 30. But in this case, the appellee contends that for certain reasons to be stated, the Justice hearing the petition did not have jurisdiction. First, because the hearing was had in vacation. But the hearing was had by agreement, and the entry of the decision of the Justice was made as of the last day of the term. In these particulars the case differs from *Powers* v. *Mitchell*, 75 Maine, 364, cited by the appellee. And in such a case as this, we think the parties should be concluded by the entry on the docket. Secondly, it is contended, that at the time when the decision was made, the court no longer had any jurisdiction of the matter, because of the delay of the petitioner in causing service to be made upon interested parties, and in securing a hearing. The appellee relies especially upon that clause of section 30 above cited which provides that "said petition shall be heard at the next term after the filing thereof." But that clause has recently been interpreted by this court adversely to the contention of the appellee. *Graffam* v. *Cobb*, 98 Maine, 200. Whether the petitioner had used due diligence in prosecuting his petition, and whether, for want of diligence he should have been refused relief, were questions addressed to the sound discretion of the Justice who heard the petition, and do not go to the matter of jurisdiction. It certainly was within his jurisdiction to hear the case at a term later than the first one after the petition was filed. *Graffam* v. *Cobb*, supra.

But outside the question of jurisdiction, it is contended that the decree allowing the appeal is irregular in form and insufficient in substance to authorize the entry of an appeal. It is in these words, "that an appeal be allowed from said decree and prosecuted with the same effect as if it had been seasonably done." The appellee contends that the statute did not authorize the court "to

allow an appeal," but only to allow the petitioner to enter and prosecute an appeal. We are unable to perceive the distinction. To allow an appeal to be entered and prosecuted is to allow an appeal, and to allow an appeal means to allow it to be entered and prosecuted. If the appeal had been seasonably taken originally, but failed of being entered, it might be entered under this decree. If it had not been seasonably claimed, as was the fact in this case, an appeal might be entered with the same effect as if it had been seasonably claimed in the first place. The decree was sufficient in this respect.

Finally, the appellee contends that the decree was faulty because it failed to designate a term of court at which the appeal should be entered, and that the entry at the next term of court was unseasonable and unauthorized. We think not. Although the Justice making the decree did not designate a term of court at which the appeal should be entered, he directed service of the appeal and the reasons therefore to be made upon the adverse parties. This would seem necessarily to imply that the appeal was not intended to be entered at the term on the last day of which the decree was made. And an entry at the next term seems to the court to have been seasonable and authorized. The statute does not specify the term at which an appeal granted shall be entered, nor does it prescribe the procedure of taking and entering the appeal. The court granting leave to appeal may designate the time for filing the appeal, order notice and fix the term of entry. It did not do so in the present case, except to order notice. In such a case, we approve the procedure as to filing and entry which was adopted in this case. We do not see how the appeal could have been entered earlier than it was, and the entry ought not to have been delayed to a later term.

We have examined all the other suggestions advanced by the counsel for the appellee, but we do not find any that are tenable, or that require further consideration.

Exceptions overruled.

CHARLES H. BRAWN et al. *vs.* JOHN F. LYFORD.

Somerset. Opinion December 27, 1907.

Contracts. Nudum Pactum. Non-Performance. Non-Liability.

When the voluntary promise of a defendant to perform a gratuitous service is nudum pactum, he cannot be held liable for its non-performance as a breach of contract.

In the case at bar, the defendant conveyed his farm to the plaintiffs and assigned to them his interest in a policy of fire insurance to the extent of the buildings insured, reserving the insurance on the personal property covered by the policy. The defendant did not deliver the deed when it was signed but did so at his home later in the day when he received the purchase price. After the deed and assignment were signed, attention was called to the necessity of having the consent of the insurance company to the assignment and the defendant promised to send the assigned policy by mail to the local agents to obtain the assent of the insurance company. He neglected to do this and seven days later the buildings were wholly destroyed by fire. The plaintiffs then brought a special action of assumpsit against the defendant to recover the amount of the insurance on the buildings, with interest from the date of the fire, for breach of his promise to send the policy to the agents of the insurance company for the assent necessary to the validity of the assignment.

Held: That the promise of the defendant to send the policy to the agents of the insurance company for its assent to the assignment was without consideration and that the defendant was not liable for his non-performance as a breach of contract.

On report. Judgment for defendant.

The defendant conveyed his farm to the plaintiffs and assigned to them his interest in a policy of fire insurance to the extent of the buildings insured, reserving the insurance on the personal property covered by the policy. The defendant did not deliver the deed when it was signed but did so at his home later in the day when he received the purchase price. After the deed and assignment were signed, the attorney who prepared the instruments called attention to the necessity of having the consent of the insurance company to the assignment and the defendant promised to send the assigned policy by mail to the local agents to obtain the assent of the

insurance company. He neglected to do this and seven days later the buildings were struck by lightning and wholly destroyed by the resulting fire.

The plaintiffs then brought a special action of assumpsit against the defendant to recover the amount of the insurance on the buildings, $1350, with interest from the date of the fire, for breach of his promise to send the policy to the agents of the insurance company for the assent necessary to the validity of the assignment. Plea, the general issue with a brief statement alleging "that if any promise was made to the plaintiffs it was without consideration and void."

Tried at the September term, 1906, of the Supreme Judicial Court, Somerset County. At the conclusion of the evidence it was agreed to report the case to the Law Court for decision with the stipulation that the Law Court should render such judgment as the law and the legally admissible evidence require.

(The defendant in the case at bar, had previously brought suit against the insurance company on this same policy and the Law Court held that the company was not liable. See *Lyford* v. *Insurance Co.*, 99 Maine, 273.)

The case appears in the opinion.

D. D. Stewart, for plaintiff.

Norman L. Bassett and F. W. Butler, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, KING, JJ.

PEABODY, J. The defendant on the 31st day of August, 1901, conveyed to the plaintiffs his farm in St. Albans in the County of Somerset and State of Maine and assigned to them his interest in a policy of fire insurance to the extent of the buildings insured, reserving the insurance on the personal property covered by the policy.

The policy was to insure $1350 on the buildings and $450 on the personal property for a term of three years, about half of which was unexpired. The premium was $27.

The defendant did not deliver the deed when it was signed but did so at his home later in the day when he received the purchase price.

After the deed and assignment were signed the attorney who prepared the instruments called attention to the necessity of having the consent of the insurance company to the assignment, and the evidence shows that after conversation on the subject, the defendant promised to send the assigned policy as soon as the deed was delivered, by mail to Parks Brothers, agents, at Pittsfield, Maine to obtain the assent of the insurance company to the assignment, that he neglected to do this, and that on the seventh day of September, the buildings were struck by lightning and wholly destroyed by the resulting fire.

The plaintiffs seek their remedy by a special action of assumpsit to recover of the defendant the amount of the insurance on the buildings, $1350, with interest from September 7th, 1901, for the alleged breach of a promise to send the policy to the agents of the company for assent necessary to the validity of the assignment.

The defendant pleads the general issue with a brief statement denying the alleged consideration and alleging that any promise to send the policy to the insurance agents was without consideration and void, and denying also that not sending the policy was the legal cause of the buildings being uninsured for which he should be held responsible.

The case is before the Law Court on report.

There is some conflict of evidence as to whether in the original trade the $2000, named as consideration in the deed included an assignment of the unexpired term of the insurance on the buildings. The defendant's testimony indicates that the subject came up when the parties met to have the deed drawn, but that of the plaintiffs and their witness, Katen, shows that it was previously agreed that the $2000 was to be paid for the property and insurance. But this is immaterial since the trade as consummated was for the farm and insurance on the buildings.

There is nothing in the nature of the defendant's undertaking to constitute it a part of what was purchased by the plaintiffs. The payment of the consideration and the execution of the deed and assignment embraced the whole transaction. We cannot agree with

the plaintiffs' theory that the promise of the defendant to send the policy to the agents of the company is based upon the pecuniary consideration paid. It was an independent matter. The defendant was under no more obligation to procure the consent of the company to the assignment than to procure the record of the deed. He volunteered to forward the policy by mail to the agents; and he claims that his promise was not legally binding because without consideration. *Thorne et al.* v. *Deas*, 4 Johns. (N. Y.) 84, upon which he relies, was an action on the case for the defendant's neglect to fulfill his promise to procure insurance on a vessel owned jointly by himself and the plaintiff. Chief Justice Kent thus concludes his opinion in which he held that there should be a verdict for the defendant: "A short review of the leading cases will show that by the common law a mandatary who undertakes to do an act for another without reward is not responsible for omitting to do the act and is only responsible when he attempts to do it and does it amiss. In other words, he is responsible for a misfeasance but not for a nonfeasance even though special damages be averred." But it was not decided upon the ground that there was no consideration for the alleged promise as consideration was not an element of that form of the action, but that the defendant had not assumed a legal duty by entering upon the execution of his undertaking. The doctrine of that case was reaffirmed in *Smedes* v. *Bank*, 20 Johns. (N. Y.) 372, although it was an action of assumpsit, but the plaintiff seems to have misconceived his remedy.

New rules have arisen from the development of the action of special assumpsit from an action on the case for deceit into one for the breach of a parol promise. Since the decision in *Rann* v. *Hughes*, 7 T. R. 350, note, a consideration for all promises not under seal has been necessary; and consideration is now generally defined as a benefit to the promisor or a detriment to the promisee.

In this case the promisor's undertaking was not for any antecedent pecuniary consideration or for an anticipated recompense, but the consideration, if any, was detriment to the promisee. If, under the facts of the case, it may be considered that the plaintiffs, on the faith of the defendant's undertaking parted with a present right,

were delayed in the present use of a right or suffered some immediate prejudice, it would be consideration, provided it was so treated by the parties. 5 Cyc. 168; Harriman on Contracts, secs. 91 and 96; *Fire Insurance Association* v. *Wickham*, 141 U. S. 564; Dutton's Estate, 181 Pa. 426; *Ames* v. *Taylor*, 49 Maine, 381.

The defendant claims that the policy remained in his custody, that he retained it because he had an interest under it, and that consequently it cannot be said that the plaintiffs parted with the document, or surrendered any present right or suffered any prejudice on the faith of the defendant's undertaking. But we do not consider that this custody of the policy was inconsistent with the plaintiffs' legal possession. They had a right to it until it was presented to the insurance company for assent to the assignment and they entrusted it to the defendant to do what they otherwise would presumably have done themselves for the protection of their legal rights. By reason of the defendant's assumption the plaintiffs were delayed in the present use of the assigned policy for a purpose recognized as important.

But the consideration of the assumpsit as detriment to the promisee lacks the element of inducement. *Fitch* v. *Snedaker*, 38 N. Y. 248. It is true that a motive might be implied from circumstances, but it clearly appears that the entrusting of the policy to the defendant was not at his solicitation and therefore was not the consideration of the promise but a mere condition precedent to the performance of the promise. Holmes' Common Law, 291; *Haigh* v. *Brooks*, 10 Ad. & El. 309; *Hart* v. *Miles*, 4 C. B. N. S. 371.

The voluntary promise of the defendant to perform a gratuitous service was nudum pactum and he cannot be held liable for its non performance as a breach of contract.

Judgment for the defendant.

ULYSSES G. MUDGETT, Admr., Appellant
from decree of Judge of Probate, estate of John Porter.

Penobscot. Opinion December 28, 1907.

Probate Courts. Decrees. Conclusiveness when not Appealed From. R. S., chapter 67, section 20.

Decrees of the Probate Court upon matters within its jurisdiction when not appealed from are conclusive upon all persons.

Decrees of the Probate Court upon matters within its jurisdiction when not appealed from are in the nature of judgments and cannot be impeached collaterally.

The right of appeal is given for the purpose of correcting errors and it is important for the security of judgments that this right of appeal should be subject to the reasonable limitations of the statute.

In the case at bar, the Judge of Probate allowed the fourth account of the administrators of the estate of a deceased intestate. In this account the administrators were allowed for certain items paid under an order of distribution to the twenty-two nephews and nieces of the deceased. In accordance with this order and a previous order of distribution, personal estate amounting to $16,891.67 was distributed to the nephews and nieces per stirpes, whereas the orders should have provided for a distribution per capita. In both petitions for distribution the Probate Court had jurisdiction and all proceedings with reference to said petitions were regular and in accordance with the statute, and the time for appeal from both decrees of distribution has long since elapsed.

Held: That these matters were within the jurisdiction of the Probate Court and its decrees not being appealed from were conclusive, and that a compliance with the orders of distribution releases the administrators from all further liability as to the assets distributed under the orders.

On report. Appeal dismissed with costs.

Appeal from the decree of the Judge of Probate, Penobscot County, allowing the fourth account of Stephen Mudgett and Benjamin F. Porter, administrators of the estate of John Porter late of Dixmont in said county, deceased intestate. The appellant, Ulysses G. Mudgett, is the administrator of the estate of Andrew Mudgett who died June 24, 1901, and who was a nephew and one of the heirs at law of the aforesaid John Porter.

The matter came on for hearing at the April term, 1907, of the Supreme Judicial Court, Penobscot County, at which time an agreed statement of facts was filed and the case was then reported to the Law Court for decision.

The sole heirs at law of the said John Porter were twenty-two nephews and nieces, and $16,891.67 was distributed to these nephews and nieces per stirpes instead of per capita.

The case sufficiently appears in the opinion.

E. M. Simpson and U. G. Mudgett, for appellant.

E. C. Ryder, for Benjamin F. Porter, administrator.

George H. Worster and E. C. Ryder, for Stephen Mudgett, administrator.

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

PEABODY, J. The case is reported to the Law Court on an agreed statement of facts.

It is an appeal from the decree of the Judge of Probate of Penobscot County allowing the fourth account of Stephen Mudgett and Benjamin F. Porter, administrators of the estate of John Porter, deceased intestate.

In the fourth account the administrators were allowed for certain items paid under an order of distribution to the twenty-two nephews and nieces of the deceased. In accordance with this order of distribution and a previous order of distribution, personal estate amounting to $16,891.67 has been distributed to the nephews and nieces per stirpes whereas the orders should have provided for a distribution per capita.

In both petitions for distribution the Probate Court had jurisdiction and all proceedings with reference to said petitions were regular and in accordance with the statute. The time for appeal from both decrees of distribution has long since elapsed.

It is alleged in the reasons of appeal that the administrators should have been charged in this account with $15,963.05, the amount which was allowed in a prior account as paid under the first decree of distribution and that they should not have been

allowed in the present account the sum of $928.62 paid under the second decree of distribution, it being claimed by the appellant that both decrees of distribution were null and void and beyond the authority of the Judge of Probate to make: and that the decree upon a prior account in which the sums paid under the first decree of distribution were allowed was likewise invalid or at least open for correction. Objection is also made on the ground that the several sums paid distributees and stated in the present account were actually paid in advance of the decree of distribution.

Decrees of the Probate Court upon matters within its jurisdiction when not appealed from are conclusive upon all persons. Such decrees are in the nature of judgments and cannot be impeached collaterally. *McLean* v. *Weeks*, 65 Maine, 411; *Harlow* v. *Harlow*, 65 Maine, 448; *Decker* v. *Decker*, 74 Maine, 465; *LeBroke* v. *Damon*, 89 Maine, 113; *Tuber* v. *Douglass*, 101 Maine, 363.

The issues raised by the two petitions of distribution were those stated in sec. 20 of chap. 67 of R. S., viz:

"When on the settlement of any account of an administrator or executor, there appears to remain in his hands property not necessary for the payment of debts and expenses of administration nor specifically bequeathed, the judge upon the petition of any party interested after public notice and such other notice as he may order shall determine who are entitled to the estate and their respective shares therein under the will or according to law and order the same to be distributed accordingly."

These matters were within the jurisdiction of the court and its decrees not being appealed from were conclusive. The right of appeal is given for the purpose of correcting errors and it is important for the security of judgments that this right of appeal should be subject to the reasonable limitations of the statute.

The matters adjudicated by the decrees of distribution are not again properly before the court for consideration.

The statute R. S., chapter 67, section 20, further provides that, "When an executor, administrator, guardian or trustee has paid or delivered over to the persons entitled thereto the money or other

property in his hands as required by a decree of a Probate Court, he may perpetuate the evidence thereof by presenting to said court without further notice within one year after the decree is made an account of such payments or of the delivery over of such property; which account being proved to the satisfaction of the court, and verified by the oath of the party shall be allowed as his final discharge and ordered to be recorded."

The first decree of distribution was dated the 31st of December, 1898, and the administrators' account showing distribution of the sum of $15,975.15 in accordance with the order was filed May 1st, 1899, and therefore fulfilled the requirements of the statute and became upon its allowance without appeal a final discharge as to the funds therein accounted for. These funds are therefore not subject to further administration and the administrators cannot be charged with them.

The last decree of distribution was May 20th, 1903, and the administrators' account was filed at the February term, 1906. Although the account did not in this respect fulfill the statutory requirement as to the time this informality effects only its availability as evidence of the facts to which it relates and its character as a discharge of the administrators with reference to the funds accounted for. Otherwise it is in the nature of an account of distribution. In such an account no question is raised as to the due administration of the estate distributed, the only question being whether the funds were in fact distributed in accordance with the order of the court.

There is, therefore, no ground for objecting to the allowance of the payments made in accordance with the order of distribution. And whether allowed or disallowed in this account it would seem that the administrators could not be placed in any different position in fact since the compliance with the order of distribution itself releases the administrators from further liability as to those assets, 18 Cyc. 628. And the account of distribution is only for preserving evidence of this release.

Appeal dismissed with costs.

HARRY SWIFT

vs.

THOMAS HAWKENS, VALENTINE CHISOLM, AND ROCKLAND, THOMASTON & CAMDEN STREET RAILWAY.

Knox. Opinion December 31, 1907.

Writs. Nominal Attachment. Officer's Return. Amendment of Return. "Chip." Legal Fiction.

When an officer's return on a writ of attachment, on which no actual attachment was made, fails to show that he made a nominal attachment by attaching a chip as the property of the defendant, but does show that a summons was duly served upon the defendant, such officer will be permitted to amend his return in relation to the nominal attachment so as to accord with the fact when in his official capacity he states that he made a nominal attachment.

When a nominal attachment only is made on a writ of attachment, a hearing as to the physical fact of attaching a chip as the property of the defendant would be an idle ceremony. Such an attachment is a legal fiction and cannot be denied when stated in the return.

On exceptions by defendants Hawkens and Chisolm. Overruled.

Action on the case for false imprisonment. The writ was entered at the January term, 1907, of the Supreme Judicial Court, Knox County. The defendants, Hawkens and Chisolm, appeared specially by counsel and filed motions to dismiss the action as to them. The case as stated by the bill of exceptions is as follows:

"On the writ, which is the ordinary and regular writ of attachment, commanding the officer to attach the goods and estate of the defendants within named to the value of five hundred dollars, the officer's return omitting the service upon the treasurer of the Street Railway, is as follows:

"'Knox, ss. December 1, A. D. 1906. At 12.30 o'clock in the afternoon, by virtue of this writ I attached a chip, the property

of the Rockland, Thomaston & Camden Street Railway, the within named defendants, A. J. Tolman, Sheriff.'

" ' Knox, ss. December 1, 1906. And on this day I summoned the within named Thomas Hawkens and Valentine Chisolm by giving to each in hand a summons for their appearance at court. A. J. Tolman, Sheriff.'

"The defendants Hawkens and Chisolm each seasonably filed a motion to dismiss said action as to them for want of sufficient service. The sheriff thereupon, by the attorney for the plaintiff filed the following petition to be allowed to amend his return:

" 'State of Maine. Knox, ss. Supreme Judicial Court. Harry Swift versus Thomas Hawkens, Valentine Chisolm and Rockland, Thomaston & Camden Street Railway.

"And now on the second day of the return term in this action comes A. J. Tolman in his capacity of Sheriff of Knox County and prays that he may be allowed to amend his return to this writ by inserting after the words ' a chip, the property of the Rockland, Thomaston & Camden Street Railway,' and before the words ' the within-named defendants,' the additional words and names ' Thomas Hawkins and Valentine Chisolm,' to the end that the amended return shall fully conform to the facts in the premises; the facts being that in each instance he severally attached a chip as the property of each of the defendants named in the writ in this action. A. J. Tolman, Sheriff.'

"Upon the petition of the sheriff to amend his return the defendants requested that there be a hearing and evidence as to what the sheriff in fact did, and that the sheriff give his testimony and they have an opportunity to examine him in relation thereto. There was neither admission nor denial that the sheriff had gone through the physical act of taking possession of a chip as the property of any of the defendants.

"The defendants contended that all there was in fact to said attachment, as the sheriff wished to show by his return, was the return itself, and that in fact the sheriff did not make any attachment, but at most only intended to do so, which intention he failed to carry out.

"No opportunity was given to prove the facts, or to examine the sheriff as to what he in fact did, although request therefor was made by the defendant's attorney; the presiding Judge ruled that if the sheriff was willing to take the responsibility of the truth of the amendment he would permit the sheriff to amend his return so as to show the same attachment with respect to the defendants, Hawkens and Chisolm as was shown with respect to the other defendant, the Rockland, Thomaston & Camden Street Railway, and denied the motion to dismiss the action as to Hawkens and Chisolm. The plaintiff contended that the return was sufficient without amendment."

To the order allowing the sheriff to amend his return and to the denial of the motions to dismiss the defendants, Hawkens and Chisolm, excepted.

The pith of the case appears in the opinion.

C. Vey Holman, for plaintiff.

Arthur S. Littlefield, for defendant Rockland, Thomaston & Camden Street Railway, "and specially to object to service" for defendants Hawkens and Chisolm.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, CORNISH, KING, JJ.

PEABODY, J. The writ in this case issued from the clerk's office of the Supreme Judicial Court for the County of Knox. It was in form a regular and ordinary writ of attachment commanding the officers to whom it was addressed to attach the goods and estate of the defendants therein named to the value of five hundred dollars.

The officer's return showed the attachment of "a chip the property of the Rockland Thomaston & Camden Street Railway, the within named defendants." The defendants, Hawkens and Chisolm, each seasonably filed a motion to dismiss the action as to them for want of sufficient service of the writ, they appearing for that purpose only. Thereupon the sheriff petitioned the court for leave to amend his return to this writ by inserting after the words "a chip the property of the Rockland Thomaston & Camden Street Railway," and

before the words "the within named defendants" the additional words and names "Thomas Hawkens and Valentine Chisholm," in accordance with the facts, alleging that the facts were that in each instance he severally attached a chip as the property of each of the defendants named in the writ in this action.

Upon the petition to amend the return the defendants requested a hearing and evidence as to what the sheriff in fact did, but this request was refused, and the officer was permitted upon his statement of the facts to amend the return in accordance therewith, and the defendants' motion to dismiss was denied, by the presiding Justice.

To this ruling and action the defendants excepted and the case is before this court on the exceptions.

The bill of exceptions states that a summons was duly served upon each of the defendants within the county. There was therefore a legal service of the writ upon them if the officer has complied with the precept, so far as to give the court jurisdiction over the excepting defendants. The return shows an omission on the part of the officer to attach property of all of the defendants as directed by the writ, or it is defective in not stating the fact of an attachment if made. If defective in this respect it was clearly amendable to accord with the fact. A nominal attachment was, with the service of the summons, a compliance with the form of the writ. The sheriff in his official capacity states that he made a nominal attachment of property as to all the defendants. His act in changing the printed word defendant to defendants in his return, by writing the letter "s" with a pen indicates that the attachment applied to a plurality of defendants, and confirms his statement.

A hearing as to the physical fact of attaching a chip as the property of the defendants would be an idle ceremony. It was a legal fiction which cannot be denied when stated in the amended return; and the amended return shows a full compliance with the form of service of the writ of attachment on defendants.

Exceptions overruled.

ISABEL HORNBLOWER

vs.

HERBERT J. BANTON et als.

Penobscot. Opinion December 31, 1907.

Adverse Possession. Colorable Title. Presumptions. Constructive Possession.

The rule is well established in this State that where one occupies a portion of a lot of land under a colorable title acquired by deed and delivered and recorded, his occupancy extends to the whole of the land included in the deed. He being in possession under a paper title containing a specific description by metes and bounds claiming the whole, and openly and notoriously exercising control of the premises, is presumed to be doing so to the extent of his claim.

But such a presumption must be limited to circumstances which would reasonably create it. It cannot, without evidence to support it, be extended to distinct lots held under different deeds though the colorable title may be in the same person, nor to separate contiguous tracts of land described in the same deed.

The rule of constructive possession is not applicable unless the lots are inclosed by a common fence embraced under one general description in the deed or in some such way merged in one parcel so that the occupation of a portion thereof could not be reasonably referred to anything less than the tract.

On exceptions by defendant Samuel L. Haskell. Overruled.

Real action to recover Lot 21 in LaGrange, Penobscot County. Herbert J. Banton, Samuel L. Haskell and one Bean are the defendants. (The christian name of the defendant Bean is not disclosed by the case as sent to the Law Court.)

Tried at the January term, 1907, of the Supreme Judicial Court, Penobscot County. (Plea not disclosed by the case.) At the conclusion of the evidence, the presiding Justice instructed the jury to return a verdict for the plaintiff which was done. The defendant Haskell excepted to this instruction and also to a ruling during the trial excluding certain offered evidence.

The case appears in the opinion.

Frank E. Guernsey, for plaintiff.

T. P. Wormwood, for defendant Samuel L. Haskell.

T. D. Bailey, for defendant Herbert J. Banton.

G. T. Sewall, for defendant Bean.

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

PEABODY, J. This was a real action to recover Lot 21 in the town of LaGrange, Penobscot County. The case comes before the Law Court on exceptions by one of the defendants to the ruling of the presiding Justice excluding evidence.

The plaintiff introduced evidence establishing a record title to the lot in question. The defendants then presented a chain of record title to the same lot but originating later than that of the plaintiff and they offered further to prove such acts of occupation for a period of more than twenty years of a part of Lot No. 1, as would constitute adverse possession, proposing to show in that connection that Lot No. 1 adjoined Lot No. 21 and that both lots had been held by one ownership but under separate deeds for a period, and under the same deed for nearly twenty years, claiming that this evidence would prove constructive possession of Lot No. 21.

This was excluded by the presiding Justice on the ground that the constructive possession did not extend to Lot No. 21. As no further evidence was offered a verdict for the plaintiff was directed.

The presiding Justice in charging the jury said:

"I understand the law to be that where one enters upon a lot under color of title, under a deed good or bad if it is good it is no matter, but if it doesn't turn out to be a good deed, enters under a colorable title and actually occupies a portion of that lot under the deed, his occupancy extends as a matter of law to the limits of his deed, but not over onto land covered by some other deed although he may have a deed of the other lot; and as that is the only defense offered to the plaintiff's record title I instruct you to return a verdict for the plaintiff."

The defendant, Samuel L. Haskell, excepted to this ruling and these instructions.

The rule as stated by the presiding Justice is well established in this State. Where one occupies a portion of a lot under a colorable title acquired by deed delivered and recorded, his occupancy extends to the whole of the land included in the deed. *Banton* v. *Herrick*, 101 Maine, 134, and cases cited.

The ground upon which the doctrine of constructive possession is based is that one in possession of land under a paper title containing a specific description by metes and bounds claiming the whole and openly and notoriously exercising control and dominion over the premises is presumed to be doing so to the extent of his claim. 1 Cyc. 1126; *Humphries* v. *Huffman*, 33 Ohio St. 395; *Barber* v. *Robinson*, 78 Minn. 193.

Such a presumption must be limited therefore to circumstances which would reasonably create it; it cannot, without evidence to support it, be extended to distinct lots held under different deeds though the colorable title may be in the same person. *Broon* v. *Pearson*, 98 Tex. 469, nor even to separate contiguous tracts of land described in the same deed. *Morris* v. *McClary*, 43 Minn. 346; *Alston* v. *McDowall*, 1 McMullan (S. C.) 293; 1 Cyc. 1128.

Unless the lots are enclosed by a common fence, *Kerr* v. *Nicholas*, 88 Ala. 346, embraced under one general description in the deed, *Bacon* v. *Chase*, 83 Iowa, 521, or in some such way merged in one parcel so that the occupation of a portion thereof could not be reasonably referred to anything less than the tract, the rule of constructive possession would be inapplicable.

Nothing of the sort is suggested by the defendants in this case beyond the circumstance that the two lots were held by the same person and were held under the same title for nearly twenty years. This alone was not sufficient to bring the case under any exception to the general rule. The evidence of colorable title and occupation of Lot No. 1 was therefore properly excluded and in the absence of further evidence of title on the part of the defendants the instructions of the presiding Justice and directing a verdict for the plaintiff were correct.

Exceptions overruled.

JAMES H. BURGESS, Judge of Probate,

vs.

THE AMERICAN BOND & TRUST COMPANY et al.

Penobscot. Opinion December 31, 1907.

Actions. Surviving Partners. Declarations. Averments. Amendments. R. S., chapter 71, section 3; chapter 74, sections 10, 13.

It is indispensable to the maintenance of an action of debt on a probate bond given to the Judge of Probate by a surviving partner and which is brought in the name of the Judge of Probate for the benefit of a person who claims as judgment creditor, that the person who originated the suit shall come within the designation and requirements of Revised Statutes, chapter 74, sections 10 and 13.

The official bond given by a surviving partner is to secure the proper administration of the firm assets and not the individual liability of the surviving partner.

A surviving partner stands in two positions in each of which he may be liable for the debts of the partnership and so subject to an action at law. First, as surviving partner he is individually liable at common law. Second, as administrator of the partnership estate he might be liable by statute.

When it is intended that a suit against a surviving partner shall be against him in his purely statutory capacity of surviving partner, the declaration should clearly indicate such intention by proper averments and in such case the judgment should be against him and the goods and estate of the partnership in his hands and under his official administration.

When a declaration and a judgment against a surviving partner omits essential recitals distinguishing between his statutory liability under the protection of his probate bond and his common law liability as surviving partner, and the declaration and judgment together make a consistent record of an action against him individually, the designation "surviving partner" being merely descriptio personae, the record cannot be amended so as to meet the statutory requirements without setting out a different cause of action.

On report. Judgment for defendants.

Debt on probate bond given to the Judge of Probate of Penobscot County by John Grady as surviving partner of the firm of

Davis & Grady, brought in the name of the Judge of Probate for the benefit of Marie Morton and Charlotte Davenport and Morse & Co., who claimed as judgment creditors. Plea, the general issue with brief statement "that the creditors for whose benefit this action is brought have not had the amount of their several claims ascertained by judgment of law against said defendant, John Grady, as administrator of the partnership estate of Grady & Davis, and against the goods and effects of said partnership in his hands as such administrator and are not persons interested in the bond in suit, within the meaning of the statute in such case made and provided."

Heard at the April term, 1907, of the Supreme Judicial Court, Penobscot County. At the conclusion of the evidence the case was reported to the Law Court for determination with the stipulation that such judgment should be rendered by the Law Court as the law and the legally admissible evidence require.

The case appears in the opinion.

Henry L. Mitchell, for plaintiff.

Terence B. Towle and Charles A. Bailey, for defendants.

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

PEABODY, J. This case is on report. It is an action of debt on a probate bond given to the Judge of Probate of Penobscot County by John Grady as surviving partner of the firm of Davis & Grady brought in the name of the Judge of Probate for the benefit of Marie Morton and Charlotte Davenport and Morse & Co., who claim as judgment creditors.

It is alleged by the defendants in a brief statement under the plea of general issue "that the creditors for whose benefit this action is brought have not had the amount of their several claims ascertained by judgment of law against said defendant, John Grady, as administrator of the partnership estate of Grady & Davis and against the goods and effects of said partnership in his hands as such administrator and are not persons interested in the bond in suit within the meaning of the statute in such case made and provided." It is

indispensable to the maintenance of this suit that the persons who have originated it shall come within the designation and requirements of R. S., chap. 74, secs. 10 and 13.

By R. S., chap. 71, sec. 3 "the parties interested (in the bond of a surviving partner) have the like remedies on his bond, as if he were an administrator."

It appears from the evidence reported that John Grady qualified as surviving partner of the firm of Davis & Grady by giving a bond in the sum of $15,000; that he returned an inventory February term 1902 showing assets of $1225.50; that he has not made any return to or filed any account in said court relating to the partnership estate.

The plaintiffs, Morse & Co., on April 22nd, 1903, recovered judgment by default in a common law action of assumpsit against John Grady of Bangor in the County of Penobscot, surviving partner of the late firm of Davis & Grady, a partnership composed of said Grady and one James M. Davis late of said Bangor, deceased, for the sum of $881.93 debt or damage and $32.82 costs of suit. The plaintiffs, Morton and Davenport, on October 30, 1903, recovered judgment in similar form for $1600 debt or damage and $9.89 costs of suit. These judgments followed the declaration of the writ in each instance which was against the surviving partner but not specifically against the goods and estate of the partnership in his hands. The officer's return of the execution in each instance shows a demand which is a sufficient compliance with the statute.

The only question, therefore, is whether the plaintiffs have established their claims by judgments against the principal defendant in his trust capacity, so as to fulfill the requirements of the statute.

The defendant Grady as surviving partner stood in two positions in each of which he might have been liable for the debts of the partnership and so subject to an action at law. In the first place as surviving partner he was individually liable at common law. In the second place as administrator of the partnership estate, an administrative office for which the statute has provided no distinguishing name when it is held by the surviving partner himself by appointment of the Probate Court, he might be liable by statute.

The official bond is to secure the proper administration of the firm assets and not the individual liability of the surviving partner.

The declarations should have clearly indicated by proper averments that a suit against the defendant in the purely statutory capacity of surviving partner was intended, and the judgments should have been against him and the goods and estate of the late partnership in his hands and under his official administration.

But it is contended that the judgments, if erroneous in this respect, may be amended.

A judgment entered against a defendant as administrator instead of against the goods and estate of the intestate may be amended so that its legal effect may follow the declaration of the writ. *Atkins* v. *Sawyer*, 1 Pick. 351; *Hardy* v. *Call*, 16 Mass. 529; *Piper* v. *Goodwin*, 23 Maine, 251; *Baker* v. *Moor*, 63 Maine, 443; *Ticonic National Bank* v. *Turner*, 96 Maine, 380. In such a case the defect would be merely formal, but in the present instance the declarations and judgments against the defendant, Grady, omitted essential recitals distinguishing between his statutory liability under the protection of his probate bond and his common law liability as surviving partner. The declarations and judgments together make a consistent record of actions against him individually, the designation "surviving partner" being merely descriptio personae. The record in this case could not be amended so as to meet the statutory requirements without setting out a different cause of action.

Judgment for defendant.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, Appellant from decree of Judge of Probate,

In re

ESTATE OF JENNIE BARNES POPE.

Cumberland. Opinion January 1, 1908.

Statutory Construction. Rule Relating Thereto. Probate Bonds. Discharge of Surety. Statute, 1899, chapter 85. R. S., 1883, chapter 72, section 3. R. S., chapter 74, section 3.

It is a fundamental rule for the construction of statutes that they will be considered to have a prospective operation only unless the legislative intent to the contrary is clearly expressed or necessarily implied from the language used.

Section 3, chapter 72, R. S., 1883, as amended by chapter 85, Public Laws, 1899, and which is now section 3, chapter 74, R. S., reads as follows: "On application of any surety or principal in such bond, the judge, on due notice to all parties interested may, in his discretion, discharge the surety or sureties from all liability for any subsequent, but not for any prior breaches thereof, and may require a new bond of the principal, with sureties approved by him." *Held:* That said section as amended does not apply to probate bonds that were filed and approved prior to such amendment.

On report. Appeal sustained. Remanded to Probate Court for further proceedings.

Appeal from the decision of the Judge of the Probate Court, Cumberland County, dismissing the petition of Fidelity & Deposit Company of Maryland, praying that the petitioner might be discharged as surety on a bond given by Jennie B. Pope as guardian of Jennie Barnes Pope, a minor.

The appeal was duly entered at the January term, 1907, of the Supreme Judicial Court, Cumberland County, sitting as the Supreme Court of Probate, and at the following April term thereof the cause by agreement was reported to the Law Court with the stipulation that the Law Court should "render such judgment as the law and the facts require."

The case appears in the opinion.

Benjamin Thompson, for appellant.

John A. Morrill, for appellee.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, PEABODY, CORNISH, KING, JJ.

KING, J. The appellant is surety upon a guardian's bond given by Jennie B. Pope, as guardian of Jennie Barnes Pope, minor, filed and approved December 7, 1897, by the Probate Court for Cumberland County, Maine.

At the time this bond was filed and approved, sec. 3, chap. 72, R. S., 1883, was in force, which read as follows:

"On application of any surety in such bond, the judge on due notice to all parties interested may, in his discretion, discharge him from liability for any subsequent, but not for any prior breaches thereof, and may require a new bond of the principal, with sureties approved by him."

By chap. 85, P. L. 1899, said sec. 3 of chap. 72 was amended so that said section as amended reads as follows:

"On application of any surety or principal in such bond, the judge on due notice to all parties interested may, in his discretion, discharge the surety or sureties from all liability for any subsequent but not for any prior breaches thereof, and may require a new bond of the principal, with sureties approved by him." This statute as so amended has remained unchanged and is sec. 3 of chap. 74, R. S.

February 20, 1906, after the amendment, the said bond being in force, Jennie B. Pope, the principal therein, made application to the judge of said Probate Court that the surety in said bond, the appellant, be discharged from any further liability as such surety, and thereupon March 20, 1906, the judge of said court made a decree discharging said surety, and requiring a new bond, which new bond was filed and approved.

No question is raised but that the provisions of the amended statute were complied with.

The appellant, however, doubting the power and authority of the Judge of Probate to discharge it upon application of the principal under the amendment passed after the bond was filed and approved, on June 20, 1906, filed its petition for its discharge as such surety and requesting that the guardian be ordered to bring "the assets and securities held by her as guardian of said ward's estate for the purpose of having them verified by the court."

This petition was dismissed by a decree dated Sept. 27, 1906, for the reason as stated in the decree "that by a decree of this court, dated Mar. 20, 1906, entered upon the petition of the principal in the bond within mentioned, the petitioner was discharged from all future liability as surety on said bond and the guardian was ordered to file a new bond." From this decree dismissing its petition the appellant appealed, and the cause is before the Law Court on report.

The question presented in this case is whether or not the amendment, approved March 16, 1899, authorizing the principal alike with the surety to petition for the discharge of the surety, applies to this bond previously filed and approved.

It is a fundamental rule for the construction of statutes that they will be considered to have a prospective operation only unless the legislative intent to the contrary is clearly expressed or necessarily implied from the language used.

Hastings v. *Lane*, 15 Maine, 134; *Torrey* v. *Corliss*, 33 Maine, p. 336; *Bryant* v. *Merrill*, 55 Maine, 515; *Rogers* v. *Greenbush*, 58 Maine, p. 397; *Deake, Appellant*, 80 Maine, 50; *Dyer* v. *Belfast*, 88 Maine, 140; *Peabody* v. *Stetson*, 88 Maine, 273; *Lambard, Appellant*, 88 Maine, 587; *Carr* v. *Judkins*, 102 Maine, 506; *Chew Heong* v. *U. S.*, 112 U. S., p. 559; 26 Am. & Eng. Enc. Law, 2nd. ed., p. 693, and cases cited.

Reference to a few only of these decisions will show how firmly this rule is established in judicial precedent.

In *Chew Heong* v. *U. S.*, supra, the Federal Supreme Court said: "Words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other

meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied."

In *Dyer* v. *Belfast*, supra, the late Chief Justice WISWELL said: "Statutes are always to have a prospective operation unless the intention of the Legislature is clearly expressed or clearly to be implied from their provisions, that they shall apply to past transactions."

And in *Lambard, Appellant*, supra, Mr. Justice WHITEHOUSE uses these words: "It is undoubtedly a well settled general rule that acts of the legislature will not be so construed as to have a retrospective operation unless the legislature has explicitly declared its intention that they should have that effect; or such intention clearly appears by necessary implication from the terms employed considered in relation to the subject matter, the present state of the law, the object sought to be accomplished, and the effect upon existing rights and obligations."

Applying this rule of construction to the statute under consideration it is plain that the amendment of March 16, 1899, should not have a retroactive operation. In the language used the legislature has not "explicitly declared its intention" that the amendment should apply to bonds previously given. Neither does such intention clearly appear by necessary implication from the language used.

The language used is sufficiently broad and comprehensive, perhaps, to embrace bonds in force at the time of the passage of the amendment as well as those to be given thereafter, but that is not sufficient to give it a retroactive operation. *Dyer* v. *Belfast*, supra, page 144. *Garfield* v. *Bemis*, 2 Allen, page 447.

As there is nothing in any of the provisions of the amendment declaratory of the will of the legislature that it shall have a retroactive operation, or showing any necessity for so interpreting it, its construction must be, in accordance with the general rule so well established, that its operation is prospective only, and it did not apply to the bond in question.

This construction of the amendment giving to it only a prospective operation makes unnecessary any consideration of the question argued by counsel whether or not the amendment, if retroactive, would be unconstitutional as impairing the obligation of a contract.

Inasmuch as the petition of the appellant for its discharge was not acted upon by the Probate Court, except so far as to dismiss the same because of the previous decree of the same court under the application of the principal in the same bond, we deem it unnecessary and inappropriate for this court to express any views touching the matter of the request that the guardian should be required to bring before the court "the assets and securities held by her as guardian of said ward's estate for the purpose of having the same verified by the court." The Probate Court has not yet passed upon that request, when it does the appellant may have no cause of complaint.

It follows, therefore, that the Probate Court had no authority to discharge the surety in this bond upon the application of the principal, and that its decree made upon that application was void. The appellant's appeal must be sustained.

Appeal sustained. Case remanded to Probate Court for further proceedings.

BERNARD E. GETCHELL *vs.* F. L. PAGE et als.

Kennebec. Opinion January 8, 1908.

Officer. Criminal Matters. Articles Usable as Evidence. Same may be taken and Detained by Officer. Law relating Thereto, Stated. Statute, 1905, chapter 92, sections 2, 3. R. S., chapter 29, sections 49, 55.

1. An officer making an arrest upon a criminal charge may also take into his possession the instruments of the crime and such other articles as may reasonably be of use as evidence upon the trial. The title to the property remains in the owner, but the lawful possession is temporarily in the officer for evidentiary purposes, subject to the order of court.
2. An officer authorized to execute a warrant properly issued for the search and seizure of intoxicating liquors under R. S., chapter 29, section 49, who finds the liquors complained of and arrests the owner or keeper, may also take and carry away such articles of property as may reasonably be used as evidence of guilt in the trial on the search and seizure process.
3. Such officer may also detain such articles to be presented to the grand jury at its next sitting as evidence that the owner or keeper is guilty of maintaining a liquor nuisance, or of keeping a drinking house and tippling shop, or of being a common seller of intoxicating liquors.
4. The common law right and duty of officers executing search and seizure processes against intoxicating liquors, issued under R. S., chapter 29, section 49, to take and temporarily detain articles of property as evidence of crime, is not in any way limited or modified by section 55 of the same chapter which specifically makes it the duty of officers executing such process to take "all dumps or appliances for concealing, disguising or destroying liquors," as well as all bottles, drinking glasses and other articles mentioned in the last named section. These statutory provisions are in affirmation of the common law duty of officers, and are not exclusive.
5. An officer executing a warrant of seizure and arrest, who takes articles of property to be used as evidence of the crime is not required to make return of such taking, upon his warrant.
6. In the case at bar, *held*, that the defendants as officers executing a search and seizure process were justified in taking to be used as evidence the cork stoppers, funnels, copper measures, bottles and mugs, the value of which the plaintiff sued to recover. But the case does not show that the two baskets taken, valued at one dollar, were reasonably useful as evidence. The plaintiff therefore is entitled to judgment for their value.

On report. Judgment for plaintiff for one dollar.

Action of trespass de bonis asportatis brought in the Superior Court, Kennebec County. Writ dated August 10, 1906. The declaration in the writ is as follows:

"In a plea of trespass, for that the said defendants, at said Augusta, on the thirteenth day of June, A. D., 1906, with force and arms took and carried away the goods and chattels, to wit, twelve bags containing cork stoppers of the value of twenty dollars, three boxes containing cork stoppers of the value of ten dollars, one pint copper funnel of the value of one dollar, one-half pint copper funnel of the value of seventy-five cents, one patent straining funnel of the value of one dollar and twenty-five cents, one gallon copper measure of the value of three dollars, one quart copper measure of the value of one dollar and fifty cents, one pint copper measure of the value of one dollar and twenty-five cents, one half-pint copper measure of the value of one dollar, fifty quart bottles of the value of one dollar and fifty cents, thirty pint bottles of the value of sixty cents, fifty half-pint bottles of the value of seventy-five cents, two baskets of the value of one dollar, and four glass mugs of the value of twenty cents, all then and there found and being the proper goods, chattels and property of the plaintiff and of great value, to wit, the value of forty-three dollars and eighty cents, and then and there unlawfully converted the same to the use of the said defendants, against the peace of the State and to the great damage of the plaintiff, as he says, the sum of five hundred dollars.

"And also for that the said defendants, at said Augusta, thereafterwards on the said thirteenth day of June, A. D., 1906, wilfully and maliciously intending and contriving to injure the plaintiff and to deprive him of his property and to hinder and prevent him from carrying on his drug business, then and there with force and arms took from the possession of the plaintiff and carried away twelve bags containing a large quantity of cork stoppers, three boxes containing another large quantity of cork stoppers, one pint funnel, one-half pint funnel, one straining funnel, one gallon measure, one quart measure, one pint measure, one half-pint

measure, fifty quart bottles, thirty pint bottles, fifty half-pint bottles, two baskets and four glass mugs, all then and there found and being the proper goods, chattels and property of the plaintiff and of great value, to wit, the value of forty-three dollars and eighty cents, and thence hitherto have maliciously and unlawfully deprived the plaintiff of the possession of the same, against the peace of the State and to the damage of the said plaintiff (as he says) the sum of five hundred dollars, which shall then and there be made to appear, with other due damages."

Plea, the general issue with brief statement as follows:

"And for a brief statement of special matter of defence to be used under the general issue pleaded, the said defendants further say: That in taking the goods and chattels described in the plaintiff's writ they were acting under and by virtue of a warrant issued by the Municipal Court of the City of Augusta, and that in the execution of said warrant they were acting as Deputy Enforcement Commissioners and by virtue of the authority and power with which they were clothed as Deputy Enforcement Commissioners legally appointed, and that the taking of said goods and chattels was by virtue of said warrant and the authority conferred upon them as said Deputy Enforcement Commissioners."

Tried at the January term, 1907, of said Superior Court. At the conclusion of the evidence the case was "reported to the Law Court for its determination on the facts and law applicable thereto."

The case is stated in the opinion.

A. M. Goddard, for plaintiff.

Charles F. Johnson, for defendants.

SITTING: WHITEHOUSE, STROUT, SAVAGE, SPEAR, CORNISH, KING, JJ.

SAVAGE, J. This is an action of trespass de bonis asportatis. The defendants admit the taking of the articles described, and seek to justify as Deputy Enforcement Commissioners appointed under the provisions of chapter 92 of the Public Laws of 1905, relating to the better enforcement of the laws against the manufacture and sale

of intoxicating liquors. They claim that they were acting under and by virtue of a warrant properly issued for the search and seizure of intoxicating liquors under the statutes of this State prohibiting the unlawful sale or keeping of such liquors, and were authorized to take and detain the articles as evidence. The case comes before this court on report.

The case shows that the defendants armed with a warrant for search and seizure issued by the judge of the Municipal Court for the city of Augusta, under the provisions of R. S., chap. 29, sect. 49, searched the plaintiff's drug store in Augusta, found and seized a large quantity of intoxicating liquors and the vessels in which they were contained, and took them away. At the same time they carried away the articles named in the plaintiff's writ. They arrested the plaintiff and took him before the Municipal Court. One of them made return upon the warrant, of the arrest and of the seizure of the liquors, but not of the taking of the other articles. These articles were taken by the defendants to be used as evidence against the plaintiff and were carried to their storehouse. At the hearing on the search and seizure process, these articles were not brought before the court, but the defendants asked the judge of the court for directions as to the further retention and custody of these articles, which the judge declined to give, because no return of their taking had been made on the warrant. However, they retained them in their storehouse and carried them before the grand jury at the next criminal term of the Superior Court in Kennebec County in September, 1906, as evidence that the plaintiff was guilty of violations of the liquor law. In the meantime, after demand, this suit was brought August 10, 1906.

The plaintiff contends that the justification offered by the defendants fails for two reasons. First, because no return was made on the warrant of the taking of these articles, and, secondly, because as he claims, the defendants were not authorized by law to take the articles, or at the most, not all of them.

It is well settled that an officer making an arrest upon a criminal charge may also take into his possession the instruments of the crime and such other articles as may reasonably be of use as evi-

dence upon the trial. The officer not only has the lawful power to do so, but he would be blameworthy if he failed to do so. The maintenance of public order and the protection of society by efficient prosecution of criminals require it. The title to the property remains in the owner, but the lawful possession is temporarily in the officer for evidentiary purposes, subject to the order of court. *Thatcher* v. *Weeks*, 79 Maine, 547; *Spalding* v. *Preston*, 21 Vt. 10; Bishop. Crim. Pro. 211. The plaintiff does not seek to controvert this principle of the common law. But he contends that in prosecutions for the violation of the prohibitory liquor law of this State the common law principle has been superseded by the express provisions of statute. He relies upon that part of section 55 of chapter 29, Revised Statutes, which reads as follows: "All dumps or appliances for concealing, disguising or destroying liquors, so that the same cannot be seized or identified, found in the possession or under the control of any person or persons, shall be taken by the officer making such search or seizure, so far as the same is practicable, together with all bottles and drinking glasses or vessels found in the possession or under the control of any such person or persons, and carried before the next grand jury sitting in said county, where said seizure and search is made, and the same, together with all evidences of such dumps or appliances for concealing, disguising or destroying liquors, shall be presented to said grand jury for their consideration, and the same shall thereafter be subject to the order of the court issuing the warrant for said search and seizure." The plaintiff claims that this statutory provision is both mandatory and exclusive, that it was intended to cover and does cover the whole ground, and that the right of an officer to take articles of personal property to be used as evidence is limited by the statute to the various kinds of articles named therein. We are unable to agree with this interpretation. The statute certainly does not say so, and we do not think it was meant so. We think, on the contrary, that the statutory provisions referred to are in affirmation of the common law duty of officers, and are not exclusive. When we consider the history of legislation in this State for the prohibition of the liquor traffic, the frequent legislative efforts

to make the law more effective, and the increasingly stringent mandates laid upon officers to enforce the law, we are persuaded that the purpose of the legislature in enacting the statute in question was to emphasize sharply the duty of officers in this respect, by express statutory command. And if this is so, it would be singular indeed, if the legislature at the same time intended to narrow the common law power of officers, and impliedly forbid them to take articles of evidence not expressly named in the statute. We do not think such a construction of the statute is permissible.

It is accordingly the opinion of the court that the defendants, who were vested by law with all the common law and statutory powers of sheriffs in the enforcement of the law against the manufacture and sale of intoxicating liquors, Public Laws of 1905, chap. 92, sects. 2 and 3, were acting within their lawful authority when they took and carried away to be used as evidence such of the articles described in the writ as were reasonably evidentiary. We think they were authorized not only to hold them to be used as evidence at the hearing before the Municipal Court, if necessary, in the search and seizure process, but to detain them to be presented to the grand jury at its next sitting as evidence that the plaintiff was maintaining a liquor nuisance, or keeping a drinking house and tippling shop, or was a common seller of intoxicating liquors. They were evidence of crime, of the plaintiff's crime. And the right of the officers who took them to detain them as evidence accords both with common law and common sense.

Nevertheless, the plaintiff contends that the defendants are not protected by their attempted justification, because no return of the taking of these articles was made on the warrant. We think it was not required. It is true beyond question that an officer who acts under a warrant, and arrests a person or seizes property, must make return of all the things which he does, and which he is commanded to do, by the warrant. If he fails to make such a return, the warrant is no protection to him.

In this case the warrant was issued under section 49 of chapter 29, R. S. The officer holding it was commanded therein to search for the liquors complained of, and if found "to seize and safely keep

the same, with the vessels in which they are contained, until final action and decision be had thereon, and to apprehend the said Bernard E. Getchell forthwith," etc. These things were all that the officer executing the warrant was commanded by the warrant to do, and of the doing of these things due return was made. He was not commanded by the warrant to take evidentiary articles. He was commanded by the law to take these. He did not take them by virtue of the warrant, but by virtue of the law, prescribing his general duties. We think he was no more required to make return on his warrant of articles so taken, than is an officer required to make return upon a warrant of the taking of the bloody knife or empty revolver of the murderer whom he has arrested.

From these considerations it follows that an action of trespass will not lie against the defendants under the circumstances of this case, for the taking of articles of an evidentiary character for the purpose of using them as evidence before the Municipal Court, and later before the grand jury. It only remains to inquire whether any of the articles named in the writ are of such a character as might not reasonably be used as evidence against the defendant of violations of the liquor law. The articles consisted of cork stoppers in bags and boxes, pint and half pint copper funnels, a straining funnel, copper measures, quart, pint and half pint bottles, glass mugs and two baskets. All of these articles, except the baskets, we think might reasonably have been regarded and used as evidence against the plaintiff. While it is true that they were appropriate of use in the plaintiff's drug business, they were also susceptible for use in the illicit traffic in intoxicating liquors. Such articles, even in a drug store, might from their quantity and situation, taken in connection with other circumstances, be of significant weight in tending to fasten guilt upon the proprietor. But the question does not go to the weight or force of the evidence, but to its relevancy.

We think the baskets, however, stand upon a different footing. There might be circumstances which would make their possession evidence of the unlawful character of the plaintiff's business, but

none are disclosed in the record. And accordingly the plaintiff is entitled to recover their value, which is one dollar.

Judgment for the plaintiff for one dollar damages.

EDWIN S. ATWOOD

vs.

THE MAINE HUB AND MANUFACTURING COMPANY.

Hancock. Opinion February 6, 1908.

Logs and Lumber. Surveyor. Scale Bill. Fraud. Mistake. Burden of Proof.

It is a well settled and familiar rule of law that when parties have agreed upon a surveyor to scale logs, they will in the absence of fraud or mathematical mistake be bound by the scale made by such surveyor.

Where parties have agreed upon a surveyor to scale logs and the correctness of the scale made by such surveyor is attacked on the ground of fraud or mathematical mistake, the burden of proof is on the party making the attack.

In the case at bar, the plaintiff by written contract agreed to cut and haul certain logs for the defendant at $9.00 per thousand feet. It was also agreed that the survey of the logs should be made by a surveyor to be agreed upon by the parties. The performance of all the conditions of the contract was admitted. The correctness of the credits allowed by the plaintiff was not questioned. The plaintiff claimed to have cut and hauled for the defendant 13074 sticks. The count was conceded. The only question was as to the number of feet of lumber contained in the 13074 logs. In accordance with the terms of the contract, the parties agreed upon one C. M. Stuart as surveyor, who assumed the duties of the position, and his scale bills showed that the plaintiff cut and hauled 728,320 feet of lumber. The defendant having refused to pay, the plaintiff brought suit against him to recover for cutting and hauling the aforesaid quantity of lumber as shown by the Stuart scale. The defendant contended that there was both fraud and mathematical mistake in the Stuart scale. The verdict was for the plaintiff for the full amount with interest from the date of the writ less the credits. *Held:* That the evidence discloses no reason for setting aside the verdict.

On motion by defendant. Overruled.

Action of special assumpsit based upon a written contract and brought by the plaintiff to recover for cutting and hauling certain logs for the defendant at $9.00 per thousand feet. The contract on which the action is based is as follows:

"Memorandum of Agreement made and entered into this 26th day of September A. D. 1905, by and between Edwin S. Atwood of Mount Desert, in the County of Hancock and State of Maine of the first part, and the Maine Hub and Manufacturing Company, a corporation duly existing by law and having its place of business in Township Long A., sometimes called West Seboois, in the County of Penobscot and State aforesaid, of the second part:

"Witnesseth that the said party of the first part, for the considerations hereinafter named, agrees to go upon the northeast quarter of Township No. 4, Range 9, North of the Waldo Patent, in the County of Piscataquis, during the ensuing lumber season, and to cut and haul the yellow and silver birch standing thereon, and deliver the same at the mills of the said party of the second part at said West Seboois. No trees are to be cut less than ten inches one foot from the ground, and when merchantable, are to be run up to eight inches at top end before cutting off.

"Said party of the first part further agrees not to go to the stump with wagon sleds, and to operate in a careful and prudent manner without strip or waste, or unnecessary injury to the smaller growth. All trees are to be cut one foot from the ground, the snow being removed if necessary, to effect this result. All logs are to be yarded so as to be conveniently scaled on the yards by a scaler hereafter to be agreed upon, all logs to be scaled, when merchantable, full bigness, and so far as possible according to the Penobscot River scale.

"The said party of the second part, in consideration of the faithful performance of this contract, agrees to pay for cutting, hauling and delivering said logs as aforesaid, the sum of nine Dollars per thousand feet, the same to be paid as follows: Three Dollars per thousand feet when the logs are upon the yards, and the balance when they are delivered at the mill as aforesaid, but said final pay-

ment shall not be made until all labor and other lien claims have been paid and satisfied.

"In Witness Whereof the parties have hereunto set their hands, and to a duplicate hereof, the day and year first above written.

(Signed) EDWIN S. ATWOOD.

MAINE HUB & MFG. CO. by C. I. Dean, Mgr."

Tried at the October term, 1907, of the Supreme Judicial Court, Hancock County. Plea, the general issue. Verdict for plaintiff for $1720.75. The defendant then filed a general motion to have the verdict set aside.

The case appears in the opinion.

Deasy & Lynam and Matthew Laughlin, for plaintiff.

A. L. Blanchard, Louis C. Stearns and B. W. Blanchard, for defendant.

SITTING: WHITEHOUSE, SAVAGE, SPEAR, CORNISH, KING, JJ.

SPEAR, J. This is an action of special assumpsit based upon a contract by the terms of which the plaintiff agreed to cut and haul certain logs for the defendant at $9.00 per thousand. It was also stipulated that the survey of the logs should be made by a scaler to be agreed upon by the parties. The performance of all the conditions of the contract is admitted. The correctness of the credits allowed by the plaintiff is not questioned. The plaintiff claims to have cut and hauled for the defendant 13074 sticks. The count is conceded. The only question raised in the case is as to the number of feet of lumber contained in these 13074 logs. In accordance with the terms of the contract, the parties agreed upon C. M. Stuart as scaler. He assumed the duties of the position and his scale bills show that the plaintiff cut and hauled 728,320 feet of lumber. The plaintiff's suit is to recover for cutting and hauling this quantity of lumber at $9.00 per thousand. The verdict was for the full amount with interest from the date of the writ, less the credits. The case comes to this court on motion and presents pure questions of fact no exceptions having been taken.

It is a well settled and familiar rule of law that "when parties have agreed upon a scaler to scale logs, they will in the absence of fraud or mathematical mistake, be bound by his scale." *Nadeau* v. *Pingree*, 92 Maine, 196. Under this rule the only avenue of attack upon the verdict open to the defendant is through fraud, or mathematical mistake, in making the survey. To establish this assault, the burden is upon the defendant. He assumes the burden of proving fraud by introducing evidence that Stuart, the scaler agreed upon, had many times repeated, during the period in which he was scaling that the logs were running from 22 to 23 per thousand, net scale, whereas by the scale bill presented, they averaged about 18 per thousand. To corroborate the evidence as to Stuart's admission upon this point, he put in evidence the testimony of two other men, each of whom scaled a certain portion of the logs in question. Of the 13074 sticks, George P. Longley scaled 1191, less than one in ten. His net scale showed "a little over 22" logs per thousand.

Leon A. Nason scaled a portion of these logs and testified that his net scale showed 28 logs per thousand.

Evidence was presented to the jury upon which, under the rules of law, they would be authorized to find affirmatively, that Nason scaled a lot of logs smaller than the average; the larger logs having been rolled into the mill to be cut up as they were hauled. He also threw out everything not suitable for hubs. This he was not authorized to do. The logs under the contract were to be merchantable, not suitable for hubs. He may therefore have thrown out many logs that should have been scaled, as a log may be merchantable and not fit for a hub.

Stuart denied that he had repeatedly stated to the defendant while he was scaling the logs that they were running from 22 to 23 per thousand. Notwithstanding the evidence of Longley that the net scale of the logs was 22 per thousand and of Nason that it was 28 per thousand, offered by the defendant as tending to show that Stuart's statement that the logs were running from 22 to 23 per thousand was the fact, and raised the probability that he made it, and that he had fraudulently reduced the number from 22 to 23

per thousand to 18, was all presented to the jury, yet their verdict negatived the allegation of fraud. We hardly see how they could have done otherwise. Stuart made the number of logs per thousand, net, 18; Longley 22; Nason 28. It will appear by a comparison of these figures that there is a greater disparity in the number of logs per thousand between Longley and Nason than between Stuart and Longley. Logically, according to the theory of the defense, Longley's survey in comparison with Nason's is more amenable to the charge of fraud than Stuart's in comparison with Longley's. A boy who can read figures can take the full scale of a log. But scaling in the end, is a matter of judgment, and a comparison of these figures simply shows how these men varied in their judgments as to how much a log should be discounted to make it merchantable. We discover no reason for disturbing the verdict upon the charge of a fraudulent scale.

The only evidence of a mathematical mistake is that already presented by the evidence of the three scalers showing the average number of logs, net scale, which they severally found. But which scale shall we take as the mathematically correct one? If Longley was correct, Nason was not; if Nason was correct, Longley was not. As already shown Longley and Nason disagree more than Stuart and Longley disagree. It is evident that neither the scale of Longley nor of Nason can be considered sufficient to show a mathematical mistake in the scale of Stuart. Their figures undoubtedly represent their honest judgment. But inasmuch as Stuart was the scaler agreed upon by the parties, the plaintiff is entitled to his honest judgment. The evidence presented a conflict of judgments. The plaintiff was entitled to the judgment of Stuart, if not fraudulent, and to his scale, if without mathematical mistake. The jury found upon both these propositions in favor of the plaintiff and the verdict should stand.

We think the evidence which breathed into this controversy the breath of life and made it a living soul, may be found in the testimony of Charles I. Dean, the General Manager of the defendant company, who was called in sur-rebuttal to testify in reference to a conversation which he had with Mr. Atwood with regard to

Mr. Nason's scale of the previous year. Being asked if he could recall the substance of that conversation, he said: "I don't recollect it as they state it here. Mr. Atwood wanted to haul the lumber by stumpage scale. I was not satisfied with the stumpage scale the year previous, and I told Mr. Atwood, as I remember it, that I didn't intend for him to haul that lumber at the stumpage scale, that I would look after the stumpage scaler and I didn't intend to have him working on it.

Q. Why did you make that statement to Mr. Atwood?

A. Well, I wanted Mr. Atwood to have, as I stated before, every foot of lumber he hauled—merchantable lumber, and to make a long story short, I intended to have more stumpage scale than I had from Mr. Nason, It was my intention and I got it and I intended to have it. If I hadn't got it there would have been trouble raised right there. I was figuring on 22 and 3 logs to the thousand that Mr. Stuart informed me all winter. And from Mr. Nason I was looking for more. I was looking for soke 28 or 30, which proved to be 28.

Q. Stumpage scale?

A. Yes sir.

Q. But you didn't care to have Mr. Atwood haul at that scale?

A. No. I was satisfied with 22 or 23 logs to the thousand.

Q. Your idea then was for Mr. Atwood to have more than the stumpage scale?

A. It was.

Comment upon this testimony with respect to its bearing upon the animus of this defense is unnecessary. Res ipsa loquitur.

Motion overruled.

FRED O. WALKER, Executor,

vs.

GEORGE W. GODING AND ERNEST GODING, Appellants.

Oxford. Opinion February 10, 1908.

Appeal. Recognizance. Same must be Signed. Same must be Returned to Appellate Court. Dismissal of Appeal.

1. A recognizance on appeal is an official record, and to be effective must be signed by the magistrate.
2. A recognizance taken by a magistrate or municipal court on appeal must be returned to the court to which the appeal is taken. Without it the appellate court has no jurisdiction to proceed further, and the appeal may properly be dismissed, on motion.
3. Reasons suggested why the appellee ought to be allowed to take advantage of the appellant's failure to have a recognizance on appeal returned and filed cannot be considered when based on allegations of facts not stated in the case.

On exceptions by defendants. Overruled.

Action of replevin brought in the Rumford Falls Municipal Court in which the plaintiff recovered judgment. The defendants then appealed to the March term, 1907, of the Supreme Judicial Court, Oxford County, and recognized with a surety to prosecute their appeal. At said term of said Supreme Judicial Court the plaintiff filed a motion to dismiss the appeal "for the reason that the appeal is defective and void because no recognizance has been furnished and none sent up from the lower court, and the record does not show that recognizance was waived in said lower court.

The presiding Justice sustained the motion and dismissed the appeal, and the defendants excepted.

The case appears in the opinion.

James B. Stevenson and Wright & Wheeler, for plaintiff.

John P. Swasey, for defendants.

SITTING: EMERY, C. J., WHITEHOUSE, SAVAGE, CORNISH, KING, JJ.

SAVAGE, J. This is an appeal from the Rumford Falls Municipal Court. The record of the appeal shows that the defendants,

who were the appellants, recognized with a surety, to prosecute their appeal. They produced in the appellate court a copy of the record of appeal, and with it what purported to be an unsigned and uncertified copy of the recognizance, but neither the recognizance itself nor a certified copy of it was produced.

Thereupon the plaintiff filed a motion to dismiss the appeal for want of the record of recognizance. The motion was sustained by the presiding Justice, and to that ruling the defendants excepted.

We think the ruling was right. It has long been settled that a recognizance taken by a magistrate or municipal court on appeal must be returned to the court to which the appeal is taken. It is there entered of record, and becomes the basis of further proceedings thereon. Without it the appellate court has no jurisdiction to proceed further. *Libby* v. *Main*, 11 Maine, 344; *Stetson* v. *Corinna*, 44 Maine, 29. In such case, a motion to dismiss lies.

A recognizance is an official record and to be effective must be signed by the magistrate. An unsigned recognizance is not a recognizance. The paper filed in this case was not a recognizance, nor even the copy of one.

A failure to return the recognizance to the appellate court at the outset is not fatal, even after a motion to dismiss. Upon suggestion of a diminution of the record, the appellate court may, and unless good cause be shown to the contrary, will grant leave to supply the deficiency. *Stetson* v. *Corinna*, supra; *Ingalls* v. *Chase*, 68 Maine, 113; *Wright* v. *Blunt*, 74 Maine, 92. But in this case, the defendants, so far as the record shows, instead of asking leave to file the recognizance took issue on the motion to dismiss and were cast. Their counsel in his brief suggests reasons why the plaintiff ought not to be allowed to take advantage of their failure, and further that it might not be possible or practicable to obtain and file the recognizance, but these suggestions are based on allegations of facts not stated in the case and cannot be considered. Inasmuch as the recognizance was never returned to the appellate court, the appeal was properly dismissed.

Exceptions overruled.

CELIA E. WILLIAMSON *vs.* WILLIAM E. GOOCH et al.

Washington. Opinion February 10, 1908.

Division Line. Monuments. Evidence. Declarations.

1. When a monument which formerly marked a division line no longer exists, and its location on the face of the earth is in dispute, it is permissible to show that at one time when the monument was in existence a measurement was made from the monument to a certain point, and also to show where that certain point was, in order that by measuring back from such point the same distance the location of the monument may be ascertained.
2. Self-serving acts and declarations of a former owner of land, when upon it, pointing out the monuments and location of his line are not admissible, unless it appears that the declarant is dead.

On exceptions by plaintiff. Sustained.

Real action to recover certain land in East Machias. Plea, the general issue with disclaimer as to a part of the demanded premises.

Tried at the October term, 1906, of the Supreme Judicial Court, Washington County. Verdict for defendants. The plaintiff excepted to certain rulings made by the presiding Justice during the trial excluding certain offered evidence.

The case appears in the opinion.

William R. Pattangall, for plaintiff.

John F. Lynch, for defendants.

SITTING: EMERY, C. J., WHITEHOUSE, SAVAGE, SPEAR, CORNISH, KING, JJ.

SAVAGE, J. Real action. The plaintiff and defendants own adjoining tracts of land. The plaintiff owns the northeast corner of lot 3 in East Machias, and the defendants own all of lot 2, which lies north of lot 3. By the pleadings the controversy is narrowed down to the question where on the face of the earth is the dividing line between them. It is admitted that that line is the division line between lots 2 and 3. It is admitted that no

monument marked the eastern extremity of that line, or what is the same thing, the northeastern boundary of the demanded premises, at the time of the trial, or had so marked it for eight or ten years. The defendants claimed that the line had formerly been marked by a fence.

The title to both lots was formerly in William Gooch. After his death lot 2 came to the defendants, and lot 3 to James H. Gooch, the plaintiff's father, who conveyed to her the northeast corner of lot 3, described as follows: "Beginning . . . at the corner of land owned by the late Josiah T. Gooch (lot 2) and running southerly on the side of the road thirteen rods to a stake, thence north 66 degrees west 22½ rods to a stake, thence north 18 degrees east 12 rods to the said Josiah T. Gooch's land, thence easterly by said Gooch's land 22 rods to the place of beginning." The plaintiff introduced evidence tending to show that at the time she was negotiating with her father for the conveyance of the demanded premises to her there was a fence on the division line. She offered evidence to show that at that time her father measured on the line of the road thirteen rods southerly from the fence to a point which he marked by a stake, and that a tree now marks the spot where the stake was placed. This evidence was excluded, and the plaintiff excepted.

It appears that the monument which formerly marked the division line no longer exists. If the monument was there it would be conclusive. Or if the evidence to show where the line was was undisputed and certain, that would be conclusive. But since the monument is not there, and since it is in dispute where the line was which it marked, the parties are remitted to other evidence of its location. The plaintiff claims that one way to show it is to commence at the tree where she claims her father placed a stake and measure back thirteen rods, the reverse of the measurement which she claims he made from the fence to the stake. We think she should have been permitted to show the fact of the measurement made by her father and the point where he placed the stake at the end. For if it was then thirteen rods from the fence to the stake, it must now be thirteen rods from the tree, if it stands in

the place of the stake, back to where the fence was. The evidence offered was not conclusive, but it was admissible. *Seidensparger* v. *Spear*, 17 Maine, 123. The measurement may have been faulty, the witnesses may be mistaken as to the location of the stake, or as to the point where the measurement began. But the plaintiff had a right to have these questions passed upon by the jury. If the plaintiff's claim which she offered to prove was true, it certainly tended to support her contention as to the location of the division line. The jury should have been permitted to say whether it was true or not. The plaintiff's exceptions on this point must be sustained.

The plaintiff also offered to show the declaration of her father, while the owner of lot 3, as to the location of the division line between lot 2 and lot 3. The evidence was excluded, and she excepted.

It is well settled in this State that the acts of the owner of land when upon it, pointing out the monuments and location of his line, and his declarations made in regard to them at a time when no controversy exists, are competent to be submitted to the jury after his death, as having some tendency to prove the location of the line, *Royal* v. *Chandler*, 83 Maine, 150; *Emmett* v. *Perry*, 100 Maine, 139. And this is true whether such acts and declarations be for or against interest. *Wilson* v. *Rowe*, 93 Maine, 205.

The declarations offered and excluded were, as it now appears, in the interest of the declarant, and not against it. They were self serving. They could only be admissible upon proof that the owner who made them was dead. Whatever the fact may be, the record before us is silent upon this question. For aught that appears, James H. Gooch may still be living. Hence it is not shown that the exclusion of his declarations was erroneous.

But, for the error pointed out in the earlier part of this opinion, the entry must be,

Exceptions sustained.

JESSE H. ROGERS *vs.* RICHARD C. DAVIS.

Piscataquis. Opinion February 10, 1908.

Statute of Limitations. Mutual and Unsettled Accounts. Statute Begins to Run, When. Statute no Bar, When. R. S., chapter 83, section 90.

1. In an action upon a mutual, unsettled account, commenced December 19, 1905, where the account opened January 13, 1894, and was continued with items of debit and credit until December 17, 1898, and there was no other item until November 15, 1902, when a charge of twenty cents was made for merchandise then sold on credit, which charge was specifically paid December 15, 1902, and credit given therefor on the account, *Held:* That the action is not barred by the statute of limitations.
2. Such a case is not governed by the rule by which partial payments take an account out of the operation of the statute of limitations, but by the statutory rule relating to mutual accounts. Under this statutory rule, the statute of limitations begins to run with the last item of the account, and it makes no difference whether it is a debit or a credit item, or which party kept or proved it, or whether it appears in the plaintiff's credits or in the defendant charges, if only it be an account of mutual dealings between the parties which have not been settled.
3. When the parties by their mutual dealings, by some item of debit or credit, have extended the time of the operation of the statute of limitations upon the balance of the account, it does not lie in the power of the debtor then to shorten the time by making specific payment of debit items.

Benjamin v. *Webster*, 65 Maine, 170, examined.

Perry v. *Chesley*, 77 Maine, 393, distinguished.

On exceptions by plaintiff. Sustained.

Assumpsit on account annexed to recover a balance of $169.45 alleged to be due from the defendant to the plaintiff, and also to recover an interest charge of $22.03. The account annexed contains 207 debit items, exclusive of item of interest charge, and 25 credit items.

Plea, the general issue with brief statement alleging that the defendant "did not promise within six years next prior to the date of the writ in this case."

The case was first sent to an auditor who, after hearing, made and filed his report the material parts of which are as follows:

"The account in question commenced January 13, 1894, and continued until December 17, 1898, at which time it appears there was a balance due the plaintiff of $169.45.

"After this time there were only two entries made on the account. On November 15, 1902, there was a debit entry of twenty cents for tobacco and on December 15, 1902, a credit entry of cash twenty cents. The evidence shows that the credit entry of December 15, 1902, was made for the express purpose of paying the debit entry of November 15, 1902.

"The writ in this action was dated December 19, 1905, and the plaintiff would be barred by the statute of limitations from recovering on the amount due on December 17, 1898, unless the account was renewed by the transactions of November 15 and December 15, 1902, as described above. If the account was, by the two items mentioned, renewed then I find that there is due the plaintiff from the defendant the sum of $169.45. If the said transactions did not renew the account then the action is barred by the statute, and nothing is due the plaintiff from the defendant."

A hearing was had on the auditor's report before the presiding Justice at the February term, 1907, of the Supreme Judicial Court, Piscataquis County. The report was accepted and the presiding Justice ruled pro forma "that the claim was barred by the statute of limitations and gave judgment for the defendant," to which ruling the plaintiff excepted.

The bill of exceptions states that "the plaintiff claimed that the account, being an open, mutual account current, was not barred by the statute of limitations since the statute began to run anew from the debit item of Nov. 15, 1902, and that the credit item of Dec. 15, 1902, although expressly made for the purpose of paying the charge of Nov. 15, 1902, aforesaid could not outlaw the account which had been revived by said debit item of Nov. 15, 1902. The defendant claimed to the contrary and that the whole claim was barred by the statute of limitations."

The pith of the case appears in the opinion.

Hudson & Hudson, for plaintiff.

John S. Williams, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, SAVAGE, CORNISH, KING, JJ.

SAVAGE, J. Action of assumpsit upon an account. The writ was dated December 19, 1905. Plea, the statute of limitations.

The account opened January 13, 1894, and until December 17, 1898, was admittedly a mutual and unsettled account, with items both of debit and credit. The case was sent to an auditor who reported that after December 17, 1898, there were only two entries made on the account, namely, a charge of twenty cents for tobacco, on November 15, 1902, and a credit of cash twenty cents, December 15, 1902. And he reported further that the cash payment of December 15, 1902, was made for the express purpose of paying for the tobacco charged thirty days before. Thereupon the auditor found that the account was barred by the statute of limitations "unless renewed by the transactions of November 15 and December 15, 1902." But if renewed, he found there was due the plaintiff from the defendant the sum of $169.45. The case was heard before the presiding Justice, who, on the facts stated by the auditor, ordered judgment for the defendant. The plaintiff excepted.

It is well to observe at the outset that the correctness of the ruling or otherwise does not depend upon an application of the principle by which partial payments take an account out of the statute of limitations, concerning which many cases have been cited by the defendant's counsel, but of the statutory rule relating to mutual accounts. The partial payments principle has reference solely to credits or payments, and regards such a payment as a recognition of the debt and a renewal of the promise to pay. The statutory rule rests upon other grounds.

The defendant particularly cites and relies upon *Benjamin* v. *Webster*, 65 Maine, 170, but we do not think that case is conclusive as an authority on the point now involved. In that case the debit account was a single item, and the payment relied upon to take the account out of the statute of limitations was made generally on account, and not specifically, as here, to pay a single, separate item. It is true that the court used language which seems to sustain the defendant's contention. But the language related to a

condition which did not exist in that case, and it was not necessary to the decision. In fact, the whole tenor of the opinion was based upon the principle of partial payments. And that principle was applicable to that case as was pointed out on page 172.

But this is a different case. Here the plaintiff's right of action does not depend upon proof of one item of credit within six years. The plaintiff relies upon a debit item within six years of the last preceding item, and within six years of the date of the writ. The item and date are undisputed. If the account stopped with the debit item of November 15, 1902, unquestionably it would not come within the operation of the statute of limitations relating to mutual accounts. That statute reads as follows: "In actions of debt or assumpsit to recover the balance due, where there have been mutual dealings between the parties, the items of which are unsettled, whether kept or proved by one party or both, the cause shall be deemed to accrue at the time of the last item proved in such account." R. S., chap. 83, sect. 90. The statute begins to run with the last item of the account, and it makes no difference whether it is a debit or a credit item, or which party kept or proved it, or whether it appears in the plaintiff's credits or in the defendant's charges, if only it be an account of mutual dealings between the parties which have not been settled. It is no longer a question of the recognition of the account and of the renewal of the promise to pay it by making a partial payment on account of it.

It follows then that when the defendant bought the tobacco on November 15, on credit, and the price was charged to him on his account, it had the effect of taking the account out of the operation of the statute for six years longer. It was an item of an unsettled account of mutual dealings between the parties, and it was then the last item.

The defendant, however, contends that the specific payment on December 15, 1902, of the price of the tobacco had the effect of taking that item out of the account, destroyed the extension of the statute which the purchase had effected, and placed the parties back in statu quo. And in support of this contention the defendant relies on *Perry* v. *Chesley*, 77 Maine, 393, as being conclusive.

That case is in some respects similar to the case at bar, but it differs at a vital point. In that case there was one debit item and one credit item within the six years. But it was admitted that the debit item was "paid at the time in cash by the defendant, and a receipt given therefor." And this payment was the credit item. It was therefore a cash, and not a credit transaction. It was never really a matter of account. The plaintiff, having been paid at the time, had nothing to charge to the defendant. Entering both the charge and the contemporaneous payment did not make them real items of account. In the present case, on the contrary, the tobacco was bought on credit and properly charged as an item of the mutual account. The case of *Perry* v. *Chesley* therefore does not sustain the defendant's contention.

Nor do we think it can be sustained by any reasonable interpretation of the statute. When the parties by their mutual dealings, by some item of debit or credit have extended the time of the operation of the statute upon the balance of the account, we do not think it lies in the power of the debtor then to shorten the time by making specific payment of debit items. The statute was evidently intended to preserve the right of action upon a mutual unsettled account for six years after the last item, no matter how far back the account commenced. Until there has been a period of at least six years during which there are no items, either debit or credit, the account is alive and suable. But this may be of little avail to a creditor, if, as is claimed by the defendant here, the latter may at any time pay specifically all the items which have accrued within six years and leave his creditor remediless as to the remainder of the account. The creditor is helpless. The debtor may choose what item he will pay and the creditor must apply the payment as the debtor directs. If then the creditor relying upon the statute, as he ought to be safe in doing, has forborne to sue until only one item is less than six years old, the debtor, if the present contention is to be sustained, may, against the will of the creditor, pay that item and escape the payment of all the rest. If he can do so in thirty days after the item is charged, he can, with like effect, do so at any time before six years have elapsed. The time is not

material. We do not think this contention can be sustained. The effect would be to rob the statute in great measure of its intended efficacy.

The court below erred in ordering judgment for the defendant. Upon the facts found by the auditor it should have ordered judgment for the plaintiff.

Exceptions sustained.

In Equity.

GERTRUDE B. STROUT *vs.* J. MERRILL LORD, Executor.

York. Opinion February 10, 1908.

Equity. Parties. Demurrer. Unforeclosed Mortgage. Descent of Same on Death of Mortgagee. Foreclosed Mortgage. Lands Vest in Heirs or Devisees. Statute 1863, chapter 212; 1870, chapter 113, section 25; 1907, chapter 163. R. S., 1857, chapter 65, section 22. R. S., chapter 67, sections 25, 26, 28; chapter 92, sections 7, 13.

1. The objection of the want of necessary parties to a bill in equity may be raised by demurrer, either general or special, and when it is raised by special demurrer, it is proper that the demurrer should suggest the names of the persons omitted. Or the objection may be taken at the hearing, or suggested at any time by the court. But a demurrer is not available unless the bill on its face discloses the want of necessary parties.
2. Under the statutes of this State, the mortgage title to lands held under an unforeclosed mortgage descends on the death of the mortgagee to his executor or administrator like all other personal estate, and not to his heirs or devisees. When such a mortgage afterwards becomes foreclosed the lands thereupon become vested in the heirs or devisees, subject to sale for the purposes of administration, and are to be distributed to the persons who are entitled to the personal estate. But until foreclosure is complete, the heirs or devisees have no title to the mortgaged estate, and they have no interest in the same except such as they have in personal estate generally.
3. In litigation in equity concerning personal estate in the hands of executors or administrators for administration, including unforeclosed mortgages of real estate, ordinarily the heirs or devisees are not necessary parties. They are sufficiently represented by the executor or administrator. This rule applies to proceedings to redeem from such mortgages.
4. But if the mortgage has in form become foreclosed, and the validity of

the foreclosure is attacked by a bill in equity praying that the foreclosure proceedings be declared null and void, and for a redemption, the heirs or devisees have a direct interest, and a right to be heard on that question, and must be made parties. It is otherwise if the mortgage is unforeclosed.

5. In the case at bar it does not appear on the face of the bill that the time for redemption had expired and that the mortgage had become completely foreclosed when the bill was brought. It therefore does not appear on the face of the bill that the devisees of the deceased mortgagee are necessary parties. The demurrer for want of necessary parties is not sustainable.

6. *Hilton* v. *Lothrop*, 46 Maine, 297, is overruled in so far as it holds that heirs or devisees are necessary parties to a bill to redeem from an unforeclosed mortgage, after the death of the mortgagee.

Hilton v. *Lothrop*, 46 Maine, 297, overruled in part.

In equity. On exceptions by plaintiff. Sustained.

Bill in equity brought against the defendant J. Merrill Lord of Parsonfield in the County of York, executor of the will of Francis A. Boothby, late of Limerick in said county, deceased, praying, among other things, that the foreclosure proceedings on a certain real estate mortgage given by the plaintiff to the said Frances A. Boothby be decreed null and void and that the cloud created by said foreclosure proceedings be removed, and for a redemption from the mortgage. The defendant filed an answer with a special demurrer therein inserted. The demurrer was sustained by the Justice of the first instance and the plaintiff excepted.

The case is stated in the opinion.

Elias Smith, *Fred J. Allen and Geo. F. & Leroy Haley*, for plaintiff.

Frank M. Higgins, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, SAVAGE, SPEAR, CORNISH, KING, JJ.

SAVAGE, J. This bill alleges that the defendant's testatrix, Frances A. Boothby, in 1902, conveyed to the plaintiff by warranty deed certain real estate in Limerick, and by bill of sale, certain personal property; that as a part of the same transaction, the plaintiff mortgaged the real estate to said Boothby to secure the performance by the plaintiff of a bond given at the same time, conditioned for the support of said Boothby; that the plaintiff fully performed the

conditions of the bond during all the lifetime of said Boothby; that during her lifetime, at her request, and acting under advice of counsel, the plaintiff signed a paper consenting to the foreclosure of said mortgage for breach of the conditions thereof; that the foreclosure proceedings were recorded in the York Registry of Deeds; and that said paper was signed and the foreclosure proceedings had in order that said Boothby might aid and assist the plaintiff in adjusting domestic troubles then existing between her and her husband; that after the foreclosure proceedings were recorded, the complainant continued to do for said Boothby until her death all the things that by said mortgage and bond she was bound to do, and that by accepting such performance, said Boothby waived the foreclosure proceedings; that Frances A. Boothby in 1906 died testate; that the defendant, as executor, claims the real estate as a part of the estate of said Boothby, and is seeking to dispossess the plaintiff; that the plaintiff in consideration of the performance of all the conditions of the bond and mortgage is entitled to have them discharged; and that the record of the foreclosure proceedings creates a cloud upon the title. She prays that the foreclosure proceedings be decreed to be null and void, and that the cloud of the foreclosure proceedings be removed. She also offers to pay whatever, if anything, is due in respect to the bond and mortgage, and prays that upon payment of such sum as may be found to be equitably due, the defendant shall be ordered to release the property to her, and to discharge the mortgage and bond. The plaintiff, therefore, in this single proceeding, seeks to remove a cloud, or failing that, to redeem.

In his answer the defendant inserted a special demurrer, and for cause stated "that the Board of Trustees of Parsonsfield Seminary of Parsonsfield in the County of York, are the residuary legatees under the will of Frances A. Boothby, and as such, a necessary party in interest, and ought to be, but have not been made a party defendant to said bill, nor has any reason been given for the omission to make such board a party." The demurrer was sustained by the sitting Justice, and the plaintiff, not having asked leave to amend, excepted. Since the effect of the ruling was to dismiss the bill,

unless amended, the exceptions are properly brought before us at this stage of the proceedings.

We think that the exceptions must be sustained and the demurrer overruled. It is true that the objection of the want of necessary parties may be raised by demurrer, either general or special. Where the parties left out are so inseparably connected with the subject of the suit that a decree could not be made without directly affecting their interests, the objection may be taken on general demurrer, or at the hearing, or when the decree is to be made. The objection may be started by the court itself. And when the objection is raised by special demurrer it is proper that the demurrer should suggest the names of the persons omitted. *Laughton* v. *Harden*, 68 Maine, 208. But whether a demurrer in either form is available depends upon whether the bill on its face discloses the want of necessary parties. Inasmuch as Frances A. Boothby died testate, it may be assumed that there are legatees or devisees, under her will. But whether the legatees or devisees, or, in case the property in question was left as, or has become, intestate property, the heirs, have any such direct interest in the property as entitles them to be heard in this proceeding depends upon facts not stated, as well as upon a construction of the statutes relating to the statutes relating to the status of lands held by an executor in mortgage. R. S., chap. 67, sects. 25, 26, 27 and 28.

At the time this mortgage was given, unless otherwise stipulated in the mortgage, a mortgagor had three years in which to redeem, after the commencement of foreclosure proceedings. But the mortgagor and mortgagee might agree upon a shorter time for redemption, not less than one year. R. S., ch. 92, sect. 7. These provisions were changed by chap. 163, of the Laws of 1907, but that does not affect this case. It does not appear by the bill whether in this mortgage the right of redemption was shortened by agreement to less than three years or not. It is alleged that the plaintiff's consent for foreclosure proceedings was given December 30, 1904, and that the mortgagee died in April, 1906. It is entirely possible then, for aught that appears in the bill, that the foreclosure, so far as procedure was concerned, became absolute in

the lifetime of the mortgagee. If so, the full record title had come to her, and passed from her to the devisees or heirs. In such case the remedy sought here must be enforced against the devisees or heirs, and not against the executor. It is equally possible that the time of redemption had not expired before the death of the mortgagee, or even before the bringing of this bill. What then is the situation if the mortgage was not fully foreclosed in the lifetime of the mortgagee ?

It is a rule in equity that all persons legally or beneficially interested in the subject matter of a suit must be made parties. At common law the legal title to an estate mortgaged in fee was in the mortgagee, and upon his death the legal estate became vested in the heir or devisee of the mortgagee. Only the heir or devisee could discharge or release the mortgage. This rule was recognized in *Hilton* v. *Lothrop*, 46 Maine, 297, quoting the common law doctrine from Story's Equity Pleadings, and it was held that such heir or devisee must be made a party to a bill to redeem, "because he has the legal title, and is to be bound by the decree. And the representative of the mortgagee, also, must be made a party, because, generally, he is entitled to the mortgage money when paid, as it is to be returned to the same fund out of which it originally came."

But the plaintiff contends that the rule as to heirs and devisees has been changed by statute, and we think the question should be re-examined. The statutory provisions relied upon are these. By R. S., chap. 67, sect. 25, it is provided that real estate held by an executor or admistrator, guardian or trustee, in mortgage, shall, until the right of redemption has expired, be deemed personal assets, and be held in trust for the persons who would be entitled to the money, if paid; and if it is paid, he shall release the estate; but if it is not paid, he may sell it as he could personal estate at common law, and assign the mortgage and debt. Section 26 provides that any such real estate may, for the payment of debts, legacies or charges of administration, be sold by a license of the Probate Court like personal estate. And section 28 provides that if such real estate is not so redeemed or sold, it shall be distributed among those who are entitled to the personal estate.

These provisions all relate to the powers and duties of executors respecting the administration of unforeclosed mortgages of real estate. And in this administration the statute looks to the debt, which is the principal thing, rather than to the security. If the debt is paid, the money is to go, by distribution, to those who are entitled to the personal estate, or, if it has been specifically bequeathed, to the legatee. If the debt is not paid, the land itself is to be distributed among those who would have been entitled to the money. And in either event, the land may be sold like personal estate to pay debts, legacies and expenses of administration. In other words, the statute treats the foreclosed mortgage just as if it were personal estate.

Similarly it is provided in R. S., chap. 92, sect. 13, relating to the redemption of mortgages, that "lands mortgaged to secure the payment of debts, or the performance of any collateral agreement, and the debts so secured, are on the death of the mortgagee, or person claiming under him, assets in the hands of his executors or administrators; they shall have the control of them as of a personal pledge; and when they recover seizin or possession thereof, it shall be for the use of the widow and heirs, or devisees, or creditors of the deceased, as the case may be; and when redeemed, they may receive the money, and give effectual discharges therefor, and releases of the mortgaged premises."

A consideration of these statutory provisions makes it clear, we think, that unforeclosed mortgages of real estate are not only to be administered as personal estate, but that they are, in the eye of the law, personal. The statute says they are to be deemed personal assets, that is, they are personal assets. *Libby* v. *Mayberry*, 80 Maine, 137. As such, the title descends on the death of the mortgagee to his executor or administrator like all other personal estate, and not to his heirs or devisees, 18 Cyc. 172. It was so expressly held in *Hemmenway* v. *Lynde*, 79 Maine, 299. See, also, *Bird* v. *Keller*, 77 Maine, 270. But when such mortgages afterward become foreclosed the lands thereupon become vested in the heirs or devisees, subject to sale for administrative purposes, and are to be distributed to the persons who are entitled to the personal

estate. *Hawes* v. *Williams*, 92 Maine, 483. Until foreclosure is complete, therefore, the heirs or devisees have no title to the mortgaged estate, and they have no interest in the same except such as they have in personal estate generally.

But while it is true that generally all persons having interests which would be affected by the decree must be made parties in equity, there are certain well recognized exceptions, where the persons beneficially interested are represented by a party. And it is said that the exception of most general application is in the case of executors or administrators, who, in contests affecting their trusts, represent creditors, legatees and distributees, 16 Cyc. 189; 18 Cyc. 206. So, in litigation in equity concerning personal estate in the hands of executors or administrators for administration, ordinarily the heirs or devisees are not necessary parties. They are represented by the executor or administrator. They have no legal interest in the res itself, but only in such a distributive share as results from administration. And since lands held by unforeclosed mortgages are, in this State, personal assets in the hands of the executor or administrator for administration, we are unable to perceive why, in proceedings to redeem, the executor or administrator does not sufficiently represent the heir or devisee, as he does with respect to other personal assets. If so, the heirs or devisees are not necessary parties.

If, however, the mortgage has become foreclosed, the title is vested in the heirs or devisees. *Hawes* v. *Williams*, supra. And if upon a bill to redeem, the validity of the foreclosure is attacked, they have a direct interest and a right to be heard on that question, and must be made parties.

Accordingly, we think the case of *Hilton* v. *Lothrop*, supra, should no longer be taken as authority for the doctrine that heirs or devisees are necessarily parties to bills to redeem unforeclosed mortgages. That case stated the common law doctrine, and placed it squarely on the ground that the legal title to the mortgage had vested in the heirs or devisees. That ground as we have seen is now untenable, and we apply the maxim cessante ratione legis cessat ipsa lex. That the common law rule is modified by statutes similar

to ours has been held by other courts. See opinion of Story, J., in *Dexter* v. *Arnold*, 1 Summer, 109; Fed. Cases, No. 3857, and cases cited in 27 Cyc. 1853. In the case of *Hilton* v. *Lothrop*, decided in 1858, no reference whatever was made to the statute, and evidently it was not considered. Moreover, the statute then in force, R. S., 1857, ch. 65, sect. 22, differed in some important respects from the present statute. The statute then provided simply that when the deceased held any real estate in mortgage without having foreclosed the right of redemption, his executor or administrator should hold it in trust for the persons who would be entitled to the money if it was paid, and that it should be accounted for as personal assets in his hands. Express power was afterwards given to executors and administrators by chap. 212 of the Laws of 1863 to sell such real estate before the right of redemption is foreclosed, and by section 25, chap. 113, of the Laws of 1870, to assign the mortgage and debt. In the general revision of 1871 appears for the first time the expression "shall be deemed personal assets," instead of the phrase "shall be accounted for as personal assets." If this change of expression did not change the construction of the statute, it at least made certain what before that time may have been of doubtful meaning, and taken with the amendments referred to it has marked the status of such mortgaged lands as personal estate, which goes to the executor and not to the devisee.

It does not appear on the face of this bill that the time of redemption has expired. Hence it does not appear yet that the devisees are necessary parties, and the demurrer for want of parties cannot be sustained.

Exceptions sustained.
Demurrer overruled.

INHABITANTS OF EAST LIVERMORE

vs.

THE LIVERMORE FALLS TRUST & BANKING COMPANY.

Androscoggin. Opinion December 19, 1907.

Double Taxation. Tax Statutes. Construction. Statute 1845, chapter 159. R. S., 1857, chapter 6. R. S., chapter 8, sections 24, 41, 44, 46, 55, 67; chapter 9, sections 2, 5, 12, 18, 19, 29, 30, 31, 32, 33, 34; chapter 47, section 24.

1. A statute imposing taxes is not to be interpreted by its own language alone, but in connection with other tax statutes prior and contemporaneous, and also in the light of contemporaneous and subsequent practical understanding of it by taxing officers and the public.
2. Tax statutes are to be construed strictly against the State, and especially are they to be so construed as to avoid double taxation unless their language interpreted according to recognized principles of statutory interpretation fairly compels a contrary construction.
3. To tax the shares of a corporation to the shareholders, and to tax at the same time the property of the corporation to the corporation itself, imposes in effect, if not in theory, a double tax burden on the shareholders.
4. To tax to the individual shareholders the shares of a bank and to tax at the same time to the bank the shares owned by it in other banks, imposes to that extent an extra burden on the shareholders of the bank so taxed.
5. While the tax statutes of the State specifically and explicitly subject the real estate of a bank to taxation to the bank, notwithstanding its shares are also subjected to taxation, they do not specifically and explicitly subject to such taxation shares in other banks owned by it, and hence it cannot be held liable to taxation upon such shares.

On agreed statement. Judgment for defendant.

Action of debt to recover a tax assessed against the defendant for the year 1905. This action was duly entered in the Supreme Judicial Court, Androscoggin County, and at the September term thereof, 1906, an agreed statement of facts was filed and the case was sent to the Law Court for determination. The "agreed statement" is as follows:

"This is an action of debt by the plaintiff town, to recover against the defendant for taxes assessed against the defendant for the year 1905, the sum of six hundred four dollars and twenty cents.

"The defendant is a duly organized Trust and Banking Company and was incorporated by special act of the Legislature, approved March 25, 1895, being chapter 275 of the laws of 1895 (which chapter may be referred to by either party as a part of this statement) and has its legal residence and domicile in said town of East Livermore.

"It is agreed that the tax in question was assessed upon the following described property, to wit:—

6 shares of the capital stock of the First National Bank, Portland, Maine, par value, $600,

48 shares of the capital stock of Casco National Bank, Portland, Maine, par value $4800.,

160 shares of the capital stock of Portland Trust Company, Portland, Maine, par value $16000.,

7 shares of capital stock of Peoples Trust Company, Farmington, Maine, par value $700.,

and that the same was in addition to the franchise tax imposed upon said defendant and paid to the State Treasurer.

"It is further agreed that the formal proceedings in the assessment of said tax, and in demand, notice and authority to bring this suit, were in due form and according to law.

"But the defendant has refused to pay said tax, and claims that the property upon which the same is assessed is not subject to said tax, as the property of said defendant.

"It is agreed that the following is a statement of the assets and liabilities of the defendant on April 1st, 1905:—

LIABILITIES.

Capital Stock,	$ 50,000.00	
Surplus,	20,000.00	
Undivided Profits,	12,422.74	
Unpaid Dividends,	43.20	
Certificates of Deposit,	66,634.02	
Time Deposits,	389,619.28	bearing int. at 3½%
Demand Deposits,	92,489.76	
Due Other Banks,		
	$631,209.00	

RESOURCES.

Loans on Mortgages,	$ 179,611.61	
Loans on Collateral,	34,735.00	
Loans on Names,	184,279.64	
Loans on Municipalities,	701.75	
Stocks and Bonds,	201,076.00	
Expense,	958.09	
Furniture and Fixtures,	5,000.00	
Cash on Deposits,	5,224.58	
Cash on Hand,	19,622.33	
		$ 631,209.00

"It is agreed that the shares of bank stock hereinbefore mentioned as assessed as aforesaid were a part of the foregoing item of 'Stocks and Bonds' in said table of resources.

"Upon the foregoing statement, if the court decides that said property is subject to said tax, judgment is to be for the plaintiff for the amount of five hundred nine dollars and twenty cents with interest from the date of the writ. If said property is not subject to such tax, judgment is to be for the defendant."

W. H. Newell, for plaintiff.

John H. Maxwell and Heath & Andrews, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, STROUT, SAVAGE, CORNISH, KING, JJ.

EMERY, C. J. The Livermore Falls Trust and Banking Company the defendant bank, was located and doing business in East Livermore on April 1, 1905, and all the shares of its capital stock were then taxable, and presumably were taxed, at their "just value" in some form in some town in this State, at least so far as such taxing would not be double taxation. R. S., ch. 9, sects. 5 and 29. At that date, however, the bank had purchased and then owned as part of its assets certain shares in national banks and in other trust or banking companies located in this State. The tax assessors of East Livermore that year assessed a municipal tax against the defendant bank upon those shares. This suit is to recover that tax.

The defendant bank contends in defense that under the circumstances a taxation of those shares to the bank in addition to the taxation upon the shares of its own stock to its stockholders would be practically and in effect, if not technically, double taxation, which the taxing statutes taken as a whole do not show was intended by the legislature, and hence the tax is not authorized. The plaintiff replies that the result is not double taxation in any legal sense and, even if it were, the tax claimed is expressly authorized by the statute, R. S., ch. 9, sec. 5, which enumerates "shares in moneyed and other corporations within and without the State" as property to be taxed to the owner. The importance of the question justifies extended consideration.

In the arguments and briefs and in many of the cases cited there was considerable discussion of the nature of such a tax, whether it was a tax upon the franchise of the bank, upon its deposits or depositors, upon its capital stock, or otherwise. We see no need to follow that discussion. The tax sought to be recovered here is simply a tax on certain specific articles of personal property owned by a moneyed corporation, to wit a banking corporation. It is undoubtedly within the letter of the statute cited. R. S., ch. 9, sec. 5. The bank is the beneficial as well as the legal owner of the property. It does not hold the shares as security. It is not known and it does not matter whether they were purchased out of the money paid in as capital stock, or out of the money deposited, or out of surplus and undivided profits. They were purchased with the funds of the bank and are part of its assets available for the payments of its debts and for distribution among its stockholders upon liquidation.

There is also much discussion in the cases as to whether a tax upon corporate shares to the stockholder and another tax upon the corporate property, to the corporation, is double taxation. There are many cases favoring the plaintiff's argument that in legal theory a corporation is a distinct and different person from the owners of its capital stock, that its liabilities are not their liabilities, that its assets are not their assets, and hence that a tax on its property is not a tax on their property and so is not double taxation within the

legal meaning of that term. But whatever the strict legal theory, it is evident that in effect a share in a corporation is a share in its assets,—that the corporation while holding the only title to its assets cognizable by the courts really holds and manages them, not for itself, but for its stockholders,—that a gain or loss in assets or the value of them by the corporation is a corresponding gain or loss by its stockholders; and hence if the shares are severally taxed as such and the corporate assets are also taxed, the result is practically a double burden on the stockholder, or double taxation. The stockholders really pay both taxes. There are many authorities supporting this view. Thompson on Corporations, sec. 2813, and cases cited; Cook on Stockholders, sec. 567; Clark and Marshall on Corporations, pages 754, 755, and note 59; 27 Am. & Eng. Ency. Law, 949, par. 3, and cases cited; *Gardiner Factory Co.* v. *Gardiner*, 5 Maine, 133; *Augusta Savings Bank* v. *Augusta*, 56 Maine, 176; *Sweetsir* v. *Chandler*, 98 Maine, 145, at pages 154, 155; *Tennessee* v. *Whitworth*, 117 U. S. 139; In re *Newport Reading Room*, 21 R. I. 440; *Cheshire Co. Tel. Co.* v. *State*, 63 N. H. 167; *Salem Iron Factory Co.* v. *Danvers*, 10 Mass. 514; *Boston W. P. Co.* v. *Boston*, 9 Met. 199, 202; *First National* v. *Douglass Co.*, 102 N. W. 315 (Wis.); *Commonwealth* v. *Bank*, 81 S. W. 679 (Ky.); *Stroch* v. *Detroit*, 90 N. W. 1029 (Mich.)

It is suggested, however, that moneyed corporations such as banks are so different in nature from business corporations generally that they are not within the purview of those cases or of the above statement. We do not see any practical difference between them so far as taxes upon their property are concerned. A banking corporation (not speaking now of pure savings banks) is a business corporation pure and simple. It is not for charitable, literary, or social purposes or for any other purpose than for business and business profits for its stockholders. It owes money and has money due it. It borrows money and uses the borrowed money in its business of discounting notes, dealing in stocks, bonds, etc. Its depositors are merely its creditors. They have merely loaned it money. They have no more concern with its assets or its investments than any

other creditor has. Its stockholders have the same legal and equitable interest in its assets that the stockholders in any business corporation have in its assets. Moreover, there are decided cases including banks within the doctrine that taxes upon the shares and also upon the assets of a corporation constitute double taxation. In *Bank* v. *Douglass Co.*, (Wis.) 102 N. W. 315, the bank recovered back a tax levied upon its real estate, the court assuming that it constituted double taxation not required by the statutes of Wisconsin. In *Commonwealth* v. *Bank*, (Ky.) 81 S. W. 679, the State sought to impose a tax on the notes, bonds, stocks, etc., owned by the bank,— the shares of which were also taxed to the shareholders. The court held such a tax could not be imposed and seems to assume that it was double and destructive taxation, citing another Kentucky case *L. & E. Mail Co.* v. *Barbour*, 88 Ky. 73, where such a tax was directly held to be double taxation. In *Hempstead County* v. *Bank*, (Ark.) 84 S. W. 715, it was held that to tax a bank first on all its net assets, and then on its real estate was double taxation. In *Frederick Co.* v. *Bank*, 48 Md. 117, it was held that to tax the property of a bank and its capital stock at the same time would be double taxation. The result would be the same whether the capital stock was taxed in solido to the bank or in shares to the shareholders. In *Cleveland Trust Co.* v. *Lander, County Treasurer*, (Ohio) 56 N. E. 1036, the shares of the bank were taxable to the shareholders. The bank in behalf of the shareholders sought to have the government bonds held by the bank deducted in fixing the taxable value of the shares. The court held that the shares were to be taxed at their value no matter what investments the bank made. A correct decision perhaps. The court reasoned, however, that the legislature only had a choice whether to tax the value of the shares to the shareholders or the value of the property of the bank to the bank, that it could not do both. It said: "The shares or stock in a bank are personal property and are employed by the owner in banking, and therefore should be taxed the same as property of individuals. To also tax the property of the bank, less the government bonds owned and held by it, would reduce the dividends to be received by the shareholder

or stockholder and would by such double taxation impose greater burdens upon the property employed in banking than upon the property of individuals." True this may be mere dictum, but it shows the opinion of able judges on the question. The case *School Directors* v. *Carlisle Bank*, (Pa.) 8 Watts, 289, seems precisely in point on this question. The bank owned, by purchase for investment, stock of the U. S. Bank of Pennsylvania. The shares of its own stock were taxable to the holders. The School Directors sought to tax the bank for the shares of the U. S. Bank stock it owned. The court held that the bank could not be taxed for them, and this clearly upon the ground that it would be double taxation which the legislature could not have intended to impose. The court said (page 292), that to impose the tax on the shares of the U. S. Bank owned by the Carlisle Bank "would be literally taxing them (the stockholders of the Carlisle Bank) for the same property twice which would seem to be the very height of injustice."

We think it clear that the imposition of the tax sued for in this case adds to the tax burden of the stockholders, and practically in a business sense, even if not in the strict legal sense, results in cumulative or double taxation upon the same person for the same property.

Has the legislature, nevertheless, clearly, explicitly, authorized the tax sued for with its manifest inequitable results as above stated? It is elementary that no tax can be imposed without express statutory authority, that such authority is to be construed strictly against the State, and particularly that no double tax burden shall be imposed on any person or property unless the statutes so clearly require it that no other construction is possible in reason. "The intent to impose taxation which is double even from an economic point of view is not to be ascribed to the legislature in the absence of clear, unambiguous expression." *Bank* v. *Douglass Co.*, (Wis.) 102 N. W. 315. "Tax laws should be so construed as to avoid double taxation unless a contrary construction is compelled by express provision or necessary implication of the statute." *County Commrs.* v. *Bank*, 23 Minn. 280. "Double taxation is never to be presumed. Justice requires that the burdens of goverment shall as

far as practicable be laid upon all; and if property is taxed once in one way, it would ordinarily be wrong to tax it again in another way when the burden of both taxes falls upon the same person. Sometimes tax laws have that effect, but if they do it is because the legislature has unmistakably so enacted. All presumptions are against such an imposition." *Tennessee* v. *Whitewith*, 117 U. S. 129.

The plaintiff's counsel contends that the tax, even if an additional burden on the same persons, is clearly authorized by the explicit, unqualified language of the statute. They cite R. S., ch. 9, sec. 2, which enacts that "all personal property of the inhabitants of the state" is subject to taxation; also sec. 5, which enacts that "personal estate for the purposes of taxation includes . . . all shares in moneyed and other corporations within or without the state;" also sec. 12, which enacts that "all personal property within or without the state" (with certain exceptions not applicable to bank stocks) "shall be assessed to the owner in the town where he is an inhabitant on the first day of each April;" also secs, 30, 31, 32, 33 and 34, which, however, do not expressly impose a tax on bank shares, but rather provide how and when the tax on them shall be assessed and collected. They also cite from sec. 29 the clause "but the stock of such banks, banking associations and other corporations shall be taxed to the owners thereof where they reside."

It may be conceded that the language of sec. 5 is explicit that all shares in moneyed corporations shall be taxed, but it does not necessarily follow that they are to be taxed twice, or so taxed that the result would be a double taxation of them. The section is equally explicit that "all goods, chattels, moneys and effects . . . all obligations for money or other property . . . all public stocks and securities" shall be taxed. If it follows from this that all such property is to be taxed to a corporation whose shares representing the same property are taxed to the shareholders, there would be a double taxation of crushing weight and all corporations subject to such taxation would be crushed out of existence. If, besides the tax upon their shares, banks and banking companies are to be taxed upon all their stocks, bonds, promissory notes, gold and silver coin, bank bills, legal tender notes, etc., in their vaults or

elsewhere the business of banking cannot be carried on by corporations. It seems incredible that the legislature could have intended to impose a tax upon the personal property of banks of its own chartering as well as upon its shares, while national banks are entirely exempt from such taxes. *Owensboro Nat. Bank* v. *Owensboro*, 173 U. S. 664.

Section 5, however, should not be read by itself. It is only a part of the statutes upon taxation. It should be read in connection with the other statutes prior and contemporaneous, and also in the light of contemporaneous and subsequent practical construction by the taxing officers and business public. Taking all these into consideration, the tax statutes as a whole do not force us to the conclusion that a tax is to be assessed at the same time upon all the personal property of a corporation to the corporation and also upon all its shares to the shareholders. The tax laws of this State from its organization have in general, comprehensive terms imposed taxes on all personal property not specifically exempted, terms comprehensive enough to include the personal property of corporations and also the shares of their capital stock; yet it was early held, following the anterior decisions of the court of the parent State, Massachusetts, that such statutes did not impose a tax upon the personal property of a corporation and upon the shares of its stock in the same year's assessment. The case of *Gardiner C. & W. Factory Co.* v. *Gardiner*, 5 Maine, 133, was a case where the Gardiner municipality sought to tax the plaintiff corporation for its personal property. The court held that the tax imposed on the shares of the corporation was a tax upon its personal property as well, and was the only tax that could be levied on such property. The tax act of 1845, ch. 159, in its enumeration of personal property liable to taxation was as specific and comprehensive as the present statute. It included "all goods and chattels, moneys and effects, etc., all shares in moneyed corporations," etc.; and there was no specific exemption of bank shares owned by another bank; yet in *Augusta Bank* v. *Augusta*, 36 Maine, 255, the court said of the act: "The intention is clearly exhibited to subject all real and personal property of the inhabitants of this State to taxation unless

it be specially exempted. It is equally clear it was not the intention of the legislature to subject the same property to be twice taxed at the same time in the ordinary mode of taxation when such a result could be conveniently and safely avoided." In that case the bank had loaned $5,000 of its capital or deposits to the Ken. & Port. R. R. Co., taking the company's note therefor, but in addition to the note the bank received and held an assignment of fifty shares of the stock of the P. S. & P. R. R. Co. The court said that if those fifty shares "constituted a part of the capital of the Augusta Bank, they were liable to taxation only by an assessment upon its stockholders for the value of its shares;" but held that it was the $5,000 note only in which the funds of the bank had been invested, that none of the funds had been paid out for the stock, and hence that this stock was not taxed as the note was by a tax upon the shares of the bank. The difference between that case and this is manifest. In that case the bank did not really own the shares of railroad stock. They were no part of its assets, being held only as security for the $5,000 note. The bank could recover of the real owner the tax it was compelled to pay on the shares. In this case the bank itself is the real owner of the shares. They were purchased with its money and are a part of its assets, as much so as the $5,000 note was a part of the assets of the Augusta Bank.

The tax act of 1857 was substantially the same as that of 1845, and came before the court for interpretation in the case *Augusta Savings Bank* v. *Augusta*, 56 Maine, 176. The plaintiff bank had invested some of its deposits in shares of national banks, and the assessors of Augusta had assessed to it a tax upon those shares. At that time the several depositors were liable to municipal taxation on their deposits in the plaintiff bank. The court held that the bank could not be taxed for the bank shares it had purchased, for the reason that it would be double taxation contrary to the policy of the law. We think that case and this are alike in principle. In that case the bank shares purchased, practically though not theoretically, belonged to the depositors, who by paying a tax on their deposits paid a tax on those shares. In this case the bank shares purchased, practically belong to the stockholders of the defendant

bank who pay a tax on them when they pay the tax on their shares in the defendant bank.

The present tax act, R. S., ch. 9, does not enumerate or specify any more particularly or explicitly what is to be taxed than did the acts of 1845 and 1857. The other sections cited, secs. 31, 32, 33 and 34, do not impose a tax on corporate shares, but provide how they shall be disclosed to the assessors, and how the tax provided by the previous sections may be assessed and collected.

We also think a consideration of other sections of the tax act and their history will show that it has been the steady policy of the legislature not to impose double taxation except in the few instances particularly specified. In assessing the shares of the stock of a bank to its several stockholders, "the assessed value of the real estate, vaults and safe deposit plants" is to be deducted, R. S., ch. 47, sec. 24. When a company is required by law to invest any part of its capital stock in the shares of another corporation, such investment is not to be taxed to the company but only to its stockholders. R. S., ch. 9, sec. 18. The stock of an insurance company is exempt from taxation to the amount of the real estate taxed to it, sec. 19. The State tax on railroad companies is in the place of all taxes on its stock. R. S., ch. 8, sec. 24. So is the State tax on telegraph and telephone companies, and, further, the local tax on their real estate is to be deducted from their State tax, sec. 41. So in the case of express companies, sec. 44. The value of the real estate of insurance companies is to be deducted in assessing the State tax upon them, sec. 46. When the legislature, after the decision in *Augusta Savings Bank* v. *Augusta*, 56 Maine, 176, (supra,) imposed a tax on savings banks measured by the amount of the deposits in them, it exempted the depositors themselves from taxation on their deposits, sec. 55. In imposing a State tax upon trust companies, etc., measured by the amount of certain of their deposits the legislature exempted those deposits from municipal taxation, sec. 67.

The foregoing illustrations should be enough to show the legislative policy to be against double taxation. There seems to be not only no intention to impose it, but an anxiety to avoid it.

The clause from sec. 29, is no more explicit and has no more than sec. 5. Read in the same light and interpreted by the same rules as above applied to that section it is modified to the same extent.

True, there is the argument, expressio unius exclusio alterius, the argument that by not affirmatively guarding against the double taxation of bank stocks owned by another bank while so carefully guarding against double taxation in the instances named, the legislature meant to leave such stocks exposed to double taxation. The answer is that it does not appear that the legislature ever contemplated such double taxation or apprehended that its statutes would be construed as authorizing it. The court had already held, and more than once, that a tax upon its personal property to a corporation and another tax at the same time upon its shares and its shareholders was double taxation not authorized by the law. Since these decisions the legislature has not in any statute declared explicitly and specifically that in other cases than those named a tax shall be assessed to a corporation upon its personal property in addition to the tax upon its shares. On the contrary, since those decisions the legislature has at least twice re-enacted the statutes upon this subject in substantially the same language. This is to be regarded as an expression of the legislative intent for the court's interpretation of the statutes to stand as the law. *Tuxbury's Appeal*, 67 Maine, 267.

Our conclusion is that our taxing statutes, taken as a whole and interpreted according to well known principles of interpretation, do not require the imposition of the tax sought to be recovered in this suit, and that hence the judgment must be for the defendant.

Judgment for defendant.

JOHN W. MANSON et als.

vs.

FRANCIS C. PEAKS.

SAME *vs.* SAMUEL NORTON.

Piscataquis. Opinion February 15, 1908.

Judgment. Chose in Action. Assignment. Collateral Attack. Quitclaim Deed. Covenant of Non-Claim. Implied Covenant. After-Acquired Title. Grantee without Notice.

1. A judgment is a chose in action and can be assigned in writing by the administrator of the deceased judgment creditor, so that the assignee can maintain an action thereon in his own name.
2. After an otherwise valid judgment in favor of such assignee in an action upon the original judgment, the validity or efficacy of the assignment cannot be questioned by the judgment debtor, nor by any one claiming under him.
3. Where one, not then having a title to real estate, gives a mere quitclaim deed thereof with only a covenant of non-claim, a title afterward acquired by him does not pass to the grantee in such prior deed.
4. A recital in such deed at the close of the description of the land as follows, "and being a part of the land purchased by me of the town of Foxcroft" does not constitute a covenant by the grantor that he then has the title to the land.
5. A grantee, without notice, under a deed given after the title was acquired by the grantor, has a better title than the grantee under a quitclaim deed without covenant of warranty given before the title was acquired by the grantor.

On report. Judgment for plaintiffs in each case.

Real actions brought by the plaintiffs as trustees in bankruptcy of the estate of Henry Hudson of Guilford. The first named action was to recover Lot No. 15, Range 11, in the town of Foxcroft, Piscataquis County, and the second was to recover Lot No. 15, Range 10, in the same town. Plea, the general issue in each action.

Both actions came on for hearing at the September term, 1906, of the Supreme Judicial Court, Piscataquis County, and at the conclusion of the evidence in each action the parties agreed that upon so much of the evidence as was competent and legally admissible, both cases should be reported to the Law Court for decision.

All the material facts are stated in the opinion.

Hudson & Hudson, for plaintiffs.

J. B. & F. C. Peaks, for defendants.

SITTING: EMERY, C. J., WHITEHOUSE, SAVAGE, SPEAR, CORNISH, KING, JJ.

EMERY, C. J. These are real actions. The plaintiffs' title is from the town of Foxcroft through the town's grantee, Seth Brawn, and through Henry Hudson, a judgment and levying creditor of Brawn. The defendants also claim title under Brawn.

The first question to be considered is whether the judgment *Hudson* v. *Brawn* is valid against collateral attack. In the declaration in the writ, *Hudson* v. *Brawn*, there was set forth the due recovery of a prior judgment (describing it) by one Thompson against Brawn and its want of satisfaction, the decease of Thompson, the assignment in writing of the unsatisfied judgment to Hudson by the duly appointed administrator of the estate of Thompson deceased, and the accruing of an action thereby to Hudson to have and recover of Brawn the amount of the judgment. The writ was duly served upon Brawn, who did not appear, and Hudson recovered judgment upon due default in 1887. The only argument urged that the judgment is void upon its face is that an administrator has no power to assign a judgment. It is settled, however, that a judgment is an assignable chose in action upon which an action can be sustained in the name of an assignee; *Wood* v. *DeCoster*, 66 Maine, 542; *Ware* v. *B. & B. R. R. Co.*, 69 Maine, 97. We do not see why a judgment cannot be assigned by an administrator as well as any other chose in action belonging to the estate. It follows that the Hudson judgment is not void upon its face.

It is claimed that the Thompson judgment had become subject to the right of Thompson's widow for an allowance before the assignment of it to Hudson by the administrator, and it is argued that as there was no effectual transfer of the judgment by that assignment, the Hudson judgment was void. That question, however, is not open in these actions. Brawn had his day in which to question the efficacy of the assignment. Neither he nor any one claiming under him can now question it in collateral proceedings. As to the parties to these actions, the question is wholly res inter alios, between the administrator and the widow or the heirs or creditors of Thompson or between Hudson and them.

In the absence of any evidence of collusion or other fraud on the part of Hudson or Brawn in obtaining the judgment *Hudson* v. *Brawn*, it must be held valid until satisfied or reversed, and its effect was to make Hudson a judgment creditor of Brawn with all the rights against Brawn of a judgment creditor. *Sidensparker* v. *Sidensparker*, 52 Maine, 481; *Treat* v. *Maxwell*, 82 Maine, 76.

Hudson, having obtained a valid judgment against Brawn, found upon the records in the registry of deeds a record of a deed of the demanded land from the town of Foxcroft to his judgment debtor Brawn, dated Jan'y 9, 1869, and recorded Jan'y 25, 1873. Not finding upon the records any record of a deed of the land from Brawn after the date of his deed from Foxcroft, Hudson levied his judgment upon the land as the land of Brawn. No defect in the proceedings of levy and sale is shown, and hence Hudson acquired at least a prima facie title to the land which title admittedly has come to these plaintiffs.

The defendants also claim title under Brawn, but only under a deed from him dated Sept. 22, 1868, and recorded Oct. 1, 1868, both some months before he received any deed from Foxcroft and before any legal title had vested in him. The defendants urge, however, that the title which afterward accrued to him under his deed from Foxcroft Jan'y 9, 1869, enured to his grantee under his prior deed of Sept. 22, 1868, so that no title remained in Brawn to be acquired by any one. That deed was a deed of release and quitclaim, in which the only express covenant was that of non-claim,

as follows: "So that neither I, the said grantor, nor my heirs, nor any other person or persons claiming from or under me or them, or in the name, right or stead of me or them, shall or will by any way or means have, claim or demand any right or title to the aforesaid premises or their appurtenances or to any part or parcel thereof forever." It is the settled law of this State that such a deed with only that covenant operates to pass the grantor's then existing title only, and does not operate to pass an after acquired title. See *Bennett* v. *Davis*, 90 Maine, 457; where the reasons and the authorities are stated at length.

The defendants claim, however, that there are implied covenants in the deed which do operate to pass the after acquired title. It appears that the town of Foxcroft at its annual March meeting of 1868 "Voted to authorize the treasurer to deed to Seth Brawn by release deeds Lots 13, 14 and 15 in the 11th Range and Lot No. 15 in the 10th Range for the sum of eighty dollars;" but, as already stated, no deed was given till Jan'y 9, 1869, and it does not appear that he had paid the eighty dollars till then. In his deed given Sept. 22, 1868, after the vote of the town but before he received the deed authorized by that vote, Brawn described the land he was quitclaiming as follows: "Lots numbered fifteen in the 10th range and fifteen in the 11th range of lots in said Foxcroft, and being a part of the land purchased by me of the town of Foxcroft." The defendants urge that these words, in view of the facts above stated, constitute in effect a covenant that he then had and was conveying an actual title and estate in the land described, and a covenant to make that title good.

Even if such a covenant would operate to pass an after acquired title, we do not think it can be reasonably implied. The words "and being part of the land purchased by me of the town of Foxcroft" are not in their connection words of covenant, but merely words of description or identification. They no more imply a covenant of title than did similar words in the deed under consideration in *Bennett* v. *Davis*, 90 Maine, 457.

It follows that the record title to the demanded land is in the plaintiffs. Though Brawn had not occupied the land, it does not

appear that Hudson had any actual notice of any deed from him, nor is any title by adverse possession set up by the defendants, and hence the plaintiffs are entitled to judgment.

Judgment for plaintiffs in each case.

LAURA HAYFORD, TRUSTEE, Petitioner,

vs.

MUNICIPAL OFFICERS OF CITY OF BANGOR.

Penobscot. Opinion February 17, 1908.

Eminent Domain. Land Taken for Public Use. Appeal from Estimate of Damages. Death of Appellant. No Survival of Appeal. Trust. R. S., chapter 4, sections 89, 90, 91; chapter 23, section 20; chapter 89, section 8.

1. The right of appeal from the estimate of damages by the municipal officers for land taken for the site of a public library building, is neither a common law nor a constitutional right, but is solely a statutory right and can extend no farther than the statute provides.
2. Such an appeal is not an "action" within the statute R. S., chapter 89, section 8, providing for the survival of actions after the death of a party, and there is no statute providing for the survival of an appeal like this; hence the death of the appellant pending the appeal abates the appeal, and the proceedings under it cannot be carried on by the representatives of the appellant.
3. Only persons having an estate or interest in the land taken at the time of the taking can appeal from the estimate of damages by the municipal officers. Persons succeeding to the estate or interest of a deceased appellant cannot prosecute that appeal.
4. The court cannot continue a trust otherwise ended, nor create a trust for the purpose of saving such an appeal after the death of the appellant trustee.

On exceptions by defendant. Sustained.

Petition in the nature of an appeal, for an increase of damages awarded to the plaintiff by the municipal officers of the city of

Bangor as compensation for land taken by said city under Revised Statutes, chapter 4, sections 89, 90, 91, for a public library lot. The petition was entered at the October term, 1906, of the Supreme Judicial Court, Penobscot County, and was continued to and past the January term, 1907, to the April term, 1907. March 29, 1907, the petitioner died. At said April term, 1907, Anna C. Pierce, administratrix with the will annexed of the estate of the aforesaid petitioner, Laura Hayford, and also devisee in remainder upon the death of the aforesaid trustee, Laura Hayford, under the will of William B. Hayford, deceased, "offered to come in and prosecute the case in whichever capacity entitled, and the city of Bangor filed a motion to dismiss the petition." After hearing, this motion to dismiss was pro forma overruled by the presiding Justice and the defendant city excepted.

Revised Statutes, chapter 89, section 8, relating to the survival of actions, reads as follows: "Sec. 8. In addition to those surviving by the common law, the following actions survive; replevin, trover, assault and battery, trespass, trespass on the case, and petitions for and actions of review; and these actions may be commenced by or against an executor or administrator, or when the deceased was a party to them, may be prosecuted or defended by them."

The case appears in the opinion.

Memorandum. In a former case growing out of the taking of the aforesaid land for a public library lot, the plaintiff, Laura Hayford, filed a petition for a writ of certiorari. See *Hayford* v. *Bangor*, 102 Maine, 340.

E. C. Ryder and Hugo Clark, for plaintiff.

Donald F. Snow, Charles A. Bailey, Taber D. Bailey and Louis C. Stearns, for defendant.

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

EMERY, C. J. By statutory proceedings, the regularity and validity of which are not now questioned, the city of Bangor took a parcel of land in the city for public use as a site for a public library building. The statutory provision for determining the

"just compensation" to be paid by the city for the land so taken was that the municipal officers of the city, after giving the specified public notice of the time and place for hearing, should "hear all parties interested . . . . and estimate the damages to be paid to each owner so far as known, and make a return of their doings," etc. A further provision was that "any person aggrieved by the estimate of damages" by the municipal officers might petition the Supreme Judicial Court to estimate the damages, such petition to be presented at the next term of the court in Penobscot County, after sixty days from the taking of the land. R. S., ch. 4, secs. 89, 90 and 91, and ch. 23, sec. 20.

The taking was April 29, 1906. The municipal officers, after due public notice and other due proceedings, estimated the damages for such taking at $45,000, and awarded the whole sum "to Laura Hayford, Trustee of estate of Wm. B. Hayford, no other being known." Wm. B. Hayford, deceased, the former owner of the land, had by will devised his estate to Laura Hayford for life, but in trust for herself and Anna C. Pierce, and after her death to said Anna C. Pierce in fee.

At the next October term of the Supreme Judicial Court for Penobscot County, Laura Hayford as such trustee, and in that capacity, filed a petition for an estimate of her damages by the court "as provided by law." This petition was continued to and past the January term, 1907, to the April term, 1907. In the vacation between the January and the April terms, viz. on March 29, Laura Hayford, the petitioner, died. At the term next following the death of the petitioner, viz. the April term, 1907, Anna C. Pierce, claiming as administratrix of the estate of Laura Hayford and also as devisee of the estate of Wm. B. Hayford under his will as above stated, offered to come in and prosecute the case under the petition of Laura Hayford and in whichever capacity she might be entitled to do so. The city objected and moved for the dismissal of the petition because of the death of the original petitioner. This motion was pro forma overruled and the city excepted. The question presented is whether the death of the petitioner abated the proceedings under her petition, or whether they survive her death, to

be carried on by her representative or by her successor in title, not being her heir.

It should be borne in mind that this is not a proceeding for the recovery of damages, nor to determine who is entitled to damages for the taking. It is simply and solely a proceeding in the nature of an appeal to procure an estimate of the damages by the court in review of the estimate made by the municipal officers. Cases and arguments applicable only to the former class of proceedings would have no application to this and do not need to be considered.

By the common law the death of a party as a rule abated all court proceedings by or against him. *Greene* v. *Watkins*, 6 Wheat. 260; *Dwinal* v. *Holmes*, 37 Maine, 97; In re *Palmer*, 115 N. Y. 493. The common law exceptions to the rule could not, of course, include a special statutory proceeding like this. Unless, therefore, there is some statutory provision for the survival and continuance of this proceeding, it abates by the death of the petitioner and must be dismissed. It is not within the purview of the general statute (R. S., ch. 89, sec. 8) providing for the survival of certain "actions." *Rines* v. *Portland*, 93 Maine, 227, 231. If a petition for the partition of land was not within that statute and hence was abated by the death of the petitioner, as was held in *Dwinal* v. *Holmes*, 37 Maine, 97, then this petition is not saved by that statute. Various proceedings other than "actions" have been made to survive by statute, such as complaints for flowage, bastardy complaints, petitions for partition, etc., but no statute has been cited and we have found none providing for the survival of a petition in the nature of an appeal for an increase of the damages awarded by the statutory tribunal for land taken for public uses. In the Palmer case, 115 N. Y. 493, the petition was to vacate a sewer assessment and was in the nature of an appeal from the statutory tribunal authorized to make the assessment. Pending the petition, the petitioner died and his executors claimed the right to prosecute the petition. It was held that, as there was no statutory provision for continuing such a proceeding after the death of the petitioner, it should be dismissed.

Laura Hayford's right to have her damages assessed by some

constituted tribunal upon due notice and hearing was a constitutional right, and was fully awarded to her by the provision for an estimate by the municipal officers. Her right of appeal by petition to this court for a revision of that estimate was purely statutory. She had no such right by the common law nor by the Constitution. *Kennebec Water District* v. *Waterville*, 96 Maine, 234. *Ingram* v. *Maine Water Company*, 98 Maine, 566. The right being purely statutory can extend no further than the statute provides. There being no statutory provision for the continuance of the proceeding after her death by her representatives, the right ceases upon her death. It must, therefore, be held that while Anna C. Pierce, in her capacity of administratrix of the estate of Laura Hayford, may recover of the city the damages awarded to the latter in her lifetime, she cannot in that capacity further prosecute this petition.

Nor can Anna C. Pierce continue and prosecute this proceeding in her capacity of devisee under the will of Wm. B. Hayford. If at the time of the taking the land she had in the land any estate or interest under the will of Wm. B. Hayford, or otherwise, she should have presented her own claim for compensation, and, if aggrieved by the award of the municipal officers, should have presented her own petition to this court, all within the time allowed by the statute. She did not do either, and there is no provision of statute allowing her now to adopt and carry on a proceeding begun by another person to enforce the claims of another owner.

If she had no estate or interest in the land at the time of the taking, and none till after the death of Laura Hayford, she was not a "person aggrieved" by the municipal officers' estimate of the damages, and hence has no right to maintain this or any petition for an increase of the damages. It is now settled law in this State that only a person having an estate or interest in the land at the time of the taking can be "aggrieved" by the estimate of the municipal officers. *Neal* v. *K. & L. R. Co.*, 61 Maine, 298; *Sargent* v. *Machias*, 65 Maine, 591; *Rines* v. *Portland*, 93 Maine, 227.

Counsel for Mrs. Pierce suggest that if she cannot prosecute the petition in either capacity named, the court should appoint for that purpose a trustee in the place of Laura Hayford, who held the land

as trustee. But there is now no trust to be executed. The trust and trust estate created by the will terminated on the death of Laura Hayford. Mrs. Pierce then took the estate in fee free from the trust. All the powers and duties of any trustee under that trust then ceased. It is not for the court to continue that trust or create a new one for any purpose.

It follows that the petition cannot be longer prosecuted and should be dismissed. But it does not follow that the city is excused from paying the damages awarded by the municipal officers. Who is entitled to recover those damages must be determined in other proceedings, not in this.

Exceptions sustained.
Petition dismissed.

HARRISON F. HIX *vs.* WESLEY GILES.

Lincoln. Opinion February 19, 1908.

Exceptions. Same Must Show Error. R. S., chapter 93, sections 3, 4.

When a party takes exceptions to rulings of the presiding Justice it is incumbent on such party to show affirmatively that there was error in such rulings and that he is aggrieved thereby.

In the case at bar, which was an action of replevin to recover a horse described in a Holmes note given by one Merrill to one Miller it appeared that immediately after its execution the note was indorsed in blank by the payee and delivered to the plaintiff, and the next day duly recorded in the office of the town clerk; that subsequently Merrill surrendered possession of the horse to Miller and the defendant afterward purchased the horse of Miller without knowledge of the Holmes note. The presiding Justice instructed the jury to return a verdict for the defendant and also to find specially whether or not the plaintiff authorized Miller to sell the horse. To these instructions the plaintiff excepted.

Held: That it does not affirmatively appear from the exceptions that the ruling ordering a verdict for the defendant was erroneous for the reason

that the exceptions fail to show what the issue was and upon what ground the ruling was based, and for the further reason that the jury specially found the plaintiff authorized Miller to sell the horse.

On exceptions by plaintiff. Overruled.

Replevin to recover possession of a certain black mare described in a Holmes note given by one Charles P. Merrill to one H. M. Miller and which said note immediately after its execution was indorsed in blank by said Miller and by him delivered to the plaintiff as his property. After the delivery of the note to the plaintiff he had the same duly recorded in the town in which the maker, Merrill, then resided. Afterward said Merrill delivered said mare to said Miller who sold the same to the defendant. The defendant had no knowledge of the Holmes note when he purchased the mare.

Tried at the October term, 1907, of the Supreme Judicial Court, Lincoln County. (The record does not show what the pleadings were or what question was raised by the issue between the parties.) At the conclusion of the evidence the presiding Justice "instructed the jury to find a verdict for the defendant, and instructed them that the first thing for them to do on retiring was to sign the verdict for the defendant which was already prepared and exhibited to them. That after signing such verdict they should answer the following question: 'Did the plaintiff Mr. Hix give Mr. Miller rightly to understand that he might sell the mare described in the writ?'" The jury answered the question in the affirmative. The plaintiff excepted to the aforesaid rulings and instructions.

The case fully appears in the opinion.

R. I. Thompson and Arthur S. Littlefield, for plaintiff.

J. W. Brackett, for defendant.

SITTING: WHITEHOUSE, SAVAGE, SPEAR, CORNISH, KING, JJ.

WHITEHOUSE, J. This is an action of replevin to recover possession of the black mare described in the following Holmes note, viz:

"$200.00 Rockland, Maine, Sept. 11, 1906.

Four months after date, for value received I promise to pay to the order of H. M. Miller, two hundred dollars with interest at six per cent, until paid, the same being for one roan mare so

called the Hix mare and one black mare so called the Knight mare and one new Concord wagon and one Bangor prison wagon, so called Orbeton wagon, which horses and wagons I have this day bought of said H. M. Miller and said horses and wagons is to remain the property of said H. M. Miller until said sum and interest are paid, and it is hereby stipulated and agreed that no right of redemption shall exist after breach hereof by non-payment at maturity of this note.

(Signed) Charles P. Merrill."

Immediately after its execution this note was indorsed in blank by the payee, H. M. Miller, and delivered to the plaintiff Hix as his property. The next day the note was duly recorded in the office of the town clerk of Boothbay Harbor, where Charles P. Merrill, the maker, then resided.

In December 1906, Merrill sold out his livery business delivered the horse in question to Miller and left the town of Boothbay Harbor. Soon afterward the defendant Giles purchased the horse in question of Miller without knowledge of the Holmes note.

The defendant contended and introduced evidence tending to prove that after the horse came into Miller's possession, the plaintiff Hix told Miller to take the horse in question and other property termed the "Merrill stuff," sell it and pay the note. The plaintiff denied that he had any such conversation with Miller.

The Holmes note was owned by the plaintiff and produced by him at the time of the trial.

The presiding Justice directed the jury to return a verdict for the defendant. He instructed them that it would be their first duty on retiring to their room to sign the verdict for the defendant which had been prepared for that purpose, and that after signing such verdict they should answer the following question, viz: "Did the plaintiff Mr. Hix give Mr. Miller rightly to understand that he might sell the mare described in the writ?"

This question the jury answered in the affirmative, and the case comes to the Law Court on exceptions to these rulings and instructions of the presiding Justice.

It was incumbent on the plaintiff to show affirmatively that there was error in these rulings and that he is aggrieved thereby. This, in the opinion of the court he has failed to do. The evidence is not reported and the exceptions fail to show what the pleadings were or what question was raised by the issue between the parties. It does not appear that the question of the general or special property in the horse replevied was raised by the issue tendered. If only the general issue of non cepit was pleaded by the defendant, the question of the taking only was put in issue. *Vickery* v. *Sherburne*, 20 Maine, 34; *Pope* v. *Jackson*, 65 Maine, 162. For aught that appears the ruling of the presiding Justice ordering a verdict for the defendant may have been based upon evidence showing that no demand was made for the horse and that in fact there was no taking or detention by the defendant; and there is nothing in the exceptions to show that such a ruling would have been erroneous. It is accordingly contended in behalf of the defendant that the question elaborately argued by the plaintiff's counsel respecting the title to, or right to the possession of the horse does not necessarily arise in the discussion before the Law Court.

But the argument of plaintiff's counsel proceeds upon the assumption that the ruling of the presiding Justice was based upon the conclusion that the defendant had a right to the possession of the horse; and it is insisted that upon the facts and circumstances of this case and the provisions of our statutes requiring Holmes notes to be recorded, this conclusion of the presiding Justice was unwarranted and the ruling erroneous.

It has been seen from the statement of facts, however, that the plaintiff's name does not appear in the Holmes note or in the indorsement of the note, and although it appears from the exceptions that the note was duly recorded, it is not stated that the "indorsement in blank" was also recorded. But if such an indorsement could be held to operate as an assignment of a mortgage and it had been duly recorded, it would have contained no reference to the plaintiff and given the defendant no information in regard to the plaintiff's claim upon the horse. It is admitted that the defendant purchased the horse of Miller without any knowledge of the

Holmes note. It is therefore insisted that the defendant, as an innocent purchaser without notice of the plaintiff's unrecorded claim, acquired title to the horse, and a right to the possession of him, even though the sale by Miller was not expressly authorized by the plaintiff, subject only to Merrill's right to redeem. In support of this contention, the defendant cites *Ramsdell* v. *Tewksbury*, 73 Maine, 197. In that case a promissory note was secured by a separate mortgage of personal property and it was held that a separate transfer of the mortgage simply by delivery does not authorize such assignee to maintain an action of replevin in his own name to recover the property. In the opinion the court say: "The title resting in the mortgage, nothing but an assignment of the mortgage could transfer the legal title of the mortgagee to the assignee."

"The statute contemplates an assignment and a record thereof where the mortgage itself is recorded. (R. S., ch. 93, sects. 3 and 4.) It could not be recorded unless in writing. The assignment is for the benefit of all parties; to inform the mortgagor and his voluntary or involuntary assignees to whom tender shall be made for redemption; and to relieve the mortgagee of all trouble after he has parted with his interest." The defendant contends that it was the intention of the legislature to bestow upon Holmes notes all the legal characteristics and incidents pertaining to a mortgage of personal property, including the written assignment and a record of it.

On the other hand the plaintiff contends that the title and right of possession passed from Miller to the plaintiff by virtue of the delivery of the Holmes note, with the blank indorsement upon it, and that Miller then had no title which he could transfer to the defendant.

But it is unnecessary to determine the question whether the defendant acquired title or right of possession without the plaintiff's consent, for the reason already stated that the exceptions fail to show affirmatively upon what ground the presiding Justice based his ruling, and for the further reason that the jury returned a special finding that the plaintiff authorized Miller to sell the horse.

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

Exceptions overruled.

In Equity.

TELEGRAPHONE CORPORATION

vs.

CANADIAN TELEGRAPHONE COMPANY.

York. Opinion February 19, 1908.

Equity. Written Contracts. Time. Forfeiture. Specific Performance. R. S., chapter 79, section 6, par. II.

The jurisdiction of a court of equity to compel the specific performance of written contracts does not rest upon any distinction between real and personal estate, but upon the ground that damages at law may not in a particular case afford a complete remedy, and that whether or not this equitable remedy will be granted is a matter of sound judicial discretion controlled by established principles of equity and exercised upon a consideration of all the circumstances of the case.

It is a well settled doctrine that ordinarily, a court of equity will not actively interfere by its decree to enforce a forfeiture and that its refusal so to do rests upon the same principle upon which the court acts when it refuses to enforce a contract which is unequal, unjust or has any inequitable features and incidents.

If it satisfactorily appears from the terms of a contract and all the circumstances, that the parties thereto actually intended to make the time specified an essential element of the contract and that the consequences of the failure of performance must have been contemplated by the parties at the time of the execution of the contract, such an express stipulation as to time will be held decisive of the question in a court of equity as well as in a court of law.

In the case at bar, the plaintiff, in accordance with the terms of a written contract, assigned a certain patent right to the defendant and received therefor $25,000 in cash and $105,000 in notes and also retained a beneficial interest in the development of the patent by a further provision that it should receive twenty per cent of the capital stock of the defendant company, which was organized to exploit it, at the time of the delivery of the

assignment. It was also agreed that the defendant should raise a working capital of $50,000 or give the plaintiff thirty-four per cent more of its capital stock and the resulting control of the company. Upon the defendant's failure to perform either of these agreements on or before the times specified in the contract, it was further expressly agreed in the same paragraph that the plaintiff should repossess the patent right. It was also covenanted and agreed in a separate paragraph of the contract that time should be "of the essence of the agreement." The defendant failed to perform either of these agreements within the time stipulated and the plaintiff brought a bill in equity to compel the defendant company to perform the contract specifically by transferring the title to the patent right back to the plaintiff corporation.

Held: (1) That as the contract relates to a patent right which on the one hand may be superseded by another and better invention and thus become practically worthless, and on the other may become of great value by giving its owner a monopoly of all branches of business to which it is applicable, and that in any event, its value cannot be known with certainty or exactness until after the lapse of time, substantial justice can only be done by a specific performance of the contract.

(2) That there is no evidence to warrant the conclusion that the plaintiff corporation intentionally relinquished its right to insist upon the performance of the contract according to its terms and nothing to justify the defendant company in believing that the plaintiff had waived such right.

(3) That it does not appear that the cash payment received by the plaintiff in consideration of the assignment was more than adequate compensation for the loss suffered by it as a result of the unexplained neglect of defendant to furnish the working capital and develop the business as contemplated by the contract; that the liability to any forfeiture either of the patent right or of the consideration paid for it was not a necessary result of the terms of the agreement when originally made, but arose from the subsequent acts and omissions of the defendant company which its officers have not attempted to justify or explain, and that any apparent hardship arising from such causes and under such circumstances cannot be deemed a sufficient cause for refusing a specific performance as damages at law would not be a full and adequate remedy.

(4) That it appears from the terms of the contract and the circumstances that the parties thereto actually intended to make the time specified an essential element of the contract.

(5) That the defendant's express stipulation in the contract that upon failure to perform its agreements, the assignment of the patent should terminate and become void and that the plaintiff should thereupon have, hold and repossess the patent as if the assignment had never been made, upon the facts disclosed in the case, created an obligation in equity on the part of the defendant to execute and deliver the necessary legal instruments to transfer the title to the patent back to the plaintiff corporation.

In equity. On appeal by defendant. Appeal dismissed. Decree below affirmed.

Bill in equity brought by the plaintiff corporation to compel the specific performance of a contract signed by the defendant company. The defendant company filed its answer to the bill and the cause was then heard on bill, answer and proofs by the Justice of the first instance who sustained the bill and filed a decree in accordance with the prayer of the bill. The defendant company then appealed to the Law Court as provided by Revised Statutes, chapter 79, section 22.

The case appears in the opinion.

Isaac W. Dyer, for plaintiff.

Frederick A. Hobbs and Anthoine & Talbot, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, SAVAGE, SPEAR, CORNISH, KING, JJ.

WHITEHOUSE, J. This is a bill in equity brought by the plaintiff corporation to compel the specific performance of a contract signed by the defendant company. The bill was sustained by the Justice presiding and a decree entered in accordance with the prayer of the bill. The case comes to the Law Court on appeal from that decree.

On the 30th day of April, 1906, the plaintiff corporation, organized under the laws of Maine, entered into a written contract with the defendant company, referred to in the contract as "the company," a corporation organized under the laws of Maine with a capital stock of one million dollars, whereby the plaintiff was to assign to the defendant certain letters patent granted by the Dominion of Canada to Valdemar Poulsen, for improvements in apparatus for electromagnetically recording and reproducing speech and other signals. In consideration of this assignment the defendant company agreed to pay to the plaintiff the sum of $25,000 in cash, upon the execution and delivery of the contract and of the assignment, and the sum of $5,000 in cash on or before May 15, 1906. The defendant also agreed to give the plaintiff four notes of $25,000 each payable October 1, 1906, April 1, 1907, September 1, 1907, and March 1, 1908, respectively, and deliver to the plain-

tiff twenty per cent of the stock of the defendant corporation. The contract further stipulated as follows:

"4. It is mutually covenanted and agreed that the said company, party of the second part hereto, shall be a legal corporation duly incorporated with a share capital of at least ($1,000,000) One Million Dollars, fully paid and non-assessable. It is also covenanted and agreed that should said company at any time hereafter issue any securities of any kind and fail to deliver as above provided to said Corporation within thirty days after written notice from said Corporation to said company (20 per cent) twenty per cent of said last mentioned securities then this agreement and the assignment of said Canada Patent Number 73,385 and the assignment or assignments of any patent or patents that said Corporation may make to said company hereafter, shall thereupon terminate and become void, and thereupon the Corporation shall have, hold, and repossess said Patent of Canada and all other patents that may have been assigned as aforesaid at any time to said company as if neither this agreement nor the assignment of said patent or patents had ever been made.

"5. Said company hereby further covenants and agrees that it will cause and procure the payment into the treasury of the company, from the sale of stock or otherwise, the sum of ($25,000.00) Twenty-five thousand Dollars lawful money of the United States to be used as working capital or for the payment of company expenses, on or before January 1, 1907, and if the company shall not cause and procure said sum of ($25,000.00) Twenty-five thousand Dollars to be so paid into the treasury as aforesaid, then said company shall on the second day of January, 1907, pay over and deliver to the Corporation the additional amount of (17 per cent) seventeen per cent of the present capital stock of the company and (17 per cent) seventeen per cent of any and every issue of stock and securities hereafter made by said company; and the company further covenants and agrees that it will cause and procure the payment, from the sale of stock or otherwise, the further sum of ($25,000.00) Twenty-five thousand dollars lawful money, as aforesaid, to be used as working capital or for the payment of company expenses, on or before May 1, 1907, and if the company shall not cause and procure said

further sum of ($25,000.00) Twenty-five thousand dollars to be so paid into the treasury of said company as aforesaid, then said company shall on the second day of May, 1907, pay over and deliver to the Corporation the additional amount of (17 per cent) seventeen per cent of the present stock of said company and (17 per cent) seventeen per cent of any and every issue of stock and securities hereafter made by said company, and it is mutually agreed that if said company shall fail to pay over said additional shares of stock or any part thereof, then this agreement and the assignment of said Canada Patent Number 73,385 and the assignment or assignments of any patent that said corporation may make to said company hereafter shall thereupon terminate and become void; and thereupon the corporation shall have, hold and repossess said Patent of said Canada and all other patents that may have been assigned at any time to said company as aforesaid, as if neither this agreement nor said assignments of patent or patents had ever been made.

"6. It is further mutually covenanted and agreed that time is, and shall be of the essence of this agreement."

It is not in controversy that in accordance with the terms of the contract the patent was duly assigned to the defendant company, and that the defendant thereupon paid to the plaintiff the sum of $25,000 in cash and gave the plaintiff four notes for $25,000 each as specified, and twenty per cent of its stock, all of which the plaintiff retains.

But with respect to the agreements contained in paragraph 5 of the contract above quoted, the plaintiff's bill contains the following averments, viz:

"Fifth: Said Plaintiff Corporation avers that said Defendant Company has not, from the sale of stock or otherwise, made, caused and procured to be paid into its treasury said two sums of twenty-five thousand dollars each, as set forth in paragraph Fourth hereof, and has not paid over and delivered to the Plaintiff Corporation the two amounts of seventeen per cent of the present capital stock of the said Defendant Company and seventeen per cent of any and every additional issue of stock and securities, or any part thereof, as set

forth in paragraph Fourth of this Bill, but has wholly neglected and refused to do so.

"Sixth: And said Plaintiff avers, on information and belief, that said Defendant has only issued and caused to be provided for issue, the share capital aforesaid, to wit, One Million Dollars, and has wholly parted with and distributed, assigned and transferred all of the shares of said One Million Dollars of capital, and said assignment and transfer and distribution by said Defendant Company has been among its own stockholders, promoters and officers, and in total disregard of the Plaintiff Corporation's rights under the aforesaid agreement, and that by its wrongful act, said Defendant Company has placed it out of its power to issue to the Plaintiff Corporation the thirty-four per cent of its share capital as set forth in paragraph Fourth hereof."

In its answer the defendant company admits the execution of the agreement and the assignment of the patent to the defendant as stated in the bill, but alleges that before the expiration of the time within which it was to perform the stipulation set forth in paragraph five of the contract, the plaintiff waived the terms of it and extended the time within which the defendant company was required to furnish the working capital of $50,000, or deliver to the plaintiff the two instalments of capital stock as required by the agreement; and it denies that it has distributed all of the capital stock among its own stockholders and officers, or that by any wrongful act it has placed it out of its power to issue to the plaintiff the thirty-four per cent of its capital stock as alleged in the bill.

The only evidence introduced consists of the testimony of Mr. Lindley, the president of the plaintiff corporation, and his testimony stands entirely uncontradicted and unexplained. No evidence was introduced in defense. Mr. Lindley states that the plaintiff corporation received "the payments provided for to be made upon the signing of the contract and the notes which were then to be delivered, and the twenty per cent of the capital stock at the time of the organization of the Canadian Company; that is all." He further testifies that although he had specifically demanded, in behalf of the plaintiff corporation the fulfilment of each of the agreements set

forth in the contract, and also a reassignment of the patent by the defendant to the plaintiff, he has never received the thirty-four per cent of stock, or any part of it, and that no one of the agreements has been fulfilled by the defendant except those first stated by him. He also states that an examination of the defendant's stock ledger disclosed the fact that all of the capital stock of the defendant company had been issued, with the exception of something over eleven per cent of it which remained in the treasury.

With respect to the alleged waiver of the terms of the contract and an extension of time by the defendant company, it satisfactorily appears from Mr. Lindley's testimony in cross-examination that while there were some negotiations looking to an extension of time for the performance of the defendant's agreements, the reasonable conditions imposed by the plaintiff were never complied with by the defendant company. There is no evidence in the case to warrant the conclusion that the plaintiff corporation intentionally relinquished its right to insist upon the performance of the contract according to its terms and nothing to justify the defendant company in believing that the plaintiff had waived such right. In the absence of any evidence in behalf of the defendant tending to contradict or modify it, the plaintiff's testimony is entitled to be received at its full probative force. The allegations in the plaintiff's bill are accordingly sustained by the testimony.

Here then is a carefully prepared written contract signed by both parties for the transfer of a patent right for a valuable consideration and upon terms and conditions to be performed by the defendant on or before certain specified dates. It is not in controversy that this contract was complete, unambiguous, definite and certain; that it was free from misapprehension, fraud or mistake, and entirely fair and reasonable in all its parts. It was not lacking in mutuality either in the terms of the contract when made, or in the remedy in equity at the time of filing the bill; and it is not contended that the performance of the agreements at the time specified would have been attended with any oppression or hardship on the defendant. It has been seen that it is not merely a contract for the sale and delivery of a patent right. The plaintiff, it is true, agreed to

transfer to the defendant the legal title to the patent, but retained a beneficial interest in its development by providing that it should receive twenty per cent of the capital stock of the defendant company, which was organized to exploit it, at the time of the delivery of the assignment. The defendant agreed to raise a working capital of $50,000, or give the plaintiff thirty-four per cent more of its capital stock and the resulting control of the company. Upon the defendant's failure to perform either of these agreements on or before the times specified in the contract, it was expressly agreed in the same paragraph of the contract, that the plaintiff should repossess the patent right. It was also formally "covenanted and agreed" in a separate paragraph of the contract that time should be "of the essence of the agreement."

But instead of furnishing a working capital of $50,000, the defendant appears to have expended its energies in issuing all of its eighty per cent of the capital stock, with the exception of about eleven per cent remaining in the treasury, as above stated. If in consequence of this disposition of its capital stock the defendant has been deprived of the power to perform its alternative stipulation to give the plaintiff 34 per cent more of its stock, such inability of the defendant must be deemed the result of its own acts performed in disregard of the terms of the contract and of the rights of the plaintiff.

It thus clearly appears that in this case all of the conditions and elements are found to exist which bring it within the class of contracts in which the equitable jurisdiction of the court may be exercised to enforce specific performance. Whether or not this equitable remedy will be granted is a matter of sound judicial discretion controlled by established principles of equity, and exercised upon a consideration of all the circumstances of the case. Pom. Eq. Rem. vol. 2, sect. 762. Pom. Eq. Jur. sect. 1404.

It is contended in behalf of the defendant that a decree for the specific performance prayed for involves not only a reassignment of the patent right to the plaintiff, but a loss of the entire consideration paid to the plaintiff, and hence that it is in effect a bill to enforce a forfeiture rather than a bill for specific performance. It

is claimed that if there has been any failure on the part of the defendant fully to perform its agreements, an action at law to recover damages would afford an adequate remedy without resorting to the harsh remedy of forfeiture.

With respect to breaches of contract concerning this class of property, the equitable principle to be applied is well stated in *Corbin* v. *Tracy*, 34 Conn. 325, as follows:

"The justice of a court of equity does not proceed upon any distinction between real estate and personal estate but upon the ground that damages at law may not in the particular case afford a complete remedy. . . . When the remedy at law is not full and complete and when the effect of the breach cannot be known with any exactness, either because the effect will show itself only after a long time, or for any other reason, courts of equity will enforce contracts in relation to personality.

"An application of these principles to the case before us relieves it of all difficulty. The contract relates to a patent right, the value of which has not yet been tested by actual use. All the data by which its value can be estimated are yet future and contingent. Experience may prove it to be worthless; another and better invention may supersede it; or it may itself be an infringement of some patent already existing. On the other hand, it may be so simple in its principle and construction as to defy all competition and give its owner a practical monopoly of all branches of business to which it is applicable. In any event, its value cannot be known with any degree of exactness until after the lapse of time; and even then it is doubtful whether it can be ascertained with sufficient accuracy to do substantial justice between the parties by a compensation in damages. On the whole, we are satisfied that justice can only be done in a case like this, by specific performance of the contract." See also *Hull* v. *Sturdivant*, 46 Maine, 34; *Nugent* v. *Smith*, 85 Maine, 433; Pom. on Specific Perf. of Contracts, sect. 20; Pom. on Eq. Rem. (1905) Vol. 2 (Vol. 6 of 3rd Ed. of Pom. Eq. Jur.) sect. 751, and cases cited.

It is clear that an action for damages would not be an adequate remedy in the case at bar.

In regard to the defendant's loss of the consideration paid by the defendant, it appears from the testimony that the four notes of $25,000 each had been endorsed and delivered to other parties and the plaintiff offered to show that they were in the custody of certain officers and stockholders of the defendant company and beyond the plaintiff's control. With respect to the cash payment of $25,000, the plaintiff contends that it is inadequate compensation for the loss suffered by it as a result of the unexplained neglect of the defendant to furnish the working capital and develop the business as contemplated by the contract.

The liability to any forfeiture either of the patent right or of the consideration paid for it, was obviously not a necessary result of the terms of the agreement when originally made, but arose from the subsequent acts and omissions of the defendant company which its officers have not attempted to justify or explain. Any apparent hardship upon the defendant arising from such causes and under such circumstances must be presumed to have been in the contemplation of the parties as the direct result of such acts and omissions on the part of the defendant, and be deemed an insufficient cause for refusing a specific performance of the contract unless it appears that the damages for the breach recoverable in an action at law would be a full and adequate remedy. *Nugent* v. *Smith*, 85 Maine, supra; 1 Pom. Eq. Jur. sects. 221, 1401, 1402; Pom. Eq. Rem. Vol. 2, sect. 745.

It is undoubtedly a well settled doctrine that a court of equity will not actively interfere by its decree to enforce a forfeiture. *Birmingham* v. *Lesan*, 77 Maine, 494; while the relief from forfeitures in oral contracts and obligations is a familiar exercise of equity jurisdiction, and a power expressly conferred upon the court by R. S., ch. 79, sect. 6, par. II. The reason for the refusal to enforce forfeitures, says Mr. Pomeroy "is found in the same principle upon which the court acts when it refuses to specifically enforce a contract which is unequal, unjust, or has any inequitable features and incidents." 1 Pom. Eq. Jur. 459. It has been seen, however, that the contract in question in the case at bar is not unequal, unjust, or inequitable in any of its features or incidents, and that

the plaintiff's bill is not one asking for a forfeiture but for a decree to compel the defendant company to perform its agreements according to the terms of the contract. If such a decree would involve the loss of the payments made on account of the patent, no evidence has been introduced by the defendant showing that upon consideration of all the facts relating to the disposition of its stock, and the conduct of its affairs, such a result would in any respect be contrary to equity.

It is also true, as contended by counsel for the defendant, that an express stipulation in the contract that time shall be of the essence of the agreement, will not be accepted by a court of equity as a final and conclusive determination of the question of specific performance against the manifest equity disclosed by all the facts and circumstances of the case. *Barnard* v. *Lee*, 97 Mass. 92. But it is obvious that time may be highly essential in certain cases by reason of the peculiar subject matter or object of the contract, and if it satisfactorily appears from the terms of the stipulation and all the circumstances that the parties actually intended to make the time specified an essential element of the contract, and that the consequences of a failure of performance must have been contemplated by the parties at the time of the execution of it, such an express stipulation as to time will be held decisive of the question in a court of equity as well as a court of law. Pom. Eq. Jur. sect. 1408; Pom. Eq. Rem. vol. 2, sect. 811; *Brown* v. *Vandergrift*, 80 Pa. St. 142. In the case at bar, time was undoubtedly deemed of great importance by the parties and it is a fact of noteworthy significance that the defendant gives the court no assurance by evidence or answer that it has either the ability or desire to perform its agreements or that justice requires an extension of the time specified for their performance.

Finally the defendant insists that the plaintiff's bill cannot be maintained for a specific performance of a contract to reassign the patent, for the alleged reason that the defendant never made a contract to reassign it. But it has been seen that the defendant expressly "covenanted and agreed" in the contract that upon failure to perform its agreements, the assignment of the patents should

"terminate and become void," and the plaintiff should thereupon "have, hold, and repossess" the patents as if the assignment had never been made. This covenant in the contract, upon the facts disclosed in this case, created an obligation in equity on the part of the defendant to execute and deliver the necessary legal instruments to transfer the title to the patents back to the plaintiff corporation.

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

Appeal dismissed. Decree below affirmed with additional costs.

EASTERN TRUST & BANKING COMPANY *vs.* ANDREW W. CUNNINGHAM.

Penobscot. Opinion February 20, 1908.

Deceit. Fraud. False Representations. Implied Representations. "Kiting" Checks. Negligence.

1. To support an action for deceit, the plaintiff must show that the defendant intentionally made false representations to him, with the intent that he should act upon them, or in such a manner as would naturally induce him to act upon them, that the representations were material, and that they were known to the defendant to be false, or being of matters susceptible of knowledge, were made as of a fact of his own knowledge, that the plaintiff was thereby induced to give credit or part with property, that he was deceived, and that he was injured.

2. When the drawer of a check delivers it to the payee, or when he deposits to the credit of his account in one bank his own check drawn upon another bank, a representation is ordinarily implied that there are funds in the drawee bank to meet it, and because of this implied representation, it is a fraud on the part of the drawer to draw and deliver such a check.

3. If the drawer of check is the treasurer of a corporation and signs it as such, the implied representation that there are funds in the drawee bank to meet it, is his own, for which he is personally responsible. And he is so responsible, though he only signs the check in blank and leaves it with another person to fill out and deliver or deposit.

4. In the case at bar, the corporation of which the defendant was treasurer had an account in the plaintiff bank in Bangor, and another in a bank in Gardiner, in both of which places it was engaged in business. For many months prior to the drawing of the checks which are the basis of this action, the defendant had practiced what is known as "kiting" checks between the plaintiff bank and the bank in Gardiner. He deposited daily in each bank checks, drawn on the other bank to meet which the defendant knew were no sufficient available funds in the drawee bank, and which he knew could only be met by the deposit of other similar checks. The bank at Gardiner discovered the practice, and finally refused payment of a check drawn upon itself, which the defendant had deposited in the plaintiff bank, and which had been forwarded for collection, and caused it to be protested. Before the plaintiff bank had notice of the non-payment and protest, it had accepted two other similar checks, credited them on the account of the defendant's corporation, and forwarded them for collection. Payment of these checks was refused, and they were in their turn protested. The result was that the plaintiff bank lost the amount of the three checks, less a small balance which was to the credit of the corporation when notice of non-payment was first received. The court is of opinion that the evidence does not warrant a finding that the officers of the plaintiff bank knew of the "kiting" practice. On the contrary it is considered that the plaintiff was induced to give credit to the defendant's corporation by his implied representation, which was false, and that it was deceived thereby. Upon these facts, *held* that the defendant is liable in an action for deceit.
5. If the plaintiff's officers were negligent in not discovering the fraud, that fact would not afford a defense. When one party has been guilty of an intentional and deliberate fraud by which to his knowledge another party has been misled or influenced in his action, he cannot escape the legal consequences of his fraudulent conduct by showing that the fraud might have been discovered had the party whom he deceived exercised reasonable diligence and care.

On report. Judgment for plaintiff.

Action on the case for deceit brought by the plaintiff bank against the defendant in his individual capacity to recover a certain amount of money alleged to have been lost by the plaintiff bank on account of checks deposited in the plaintiff bank, drawn upon the Gardiner National Bank by the defendant in his capacity as treasurer of the Harmon Produce Company against a fund which, it was alleged, did not exist in the said Gardiner National Bank, with the alleged intent on the part of the defendant to deceive and defraud the plaintiff bank. The plaintiff's declaration contains seventeen counts and fills forty printed pages of the size of this page. Plea, the general issue.

The action came on for trial at the April term, 1907, of the Supreme Judicial Court, Penobscot County. At the conclusion of the evidence it was agreed that the case should be reported to the Law Court and that upon so much of the evidence as was legally admissible the Law Court should "render such judgment as the law and the evidence require."

The case fully appears in the opinion.

Charles A. Bailey and Matthew Laughlin, for plaintiff.

George W. Heselton, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, SAVAGE, CORNISH, KING, JJ.

SAVAGE, J. Action on the case for deceit. The case is before us on report. The particular transactions complained of are these. The Harmon Produce Company, a corporation doing business and having stores both at Bangor and Gardiner, on October 6, 1905, deposited in the plaintiff bank in Bangor its check dated October 5, signed by the defendant as its treasurer, on the Gardiner National Bank at Gardiner for the sum of $764.58. This deposit with other cash items amounting in all to $860 was received by the plaintiff and credited to the account of the Produce Company. The check in the regular course of business was forwarded for collection through Boston, and reached the Gardiner bank on October 9. The latter bank declined to honor it, but caused it to be protested. Information of the protest reached the plaintiff by telegram from Boston, October 10, and the formal notice was received the following day.

Meanwhile, on October 7, a like check for $1042.21, with other cash items, was deposited by the company in the plaintiff bank, was received and credited, was forwarded for collection through Boston, was received at Gardiner and protested for non-payment October 10, of which the plaintiff had notice October 12. Still another check for $961.95, with other cash items, was deposited and credited October 9, went through the same channels, and was received at Gardiner and protested October 11. Notice of the protest was received by the plaintiff October 13. Thus the plaintiff

had credited to the account of the Produce Company, on account of these checks, the sum of $2768.74, before it had any information of the non-payment of any of the checks. While these checks were severally proceeding along their course to final protest, the plaintiff honored and paid the Produce Company's checks drawn on itself, including three which had been deposited in the Gardiner bank amounting to $2649.10, to the extent that on October 11, when the first protested check came back, there was standing to the credit of the company only $440.79. This amount was appropriated towards that check. The balance, $323.79, of the first check, and the amount of the second and third checks and the protest fees, being $1042.21, $961.95, and $4.56, respectively, amounting in all to $2332.51, the plaintiff seeks to recover in this action.

It appears that the balance to the credit of the Produce Company on the books of the Gardiner National Bank on October 6, the date when the first of these checks was deposited in the plaintiff bank, was $69.28. October 7 it was $24.89. October 9, the day when the first check was received at the Gardiner bank, it was $771.34. This last amount included, however, the company's check for $728, drawn on the plaintiff bank, and that day deposited. The Gardiner bank did not regard the latter check as available funds out of which to pay the company's checks until it was collected, and for that reason declined to honor the $764.58 check in question. As a matter of fact, the $728 check on the plaintiff was never collected, but was protested by the plaintiff bank for non-payment. The company's balance on the books of the Gardiner bank continued in the same condition through October 10 and 11, and on October 12, it would seem from an inspection of the balances, that the $728 check was charged back, or in some other way taken out of the account. It appears then that neither on the days when these three checks in question was severally deposited in the plaintiff bank nor on the days when they were presented for payment to the Gardiner Bank in the regular course of business, did the company have available funds in the latter bank to meet them.

But the defenses set up, which we shall presently consider, make

it necessary to state with considerable detail the previous history of the dealings of the Harmon Produce Company with the plaintiff bank. It appears that the Produce Company for two years or more previously had been engaged in the practice of what is known in banking parlance as "kiting" checks, and that the checks in question were drawn and deposited in pursuance of that practice. It had an account in the plaintiff bank, and one in the Gardiner National Bank. It was doing a large businsss on seemingly insufficient capital. For the express purpose of getting the use of more money in its business, it adopted the following method. It would deposit its check on the Gardiner bank in the plaintiff bank. By the usual methods of collection through Boston the check would reach Gardiner in two days, or three, if Sunday intervened. On the day when it would be expected at the Gardiner bank the company would deposit in the Gardiner bank a check on the plaintiff bank of sufficient size, with the other deposits, to pay the first check. Then in two or three days the Gardiner check would be due to reach the plaintiff bank, and the company would deposit there another check to meet that, and so on ad infinitum. By starting a check each day from each end of the route they were enabled to keep six checks in the air all of the time, to pay none of which were there available funds in either bank, unless new kited checks should be accepted and credited. The scheme could continue only as long as both banks were either ignorant or indulgent, or one ignorant and the other indulgent. The plaintiff claims that it was ignorant and that the Gardiner bank was indulgent. The defendant claims that both banks had knowledge and were indulgent. It was inevitable that if either bank chanced at any time to stop payment on these checks, the other would stand to lose the amount of three checks.

The defendant was treasurer of the Harmon Produce Company. He lived at Gardiner. He did not personally deposit any of the checks in the plaintiff bank, and perhaps none in Gardiner. But he was well aware of the practice of kiting checks which was being followed, and of the purpose of it. His custom was to sign checks in blank and give them to the bookkeepers in the two stores.

They filled out the signed blank checks from day to day as exigencies required and deposited them in the banks, having ascertained by correspondence between themselves daily the amounts which would be necessary to meet checks to arrive. The defendant so signed in blank the three checks in question and sent them to the Bangor store, intending them to be used in the kiting practice. He made the Bangor bookkeeper his agent for the purpose of filling out and depositing the checks. So that his responsibility is the same as if he personally had deposited the checks and procured the credit in the plaintiff bank.

It is incumbent upon the plaintiff to show that the defendant intentionally made false representations to it, with the intent that it should act upon them, or in such a manner as would naturally induce it to act upon them, that the representations were material and that they were known to the defendant to be false, or being of matters susceptible of knowledge, were made as of a fact of his own knowledge, that the plaintiff was thereby induced to give credit to the Produce Company, that it was deceived, and that it was injured. These principles are well settled. In the recent case of *Atlas Shoe Co.* v. *Bechard*, 102 Maine, 197, this language was used:— "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." And if the other party is induced thereby to act, and is deceived and injured, he has a cause of action for the deceit. A fraudulent purpose may be inferred from a wilfully false statement in relation to a material fact. *Wheelden* v. *Lowell*, 50 Maine, 499; *Braley* v. *Powers*, 92 Maine, 203. And when the necessary consequences of a transaction is the defrauding of another, fraud may be inferred, and the transaction held to be fraudulent. *Gardiner Sav. Inst.* v. *Emerson*, 91 Maine, 535; *Whitehouse* v. *Bolster*, 95 Maine, 458.

The false representation relied upon here is the representation which ordinarily is implied by the drawer of a check when he delivers it to the payee, that it is drawn against available funds, or that

there are funds in the drawee bank to meet it. The same implied representation arises when one deposits to the credit of his account in one bank his own check drawn upon another bank. Because of this implied representation, it is a fraud on the part of the drawer to draw a check upon a bank where there are no funds to meet it. *True* v. *Thomas*, 16 Maine, 37, and cases cited in 44 L. R. A. 397. Such an implied representation was made by the defendant when the bookkeeper for him filled out and deposited each of the signed blank checks furnished by him for that express purpose. The representation went with his signature. Although he signed as treasurer, the implied representation was his own, for which he was personally responsible. 7 Thomp. Corp. sect. 8569; 21 A. & E. Ency. of Law, 2nd Ed. 880; *Cole* v. *Cassidy*, 138 Mass. 437. As shown, there were no available funds in the Gardiner bank to meet either of these checks when it was drawn, nor when it was presented. Nor would the drawing and depositing a check under such circumstances be any less a fraud, even if the depositor had succeeded later in having funds in the Gardiner bank to meet it when presented, though in that case the plaintiff would not have been injured. The defendant in fact knew that there were no funds in the Gardiner bank to meet these checks, when they were drawn. He knew that the only hope of the checks being honored was his ability to get credit at the Gardiner bank by depositing similar checks on the plaintiff. He knew that the Gardiner bank was then cognizant of the character of the checks. He had been notified by it that he must stop drawing them, and he had no reason to suppose that the Gardiner bank would not any day put a stop to the practice by refusing to give credit for the Produce Company's checks on the plaintiff. So that, even if the defendant's reasonable expectations of being able to meet the checks when presented would constitute a defense, as they would not, yet those expectations in this case were not sufficiently well founded to be reasonable.

Taking the facts thus far presented, we think the plaintiff has clearly shown that the defendant's implied material representations as to funds in the Gardiner bank to meet the checks were false, that they were known to the defendant to be false, and that they were

made with an intent that the plaintiff should act upon them, or in such a manner as would naturally induce it to act upon them. *Atlas Shoe Co.* v. *Bechard*, 102 Maine, 197. It remains to inquire whether the plaintiff was induced thereby to act to its injury, and whether it was deceived.

The defendant answers these questions in the negative. He says that the practice of kiting checks between the two banks had been carried on so long, so continuously and so openly that the only reasonable conclusion is that it was known to the responsible officers of the plaintiff bank. He claims that the inferences of their knowledge are so strong and overwhelming as to overbear the denials in testimony of the officers themselves. If the fact be as claimed, the defense is made out. If the officers of the plaintiff knew of this kiting practice at the times the three checks in question were received, and knew or believed that there were no funds in the Gardiner bank to meet them, and expected that these checks would be provided for by other like checks deposited there, we should not say that the plaintiff was induced to act by the defendant's representations, nor should we say that it was deceived.

The kiting practice was begun in June 1903 between the plaintiff bank and the Oakland National Bank of Gardiner, where the Harmon Produce Company then kept its Gardiner account, and so continued until some time in October 1904, when the officers of the Oakland bank, having discovered the practice, declined to keep the account longer. The account was then transferred to the Gardiner National Bank, and the practice was continued until these checks were protested for non-payment in October 1905. The defendant however was not treasurer until September 1903. After he became treasurer he seems for many months to have done no acts as treasurer except to sign blank checks for the bookkeepers to use, and he did not discover the kiting practice until July 1904. From June 1903 to October 1905 there were 968 kited checks used, 472 deposited in the plaintiff bank payable at one or the other of the Gardiner banks, and 496 deposited in the Gardiner banks payable at the plaintiff bank. These checks amounted to $660,275.44. They varied in amount from less than $100 to more than $1400, ranging

in the last month from about $600 to about $1100. Usually the checks were drawn for odd amounts, dollars and cents. They were never, as far as we can discover, alike on any two days. They sometimes varied by hundreds of dollars from one day to another. Nor were the amounts of the checks deposited day by day the same as of those which they were deposited to meet. To illustrate the last statement we refer to some dates just previous to the drawing of the checks in question. On October 2 a check for $750.17 was deposited in Bangor. It reached Gardiner October 5, on which day a check on Bangor for $939.06 was deposited in Gardiner. A check deposited in Bangor October 3, for $865.14 was met in Gardiner three days later by a check deposited for $972. A check deposited at Bangor October 4, for $1104.85 was met at Gardiner October 7, by a $750 check on Bangor.

Besides the magnitude and incessant continuity of the practice, as evidence to show actual knowledge, the defendant claims that the plaintiff's books show that the Produce Company's account was almost constantly overdrawn, and that this fact must have quickened the apprehension of the plaintiff's officers and given them notice of the hollowness of the Produce Company's credit. But the books do not show overdrafts except in rare and explainable instances. The overdrafts claimed by the defendant are not shown except by excluding from the account the kited checks which were deposited.

In reply to the defendant's contention, the plaintiff's treasurer, and its clerks who had to do with the Produce Company's deposits and accounts have testified and each has denied that he ever discovered, or in any way knew, that the Produce Company was kiting checks. The case shows that the plaintiff bank was an institution with about $3,000,000 deposits and about 3,000 depositors. The treasurer had the general control and management, and sometimes acted as paying teller. There were four or five clerks. One of these was a receiving teller. In the regular course of business he received the deposits from the Produce Company. Accompanying a deposit was a deposit slip, on which the deposit was itemized, bills, coins, and checks on various banks, including one on the Gardiner bank. His duty was to check up the slip and see that the footings were

correct, examine the signatures and count the bills and coin. He put the check on Gardiner in a pigeon hole, from which it was taken by another clerk and caused to be sent for collection through Boston. The deposit slip was taken to the bookkeeper who entered the total, but not the items, on the Produce Company's account to its credit. The slip was then filed away. The check then entered into the accounts with the bank's Boston correspondent, and its identity was lost, unless it was protested.

On the other hand, a check deposited in the Gardiner bank on the plaintiff bank went to Boston, and then came back to Bangor. It was the bookkeeper's duty to open the Boston mail, which he did. He then credited the check to the Boston correspondent, and charged it to the Produce Company, on the bank's books. No other officer or clerk had any duty with that check. The bookkeeper was the only employee whose duties required him to have any knowledge of both sides of the account, the credits and charges, and of the credits or deposits he had no duty except to know the total, and his books showed no more.

While the treasurer was in general charge of the bank, and doubtless had a duty to have some knowledge of the general run of depositors and deposits, for the protection of the bank and the promotion of its interests, there is no evidence that his attention was ever called specifically to any suspicious facts respecting the Produce Company's account, though he undoubtedly knew that sometimes the company deposited its own checks on the Gardiner bank. He testifies that he did not ever open the letters containing the checks received through Boston from the Gardiner bank, and that he did not see the checks themselves. He examined the depositors' ledger occasionally to notice the balances. It was the duty of the bookkeeper to notify him if there were any overdrafts, but with rare exceptions none appeared on the books. There is no fact shown on which can be properly based an inference of knowledge on his part, except his general duties, and the long continued practice itself. One thing lends an air of great improbability to the defendant's contention. We think we may assume that no one of the officers of the plaintiff bank had ever complained to the Produce Company of

the practice, for if such had been the fact, it would undoubtedly have been offered as evidence of the plaintiff's knowledge. No such fact appears. Assuming the defendant's contention to be true, we are therefore face to face with the proposition that the officers of the bank, knowing the practice, permitted it to go on for days or weeks, or perhaps years, without finding any fault about it, and without taking the trouble even to speak about it. This improbability is so great as materially to strengthen the effect of the sworn denials of the bank's officers and employees. The improbability is made even stronger when we consider that these officers must have known that if the Gardiner bank discovered the practice and dishonored the checks first, the plaintiff bank must inevitably lose.

Upon a careful study of the whole case, we do not think we are warranted in holding that the plaintiff bank had knowledge of the kiting practice. On the contrary, we think the evidence requires us to find that the bank was induced to give credit to the Produce Company by the implied representation of the defendant, and that it was deceived thereby.

Doubtless an analysis of the account, and perhaps a not very critical one, would have disclosed the practice. In the case of a smaller bank, where a single official or clerk receives the deposits and also keeps the accounts or personally oversees them, it would have been easier to discover it, as it was discovered in both the banks at Gardiner. But ability to discover is not discovery, and in respect to the question of actual knowledge, the situation is not helped unless there was a discovery.

But the defendant contends further that if the plaintiff did not know, it ought to have known, and would have known but for its own negligence. We think this defense cannot avail. There are cases which hold that where one carelessly relies upon a pretence of inherent absurdity and incredibility, upon mere idle talk, or upon a device so shadowy as not to be capable of imposing upon any one, he must bear his misfortune, if injured. He must not shut his eyes to what is palpably before him. But that doctrine, if sound, is not applicable here. We think the well settled rule to be applied here is that if one intentionally misrepresents to another facts particu-

larly within his own knowledge, with an intent that the other shall act upon them, and he does so act, he cannot afterwards excuse himself by saying "You were foolish to believe me." It does not lie in his mouth to say that the one trusting him was negligent. In this case the fact whether or not there were funds in the Gardiner bank to meet the checks was peculiarly within the knowledge of the defendant. The rule is stated in Pollock on Torts, sect. 252, as follows:—"It is now settled law that one who chooses to make positive assertions without warrant shall not excuse himself by saying that the other party need not have relied upon them. He must show that his representation was not in fact relied upon. In short, nothing will excuse a culpable misrepresentation short of proof that it was not relied upon, either because the other party knew the truth, or because he relied wholly on his own investigations, or because the alleged fact did not influence his actions at all." In *Linington* v. *Strong*, 107 Ill. 295, we find this language: "The doctrine is well settled that, as a rule, a party guilty of fraudulent conduct shall not be allowed to cry 'negligence' as against his own deliberate fraud. . . . . While the law does require of all parties the exercise of reasonable prudence in the business of life, and does not permit one to rest indifferent in reliance upon the interested representations of an adverse party, still, as before suggested, there is a certain limitation to this rule; and as between the original parties to the transaction, we consider that when it appears that one party has been guilty of an intentional and deliberate fraud by which to his knowledge, the other party has been misled or influenced in his action, he cannot escape the legal consequences of his fraudulent conduct by saying that the fraud might have been discovered had the party whom he deceived exercised reasonable diligence and care." See 6 L. R. A. (N. S.) 463.

Finally, the defendant's counsel in argument contends that the plaintiff, by its own conduct, that is, by receiving and crediting these checks for so long a time, gave the defendant cause to believe, and that he did believe, that the kiting was done with the knowledge, approval and consent of the plaintiff. This ground, of course, could be available only by way of estoppel. But since the defend-

ant has not testified that he so believed, and as there is no evidence that he so believed, or that he was misled by the plaintiff's conduct, ignorant or otherwise, it is unnecessary to consider this proposition further.

Judgment for the plaintiff for $2332.51 and interest from the date of the writ.

STATE OF MAINE *vs.* AMOS FEZZETTE, Appellant.

Penobscot. Opinion February 22, 1908.

Intoxicating Liquors. Search and Seizure. Complaint. "Place" Construed. Constitution of Maine, Article I, section 5. R. S., chapter 29, sections 49, 72.

1. A complaint for a search and seizure process made under R. S., chapter 29, section 49, relating to the unlawful keeping or depositing of intoxicating liquors which fails to designate any place in which they are so kept and deposited otherwise than "in a valise in the possession of the said Fezzette in said Bangor" does not sufficiently allege an offense under that section.
2. The word "place" in R. S., chapter 29, section 49, cannot be construed as broad enough to cover the search for and seizure of liquors in a valise alleged merely to be in the possession of a person charged with unlawfully keeping or depositing liquors, but not alleged to be in any definite and fixed locality or place.
3. To support a search and seizure process, the place to be searched must be a locality, definite, certain and fixed, and must be so described in the complaint.

On exceptions by defendant. Sustained.

Search and seizure process under the provisions of Revised Statutes, chapter 29, section 49, based on a complaint addressed to the Bangor Municipal Court and a warrant issued thereon by said court. The complaint, omitting formal parts, is as follows:

"Harry A. Friend of Etna in said County, competent to be a witness in civil suits, on the twenty-fifth day of June, A. D. one thousand nine hundred and six in behalf of said State, on oath,

complains that he believes that on the twenty-fifth day of June, in said year, at said Bangor, intoxicating liquors were, and still are kept and deposited by Amos Fezzette of Etna in said County, in a valise in the possession of the said Fezzette in said Bangor, said Fezzette not being then and there authorized by law to sell said liquors within said State, and that said liquors then and there were, and now are intended by said Fezzette for sale in the State in violation of law, against the peace of the State and contrary to the form of the statute in such case made and provided.

"He Therefore Prays that due process be issued to search the premises hereinbefore mentioned where said liquors are believed to be deposited, and if there found, that the said liquors and vessels be seized and safely kept until final action and decision be had thereon and that said Fezzette be forthwith apprehended and held to answer to said complaint, and to do and receive such sentence as may be awarded against him."

The warrant issued on said complaint, omitting formal parts, is as follows:

"In the name of the State, you are commanded to enter the premises described and specially designated in the foregoing complaint of said Harry A. Friend, which is expressly referred to as a part of this warrant, and therein search for said liquors, and, if there found, to seize and safely keep the same, with the vessels in which they are contained, until final action and decision be had thereon; and if you shall there find said liquors, you are hereby commanded to arrest the said Amos Fezzette if he may be found in your precinct, and bring him forthwith before said Court, holden at the Municipal Court Room in said Bangor, to answer to said complaint, and to do and receive such sentence as may be awarded against him."

The defendant was duly arrested on said warrant and arraigned before the said Bangor Municipal Court where he pleaded not guilty. After hearing he was adjudged guilty and thereupon he appealed to the Supreme Judicial Court. The case was then tried to a jury at the February term, 1907, of said Supreme Judicial Court, Penobscot County. Verdict guilty. The defendant then

filed a motion in arrest of judgment which, omitting formal parts, is as follows:

"And now after trial and verdict of guilty and before judgment the said Amos Fezzette comes, etc., and says that judgment ought not to be rendered against him, because he says that the said complaint and warrant and matters therein contained and alleged in the manner and form in which they are therein stated, are not sufficient in law for any judgment to be rendered thereon, and the said complaint and warrant is bad because there is no sufficient description contained in said complaint and warrant of the premises where it is alleged that intoxicating liquors were and still are kept and deposited by Amos Fezzette the said respondent; Also if it can be construed that the allegation in said complaint is that intoxicating liquors were kept and deposited or concealed upon the person of the said respondent then the said complaint and warrant is bad because there is no command in the warrant to the officer to search the person of the said respondent, and for the further reason that there is not contained in said complaint and warrant any allegation of the magistrate before whom the complaint was made that the said magistrate is satisfied by evidence presented to him that intoxicating liquors are kept, deposited or concealed upon the person of the said respondent.

"Wherefore he prays that judgment on said verdict may be arrested and that he may be hence dismissed and discharged."

This motion was overruled by the presiding Justice and the defendant excepted.

The case appears in the opinion.

H. H. Patten, County Attorney, for the State.

John F. Robinson and Charles J. Hutchings, for defendant.

SITTING: WHITEHOUSE, SAVAGE, PEABODY, CORNISH, KING, JJ.

SAVAGE, J. The defendant was tried and convicted on a search and seizure process issued under the provisions of section 49, chapter 29 of the Revised Statutes relating to the unlawful keeping or depositing of intoxicating liquors. After conviction, he filed

this motion in arrest of judgment, which was overruled, and exceptions were taken.

The statute in question provides that "if any person competent to be a witness in civil suits, makes sworn complaint before any judge of a municipal or police court or trial justice, that he believes that intoxicating liquors are unlawfully kept or deposited in any place in the State by any person, and that the same are intended for sale within the State in violation of law, such magistrate shall issue his warrant, directed to any officer having power to serve criminal process, commanding him to search the premises described and specially designated in such complaint and warrant, and if said liquors are there found to seize the same, with the vessels in which they are contained."

In the complaint in this case the complainant alleged that he believed that on a day named, "at said Bangor, intoxicating liquors were and still are kept and deposited by Amos Fezzette of Etna in said county, in a valise in the possession of the said Fezzette in said Bangor." The prayer in the complaint was "that due process be issued to search the premises hereinbefore mentioned where said liquors are believed to be deposited." And the warrant commanded the officer "to enter the premises described and specially designated in the foregoing complaint . . . which is expressly referred to as a part of this warrant."

The contention of the defendant is that a "valise in the possession of" a person is not a "place," within the meaning of that word in the statute, and hence that the complaint fails to charge the statutory offense. We think this contention must be upheld.

The constitution of Maine, Art. I, sect. 5, provides that no warrant to search any place, or seize any person or thing shall issue "without a special designation of the place to be searched." The statute above referred to requires that the "premises" to be searched shall be described and specially designated in such complaint and warrant." The form of warrant found in section 72 of the same chapter is, at least, a legislative interpretation of the meaning of the word "place" in section 49. It commands the officer to "enter"

the place or premises before named and "therein" to search for said liquors.

While the word place has several meanings, it ordinarily has reference to locality. And it is obvious that in a statute providing for a search and seizure not only does the word place refer to locality, but under the constitutional provision above named, the locality must be definite, certain and fixed. It must be capable of being described and specially designated. It must be so definite as to direct the officer not only what, but where, he is to search. The warrant commands him to "enter" a place. It would be a perversion of terms to say that he is to "enter," if he can find it, the valise of a "peripatetic rumseller," as such a one is characterized by the court in *State* v. *Grames*, 68 Maine, 418. As we have seen, in the same section, the "place" is also referred to as the "premises described." The word "premises" signifies a distinct and definite locality. It may mean a room, or a shop, or a building, or a definite area, but in either case, the locality is fixed. Otherwise the use of the word would be misapplied.

We cannot extend the statute by construction beyond the plain signification of the language used. We think it is clear that the word "place" in the statute cannot by any reasonable interpretation be construed as broad enough to cover the search for and seizure of liquors in a valise alleged merely to be in the possession of the defendant, but not alleged to be in any definite and fixed locality or place.

Doubtless one who peddles intoxicating liquors from a valise carried about by him from place to place as he may find customers is punishable for his single sales or as a common seller of intoxicating liquors. But under the existing statute, the search and seizure process will not lie against him for unlawfully keeping such liquors upon the mere allegation that they are contained in a valise in his possession.

Exceptions sustained. Judgment arrested. Complaint quashed.

LUTHER O. POLAND *vs.* ALWILDA S. DAVIS AND JAMES B. DAVIS.

Knox. Opinion February 25, 1908.

Pleas in Bar. Prevailing Party. Costs.

When in a real action for the recovery of land, the defendant files the plea puis darrien continuance and the plaintiff accepts such plea, the plaintiff is the prevailing party up to the time of filing the plea and is entitled to costs up to that time. After that time the defendant is the prevailing party and is thereafter entitled to costs.

On exceptions by defendants. Overruled.

Real action to recover certain real estate in the town of Cushing. (See *Poland* v. *Davis, et al.*, ante, 55) The case fully appears in the opinion.

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

David N. Mortland, for defendants.

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

SPEAR, J. The defendants' exceptions state the case.

"Real action, brought to recover the possession of the whole of a parcel of land described in the writ.

"At a former trial, April term, 1904, the general issue was pleaded, at which time a verdict was ordered for the plaintiff, to which ruling the defendants took exception, which exceptions were sustained. Said action was then continued from term to term till the April term, 1907, at which time the action was heard by the court with leave to except. At said trial defendants filed a plea puis darrein continuance. To which plea plaintiff filed a general demurrer which was joined and overruled, and judgment was ordered for the plaintiff 'for his costs up to the date of filing the last plea of defendants,' and judgment was ordered for the defendants, that 'the action be discontinued and for their costs after last plea filed.' To which ruling and judgments, exceptions were filed by both plaintiff and defendants. Aug. 31, 1907, the following order from the

Law Court was received and filed. 'Plaintiff's exceptions sustained. Demurrer sustained. Plea bad. Repleader nunc pro tunc awarded on payment of costs since filing the plea.'

"At this term defendants filed a repleader, and paid plaintiff's costs, amounting to $25.43, and judgment was ordered as follows, 'Judgment for plaintiff for his costs up to time of filing last plea in bar which is filed as of April term, 1907, in accordance with mandate of Law Court, judgments for the defendants that the action be discontinued.' To which ruling and judgment defendants except, and respectfully pray that their exceptions be allowed."

The defendants' exceptions proceed upon the ground that the defendants in the end were the prevailing party, and by the general rule were entitled to costs. But the rule does not mean that such party shall recover full legal costs from the beginning to the end of every suit. The course of pleading may, and often does, materially modify the uniformity of the rule. The present case illustrates an exception. While in this case, the party finally prevailing is entitled to costs, yet it is only those costs which accumulate after a certain stage of the pleadings, the costs previous to that time having been awarded to the other party, because he has prevailed upon an intervening issue presented by the defendants' plea. That is, the plaintiff having accepted the plea puis darrein continuance was the prevailing party up to this time and entitled to costs. The defendant was the prevailing party after this time and entitled to costs thereafter. We understand this to be precisely in accord with the well established rule in this State. In *Hilliker* v. *Simpson*, 92 Maine, at page 600, the court say: "It is a well settled rule of pleading that a plea puis darrein continuance operates as an abandonment of all former pleas, on which no proceedings are afterwards had. After the filing of such a plea in contemplation of law all previous pleas are stricken from the record and everything is confessed except the matter contested by this plea."

This case settles the effect of this plea in practice and *Leavitt* v. *School District*, 78 Maine, at page 579, determines the effect upon costs: "In one sense, such a plea may be said to divide the suit into two actions, in the first of which the plaintiff is the prevailing

party and entitled to costs, and in the second of which the defendant is the prevailing party and entitled to costs."

It seems to us that the case at bar fairly comes within the scope of these decisions.

Exceptions overruled.

INHABITANTS OF YORK *vs.* JOHN C. STEWART et als.

Opinion February 25, 1908.

Bond. Pleading. Declaration.

In an action upon the official bond of a town treasurer, it is sufficient to declare in the writ only upon the penal part of the bond and allege a breach by the non-payment thereof.

In debt on bond, it is not necessary for the plaintiff in his declaration to count upon any other than the penal part of the instrument, leaving the condition to be pleaded by the defendant if it affords him any defense.

The penal part of a bond alone constitutes, prima facie, a right of action, the breach being the non-payment of the money.

Waterman v. *Dockray*, 56 Maine, 52, approved.

On exceptions by plaintiff. Sustained.

Action of debt on the official bond given by the principal defendant John C. Stewart as treasurer of the town of York, York County, for the year beginning March 12, 1906. The defendants prayed oyer of the bond and the same was produced in court and read. The defendants then filed a special demurrer to the declaration which was sustained by the presiding Justice and thereupon the plaintiff excepted.

The declaration in the plaintiff's writ was as follows: "In a plea of debt, for that the said John C. Stewart, J. Perley Putnam, Charles F. Blaisdell, Ernest F. Hobson, Edward E. Young, Edward S. Marshall, Samuel A. Preble, Charles H. Young and Joseph W. Simpson, on the thirty-first day of March in the year of

our Lord one thousand nine hundred and six, at York, aforesaid, by their writing obligatory of that date, sealed with their seals, and here in court to be produced, bound and acknowledged themselves to be indebted to the plaintiffs in the sum of fifteen thousand dollars, to be paid to the plaintiffs on demand; and said plaintiffs aver that said defendant Blaisdell executed said writing obligatory by and under the name of Charles F. Blaisdell; that said defendant Hobson executed said writing obligatory by and under the name of E. F. Hobson; that said defendant Young executed said writing obligatory by and under the name of E. E. Young; that said defendant Marshall executed said writing obligatory by and under the name of Edw. S. Marshall; that said defendant Simpson executed said writing obligatory by and under the name of Jos. W. Simpson: yet, though requested, the said defendants have never paid the same to the said plaintiffs, but wholly refuse and neglect so to do; to the damage of the said plaintiffs, (as they say), the sum of thirty thousand dollars, which shall then and there be made to appear, with other due damages."

At the return term of the writ the defendants filed pleadings as follows:

"Now come the defendants in the above entitled cause, and having claimed oyer of a certain writing obligatory mentioned in plaintiffs' declaration annexed to the writ, in the above entitled cause now pending before said court, the same is read to them in this language:

'Know all men by these presents that John C. Stewart, J. Perley Putnam, Charles F. Blaisdell, Ernest F. Hobson, Edward E. Young, Edward S. Marshall, Samuel A. Preble, Charles H. Young and Joseph W. Simpson, all of York in the county of York and State of Maine are holden and stand firmly bound and obliged unto Inhabitants of York in the county of York and State of Maine in the sum of fifteen thousand dollars to be paid to said Inhabitants their successors Executors, Administrators, or Assigns, to which payment, well and truly to be made, we bind ourselves, our Heirs, Executors, and Administrators, firmly by these presents.

'Sealed with our seals. Dated the thirty-first day of March in the year of our Lord one thousand nine hundred and six.

'The condition of the above obligation is such, that whereas John C. Stewart has been elected Treasurer of the Town of York for the year beginning March 12, 1906.

'Now, therefore, if the above bounded John C. Stewart shall well and truly perform all the duties of said office then this obligation shall be void; otherwise it shall remain in full force.

'Witness our hands and seals on the day and year above written.

In presence of
ELLEN M. WELCH.

JOHN C. STEWART. (L. S.)
J. PERLEY PUTNAM. (L. S.)
CHAS. F. BLAISDELL. (L. S.)
E. F. HOBSON. (L. S.)
E. E. YOUNG. (L. S.)
EDW. S. MARSHALL. (L. S.)
SAMUEL A. PREBLE. (L. S.)
CHARLES H. YOUNG. (L. S.)
JOS. W. SIMPSON. (L. S.),

"And now comes the defendants and demur to the plaintiff"s declaration and each and every count thereof, and for causes of special demurrer show:

"First: That the defendants say that the declaration annexed to plaintiff"s said writ is insufficient in law, in that it is not claimed or declared that there has ever been any breach by any or all of the defendants of the writing obligatory declared upon.

"Wherefore the said defendants pray for their costs."

The plaintiffs joined issue as follows: "And the plaintiffs say that said declaration is sufficient in law, wherefore they pray judgment."

James O. Bradbury and Geo. F. & *Leroy Haley*, for plaintiffs.

Cleaves, Waterhouse & *Emery*, for defendants.

SITTING: EMERY, C. J., WHITEHOUSE, SAVAGE, SPEAR, CORNISH, KING, JJ.

SPEAR, J. In this case the plaintiffs brought an action upon the official bond of the defendant, as treasurer of the town of York, and sureties, declaring in their writ only upon the penal part of the bond and alleging a breach by the non-payment thereof. The defendants prayed oyer of the bond and it was produced in court and read. They then filed a special demurrer to the declaration "that the defendants say that the declaration annexed to plaintiffs said writ is insufficient in law in that it is not claimed or declared that there has ever been any breach by any or all of the defendants of the writing obligatory declared upon." The demurrer was sustained and exceptions taken to the ruling. The exceptions must be sustained. This form of pleading is now too well established to admit of discussion. It follows the directions prescribed in Oliver's Precedents, Chitty's Pleading, Stephens on Pleading and Gould's Pleading. It is also the well established method under our own decisions.

In *Waterman* v. *Dockray*, 56 Maine, 52, involving an action upon a probate bond the court say: "The real controversy seems to be on which party is the duty of setting out the condition? . . . . Usually there is no difficulty in such actions on bonds. The plaintiff declares on the penal part of the bond and makes profert of the whole instrument."

In *Colton et als* v. *Stanwood et als*, 68 Maine, 482, the precise question now before us was raised, the defendants contending that the "plaintiffs should allege breaches of the condition of the bond." With respect to this contention the court say: "All authorities concur in holding that, in debt on bond, it is not necessary for the plaintiff, in his declaration, to count upon any other than the penal part of the instrument; leaving the condition to be pleaded by the defendant, if it affords him any defence. For the penal part of the instrument alone constitutes, prima facie, a right of action, the breach being the non-payment of the money." *Waterman* v. *Dockray*, is approved by citation.

Exceptions sustained. Demurrer overruled.

JOHN ROGERS *vs.* WALLACE BROWN & Trustees.

Piscataquis. Opinion February 25, 1908.

Actions. Assumpsit. Assignee of Chose in Action. Statute 1874, chapter 235.

In the case at bar, Frances H. Rogers, assignee, brought an action of assumpsit in the name of John Rogers, assignor, against the defendant to recover payment for the items specified in the following agreed statement, to wit: "The plaintiff in his account annexed among other articles, claims to recover for certain coupon books sold and delivered by the plaintiff to the defendant, to be paid for in money. Each coupon book appears upon the books aforesaid and in the account annexed to the writ. The said coupon books were made up of coupons, each coupon representing from one cent up to five cents according to the price of the coupon book. The coupons were redeemed by the store by the sale and delivery of goods until all the coupons in each book were redeemed. The name of the purchaser of each book and the seller's name were written in each book." The defendant contended that the plaintiff could not recover in this form of action; that the sale and delivery of the coupon books disclosed a special agreement and that consequently special assumpsit was the only appropriate remedy. The defendant also denied the right of the said Frances H. Rogers to maintain her action in the name of the assignor.

Held: That the action of assumpsit was properly brought and also that the action was maintainable in the name of the assignor.

On agreed statement. Judgment for plaintiff.

Assumpsit on account annexed to recover for certain coupon books alleged to have been sold and delivered by the plaintiff to the defendant, "to be paid for in money." Plea, the general issue and statute of limitations. The action originated in the Dover Municipal Court, Piscataquis County, and probably reached the Supreme Judicial Court on appeal although the record is silent on that point. The action came on for trial at the February term, 1907, of the Supreme Judicial Court in said county, at which time an agreed statement of facts was filed and the case was then sent to the Law Court for determination.

The case appears in the opinion.

Hudson & Hudson, for plaintiff.

J. S. Williams, for defendant.

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

SPEAR, J. This is an action of assumpsit brought by Frances H. Rogers, assignee, in the name of John Rogers, assignor, against Wallace C. Brown, to recover payment for the items contained in the following account.

WALLACE C. BROWN,

To JOHN ROGERS, DR.

1898.	February 10,	Coupon book,	$ 2.50
	" 22,	"	10.00
	March 12,	"	10.00
	" 30,	"	15.00
	May 28,	"	15.00

The case comes here on an agreed statement and presents two questions, which will be considered in their order.

The agreed facts pertaining to the first point are: "The plaintiff in his account annexed among other articles, claims to recover for certain coupon books sold and delivered by the plaintiff to the defendant, to be paid for in money. Each coupon book appears upon the books aforesaid and in the account annexed to the writ. The said coupon books were made up of coupons, each coupon representing from one cent up to five cents according to the price of the coupon book. The coupons were redeemed by the store by the sale and delivery of goods until all the coupons in each book were redeemed. The name of the purchaser of each book and the seller's name were written in each book." The first question of law presented is: "Can the plaintiff recover in this action, upon the above statement, for said coupon books?" The contention of the defendant is that the plaintiff upon the agreed statement cannot recover under this form of action; that the coupon books should have been declared upon specially; that the sale and delivery of the coupon books disclosed a special agreement and that, consequently, special assumpsit was the only appropriate remedy.

But we are unable to discover any evidence in the agreed state-

ment of a special contract attending the sale of the books, which brings the transaction within the rule of special assumpsit. The agreed statement admits that the plaintiff seeks "to recover for certain coupon books sold and delivered by the plaintiff to the defendant, to be paid for in money." The accomplished fact of a sale and delivery is admitted by the quotation.

So far as the legal aspect of the sale is concerned, we think it is precisely the same as it would have been if the charge had been made for a spelling book instead of a coupon book.

Whatever agreement the plaintiff entered into with respect to the redemption of the books was a separate contract and might, perhaps, upon the failure of the plaintiff to carry out his agreement, have been set up in defense for total or partial want of consideration, or by way of recoupment, to the right of the plaintiff to recover, but not to his form of action. The case shows a sale and delivery upon which the plaintiff is entitled to recover in an action of assumpsit. *Cape Elizabeth* v. *Lombard*, 70 Maine, 396.

The agreed statement seems to present a case analogous to the sale and delivery of a chattel with a warranty. The rule of law is elementary that the plaintiff, in such a case, could bring assumpsit to recover for the article sold, without reference to his contract of warranty, while the defendant could plead such contract as a defense to the merits of the action but not to the form of it.

But it has been held that a recovery may be had under a declaration in assumpsit for the price of goods sold and delivered under an express agreement, when the plaintiff has fully executed the agreement on his part and nothing remains for the defendant but the payment of the price in money. *Holden Steam Mill Co.* v. *Westervelt et als*, 67 Maine, 446.

While so far as the form of action is concerned, we believe it to be immaterial, yet it is admitted that the plaintiff has fully redeemed the coupon book and had therefore fully performed on his part every stipulation arising out of the contract of sale. Conceding a special agreement, arguendo, and it would then seem to be fully covered by *Holden Steam Mill Co.* v. *Westervelt*, supra.

It also appears from the agreed statement that John Rogers, in

whose name this action is brought, before the date of the writ, assigned in writing all of his right, title and interest in the above account annexed to Frances H. Rogers, his wife. The second question therefore submitted by the agreed statement is: "Do the papers from John Rogers to his wife Frances H. Rogers, as introduced in the case by the defendant, bar the plaintiff from recovery?" The defendant admits the validity of the assignment but denies that the plaintiff can maintain her action in the name of the assignor.

This question was fully settled in *McDonald* v. *Laughlin*, 74 Maine, 480. It was there held that the right of an assignee of a chose in action to bring suit in his own name was a remedy in addition to, but not exclusive of, that already established by the common law. The opinion says: "The Act of 1874, chapter 235, authorizes, but does not require, assignees of choses in action assigned in writing to bring actions upon them in their own names. There is nothing in it to limit or exclude remedies previously existing."

This interpretation of the statute has never been questioned nor do we think it reasonably can be. In accordance with the stipulation in the agreed statement, the entry must be,

Judgment for the plaintiff.

CLARA W. CAMERON

vs.

LEWISTON, BRUNSWICK AND BATH STREET RAILWAY.

Sagadahoc. Opinion February 25, 1908.

Street Railways. Negligence. Leaning Trolley Pole. Duty to Passengers.

When the facts disclose a situation, dangerous to life or limb, into which, from its very nature, it is practically certain, even prudent men may be induced to enter, and it is practicable to remove such danger, without injuriously interfering with other rights or privileges, then the court should establish, as the law, the rule which prevents injury or loss of life, rather than that which invites or even permits it. A street railroad is a public corporation. It receives all its privileges from the public. It depends upon the public for its income. It invites and induces the public to ride upon its cars. Great experience makes it familiar with the habits of people so riding and with their natural tendency, with or without reason, to move from seat to seat. With its special means of knowledge, it should be held to anticipate, what is even a matter of common knowledge, that a passenger riding upon one of its cars, may, at any place along the line and while the car is in motion, undertake to change his seat.

It is too narrow a construction, and against good public policy, to hold that it is negligence, per se, on the part of a passenger riding on a trolley car, not to anticipate that a pole may be permitted to stand so near the railroad track, that he cannot, in an erect position and careful manner, pass from one seat in the car to another over the running board without danger of injury from collision with such pole.

It establishes a safer rule of law, to require street railroads to exercise a degree of care sufficient for the protection of their passengers with respect to poles and other obstacles along their rights of way when such protection involves only a question of pecuniary outlay, than to hold that such railroad may be permitted, for the mere purposes of saving expenditure, to continue the maintenance of a structure which may be calculated sooner or later to result in the injury or death of a passenger.

A street railroad owes to its passengers a duty with respect to the proximity to the track of poles and other permanent structures, and that whether, in case of an injury to one of its passengers by coming in contact with a pole or other structures, the defendant was negligent in the location and maintenance thereof, is a question of fact for the jury.

In the case at bar, the chartered rights of the defendant, the location of its tracks and poles by the city, and approval of the same by the railroad commissioners, were all proceedings, assuming them to be in all respects legal, intended to bestow upon the defendant the right to exist, not to destroy. They were calculated to confer upon it the right to exercise all the privileges of its franchise, but not immunity from its negligence.

Although in the case at bar, on the back of each seat in the car on which the plaintiff's intestate was riding at the time of his injury, in legible letters, plainly to be seen, were the words, "Avoid accidents; wait until the car stops," yet this notice must be construed to have been intended by the defendant as a caution to passengers against alighting from a car in motion, and not as an exemption from its own negligence. If not so intended it was calculated to so impress the mind of the ordinary passenger.

The court will sustain in favor of a verdict every inference of fact that can be deduced from the evidence, when considered in the light most favorable to contention of the winning party.

On motion by defendant. Overruled.

Action on the case brought by the plaintiff as administratrix of the estate of her husband, Lewis Cameron, to recover damages sustained by her said husband while a passenger on one of the defendant's street cars on lower Washington Street, Bath, caused by the alleged negligence of the defendant, and which said injuries subsequently resulted in the death of the plaintiff's intestate. Plea, the general issue.

The declaration in the plaintiff's writ was as follows:

"In a plea of the case, for that the defendant is, and on the third day of July, 1906, was a corporation owning and operating a street railway in said Bath, and using in its business cars driven by electricity, by the trolley system, through a street, in said Bath, known as lower Washington Street. And said intestate, on the said day of July, 1906, was a passenger on one of the defendant's open cars, then running on said street in a northerly direction and was lawfully standing on and moving along the running board of said car, and while he was so standing and moving, and when said car was passing a certain trolley pole, near Weeks Street, which was then and there supporting the defendant's trolley wire, and slanting towards the defendant's track, and situated in such close and dangerous proximity to said track, that there was no room for a person, though in the exercise of due care, to stand between said

car and said pole without being struck by the latter, said intestate, who was in the exercise of due care and caution, was violently struck by said pole, and thrown to the ground, and solely as a result of the injuries he thus sustained, he thereafter suffered great pain, was put to great expense for medical care and treatment, and on the fifteenth day of July, 1906, he died. The plaintiff further avers that said car was not then furnished with a guard rail on the side of said pole, or any other shield or protection between the passenger on said car and said pole, and that said injury to said intestate and his subsequent suffering and death, and the expense incurred as aforesaid were caused solely by the negligence of the defendant in maintaining its said track, and in running its said car in dangerous proximity to said pole, as aforesaid, and without the protection which would have been afforded by a guard rail or other shield, and were in no respect due to any negligence or want of care of said intestate. All of which suffering and expense were to the damage of said intestate, in his lifetime, in the sum of ten thousand dollars, which sum the defendant has never paid to said intestate or to the plaintiff since his decease, and which shall then and there be made to appear with other due damages."

Tried at the August term, 1907, of the Supreme Judicial Court, Sagadahoc County. Verdict for plaintiff for $2,875. The defendant then filed a general motion to have the verdict set aside.

The case appears in the opinion.

Barret Potter and A. N. Williams, for plaintiff.

W. H. Newell, for defendant.

SITTING: EMERY, C. J., WHITEHOUSE, SAVAGE, SPEAR, CORNISH, KING, JJ.

SPEAR, J. This case involves an action for damages by the plaintiff, as administratrix, for injuries received by her husband while riding as a passenger upon the defendant's car on lower Washington street in the City of Bath alleged to have been caused by the defendant's negligence.

The facts show that the plaintiff's intestate boarded an open car

going northerly toward Bath in the early evening. At first he sat upon one of the rear seats. He sat for a minute or so, then, while the car was in motion, stepped to the running board on the pole side of the car, for the apparent purpose of taking a seat nearer the front. In so doing he was struck by a trolley pole and was so injured by the impact that he died in eleven days. The seating capacity of the car was 72. There were upon it from 16 to 20 passengers. The side of the pole toward the track was $30\frac{3}{4}$ inches from the east rail at the ground. It leaned toward the track so that six feet up it was $28\frac{3}{4}$ inches to a point vertically above the east side of the east rail, that is, the pole leaned two inches in six feet. The car was 7 feet 9 inches wide, the running board $8\frac{1}{2}$ inches wide, $16\frac{1}{2}$ inches from the ground and 16 inches below the floor of the car. It was $3\frac{1}{2}$ inches from the running board to the pole. At a distance of $5\frac{1}{2}$ feet above the running board it was $8\frac{1}{2}$ inches from the grab handle to the pole. As the handle projected outward from the side of the car $3\frac{1}{2}$ inches, it was exactly one foot from the side of the car between the grab handles and the pole, $5\frac{1}{2}$ feet above the running board. The decedent was about $5\frac{1}{2}$ feet in height and weighed about 160 pounds. The car was going at a reasonable rate of speed. The track is laid on the easterly side of the street, the highway travel being westerly of the track.

The deceased was a spar manufacturer with his place of business on the same side of the street as the track. His residence where he had lived four or five years prior to the accident was on the same side of the street, and both were a short distance only from the trolley pole by which he was injured. He frequently rode past it on the car to the city.

There is so little conflict between the testimony of the plaintiff and the defendant with respect to the above statement of facts that, for the purposes of consideration in this case, they may be regarded as undisputed. In favor of a verdict the court will sustain every inference of fact that can be deduced from the evidence, considered in the light most favorable to the contention of the winning party.

Therefore, in addition to the conceded facts, the jury were also authorized to find from the evidence that the plaintiff's intestate in

attempting to move from one seat in the car to another, was standing erect upon the running board when struck by the pole, and, in all other respects, in the exercise of due care, if the act itself, however carefully performed, was not negligence, per se; that at the height of a man's head and shoulders above the running board, the distance was only $8\frac{1}{2}$ inches between the grab handles and the pole, or one foot between the side of the car and the pole; that while the car was passing that pole a man of ordinary size, or even less, standing on the running board and facing the direction in which the car was going, could not however closely he clung to the side of the car avoid a collision with the pole; that the defendant at the time did not give any notice to the occupants of the car, and that it had never given any notice, of the proximity of the pole to the car, and that it appeared to have been the only pole in that vicinity that was dangerous to a man standing on the running board of an ordinary car; that while the plaintiff had general knowledge that there was a line of poles along the east side of the track, he had no specific knowledge of the proximity of the particular pole by which he was injured.

It also appeared that upon the back of each seat, in legible letters plainly to be seen, were the words: "Avoid accidents; wait until the car stops."

The defendant also put in evidence as a part of its case, the charter of the railroad company and the records of the city of Bath tending to show a legal location of the railroad, and particularly, the legal location of the track and poles, including the pole upon which the plaintiff was injured, on the east side of Washington Street where the accident occurred. For the purposes of this case a legal location may be conceded.

Under this evidence three questions were submitted to the jury. (1) Was the defendant negligent? (2) Was the plaintiff's intestate guilty of contributory negligence? (3) The assessment of damages. It is admitted that the amount of damages if maintainable is reasonable. No further allusion therefore will be made to this question. The jury found upon the other questions that the

defendant was guilty of negligence, and that the decedent was not guilty of contributory negligence, or, affirmatively stated, was in the exercise of due care.

(1) Was the defendant negligent?

The ground upon which the defendant claims exemption, as we understand it, is that it had a right to maintain a pole as near to its track or car as it pleased, provided it did not come in contact with passengers occupying seats in the car, or with those riding elsewhere with the permission of the company. In other words that the plaintiff had no right to move from seat to seat as he was attempting to do, and that consequently the defendant owed no duty to him while so doing. This must necessarily be the defendant's position as it requires no argument to demonstrate that it was not authorized to maintain a pole in such a position as to injure a passenger in any situation upon the car where he had a right to be. If the plaintiff had no right to be upon the running board, the defendant was not negligent; if he did have a right to be there, then it is a question of fact for the jury to say whether he exercised that right in a prudent or negligent manner. As the negligence of the defendant depends upon the duty owed to the plaintiff, it is evident that these two questions must become more or less blended, even in an endeavor to discuss them separately.

We do not understand that the defendant seriously questions the propriety of the verdict if the facts conceded and inferred by the jury were sufficient to constitute the basis of a legal cause of action, but emphatically urges that the controlling fact in the case, that the decedent was voluntarily moving by way of the running board from one seat in the car to another, was evidence, per se, of negligence; an act which the defendant could not be reasonably held to have anticipated; while the location and use of the pole upon which he was injured, were facts which the decedent should be held to have anticipated and that, consequently, the verdict of the jury, admitting all the facts to be true, was erroneous in law.

Of course it follows, if the defendant owed no duty to a passenger upon one of its cars, who attempted to move while the car was in motion from one seat to another by way of the running board, it

was not guilty of negligence in setting or using a pole erected at any distance from the running board, however near. On the other hand, if the defendant did owe to a passenger upon its cars the duty of using poles, erected at such a distance from the running board that a passenger, standing erect and otherwise in the exercise of due care, could pass from one seat in the car to another without danger of collision with the pole, then, whether the defendant should be held to be negligent in using a pole thus located was a question of fact to be submitted to the jury.

It is too narrow a construction, and against good public policy, to hold that it is negligence, per se, on the part of a passenger riding on a trolley car, not to anticipate that a pole may be permitted to stand so near the railroad track, that he cannot, in an erect position and careful manner, pass from one seat in the car to another over the running board without danger of injury from collision with such pole.

The defendant is a public corporation. It receives all its privileges from the public. It depends upon the public for its income. It invites and induces the public to ride upon its cars. Great experience makes it familiar with the habits of people so riding and with their natural tendency, with or without reason, to move from seat to seat. With its special means of knowledge, it should be held to anticipate, what is even a matter of common knowledge, that a passenger riding upon one of its cars, may, at any place along the line and while the car is in motion, undertake to change his seat. Who has not done it? It establishes a safer rule of law, to require street railroads to exercise a degree of care sufficient for the protection of their passengers with respect to poles and other obstacles along their rights of way, when such protection involves only a question of pecuniary outlay, than to hold that such railroad may be permitted, for the mere purpose of saving expenditure, to continue the maintenance of a structure which may be calculated sooner or later to result in the injury or death of a passenger.

When the facts disclose a situation, dangerous to life or limb, into which, from its very nature, it is practically certain, even prudent men may be induced to enter, and it is practicable to

remove such danger, without injuriously interfering with other rights or privileges, then the court should establish, as the law, the rule which prevents injury or loss of life, rather than that which invites, or even permits it.

We believe it to be a better and safer rule in the case at bar to hold, that the exercise of due care required that the defendant company should have moved the fatal pole in question such a distance from its track, as would have enabled the decedent to have done, just what he did do, without injury, than to say that the defendant has a right to continue the pole as it was then located, and thereby subject its future passengers to the constant menace of injury or death.

Not only is this rule based upon reason and good public policy but it is the well settled law.

In *San Antonio* v. *Bryant*, 30 Texas Civ. App. 437, the plaintiff was on the running board moving toward a vacant seat. While crossing a bridge, the space between the bridge and the car not being sufficient to allow his body to pass, he was struck by the bridge and injured. This was held to constitute negligence on the part of the road.

In *Elliott* v. *Newport Street Railway Company*, 18 R. I. 707, the court held: "A passenger who rides on the foot-board of a car necessarily takes on himself the duty of looking out for and protecting himself against the usual and obvious perils of riding there; such, for instance, as injury from passing vehicles, or of being thrown off by the swaying or jolting of the car; assuming, of course, proper management of the car and proper construction and condition of the road. We do not think, however, that the danger of being hit by a trolley pole is such a peril as a passenger whom the railroad company has undertaken to carry on the foot-board of its car is bound to anticipate and be on the lookout for; unless, indeed, it appears that the passenger had knowledge of the close proximity of the track to the trolley pole. He has a right to assume that the railway company has performed its duty in so constructing its road that its passengers, even on the foot-boards of its

cars, riding there by its permission, shall not be exposed to injury by the unsafe construction of its road."

The facts in this case show that the plaintiff was riding on the foot-board with the acquiescence of the company, the car being filled with passengers, but this fact does not distinguish it in principle from the case at bar. It is as much a matter of common knowledge that passengers, with the permission of the company, move from seat to seat while the cars are in motion, as that they ride upon the running board when the seats are full. A person standing upon the running board for the purpose of changing his seat is no more bound to anticipate the dangerous proximity of a pole to the car, than a person riding on the running board because the seats are full. While different motives may prompt them to occupy the running board, the fact of occupancy, and all the dangers surrounding it, are precisely the same. Every reason which can be urged for anticipating danger in the one case obtains with equal force in the other.

In *North Chicago Street Railroad Co.* v. *Williams*, 140 Ill. 275, the court say: "When a railroad company places its track so near an obstruction which it is necessary for its cars to pass, that its passengers, in getting on and off its cars and while riding upon them, are in danger of being injured by contact with such obstruction, it is a fair question for the jury whether the company is or is not guilty of negligence."

In *Anderson* v. *Railway*, 42 Oregon, 505, the court say: "The authorities all agree that it is negligence for a street railway company to permit permanent obstructions to stand so near its tracks that passengers getting on and off its cars or riding thereon, are in danger of coming in contact therewith, and it is generally considered a question for the jury as to whether a given obstruction is so situated." This opinion cites numerous cases. To the same effect are *W. Chicago Street Railroad Co.* v. *Marks*, 182 Ill. 15; *Mason* v. *St. Railway*, 190 Mass. 255; *Nugent* v. *B. C. & M. Railroad*, 80 Maine, 62; *Withee* v. *Traction Company*, 98 Maine, 61, and *Stone* v. *Street Railway*, 99 Maine, 243, while not in point, have some bearing upon the principle here involved. Our

conclusion upon this point is, that street railways do owe their passengers a duty with respect to the proximity to the track of poles and other permanent structures, and that whether, in case of an injury to one of their passengers by coming in contact with a pole or other structure, the defendant was negligent in the location and maintenance thereof, is a question of fact for the jury.

While the defendant put in evidence all the records pertaining to its chartered rights, the location of its tracks and poles by the city, and approval of the same by the railroad commissioners, as an element of defense, it has laid but little stress upon these features in the argument, yet perhaps all they would bear. All these proceedings, assuming them to be in all respects legal, were intended to bestow upon the defendant the right to exist, not to destroy. They were calculated to confer upon it the right to exercise all the privileges of its franchise, but not immunity from its negligence. They do not, therefore, exempt it from the consequences of its negligent acts.

The verdict of the jury upon the question of the defendant's negligence was fully warranted by the evidence and clearly right.

(2) Was the plaintiff's intestate guilty of contributory negligence? We have already stated the facts, and inferences from the facts, authorized to be found by the jury, and held as a matter of law that it was not negligence, per se, for the decedent to have attempted to move from one seat to another as he did when he was injured. The only question of fact therefore left for discussion is whether the evidence warranted the finding that the decedent while in the attempted act of moving was in the exercise of due care. We have already suggested that the jury were authorized to infer from the evidence "that the plaintiff's intestate in attempting to move from one seat in the car to another was standing erect upon the running board when struck by the pole and in all other respects in the exercise of due care." The only explanation which need be here added is that the phrase "and in all other respects in the exercise of due care" is intended to mean that the accident producing the decedent's injuries was not due to any of the ordinary risks assumed by a passenger who undertakes to ride upon the running board of a trolley car, such as the meeting of other vehicles, the jolting and jostling of the car, or the sudden rounding of a curve,

and that he was not swinging himself out from the car in such a manner that the unnecessary swerving of his head and body, to accomplish his purpose, contributed to the accident.

The defendant, however, contends that, admitting all the facts and inferences found by the jury to be true, yet the decedent was guilty in law of negligence, per se, in standing upon the running board as the evidence shows he did. As to what constitutes contributory negligence, there are two broad classes of cases promulgated by the courts of this country, one holding that electric railroads should be governed by the rules of law applied to the operation of horse railroads, the other that they should come within the analogy of steam railroads. In the latter class, it is held to be negligence, per se, to ride upon the platform or running board of a moving car, but in the former class it is otherwise, and the question of negligence is regarded as a question of fact. Several states in the union hold electric roads to the analogy of the steam roads, but a large majority of the states, including Maine, have established the other rule. This question was specifically raised in *Watson* v. *Portland & Cape Elizabeth Ry. Co.*, 91 Maine, 584. In this case the passenger was voluntarily riding upon the front platform of the car. The car was rounding a sharp curve approaching a switch with such speed that the motorman was unable to see whether it was properly set or not, and, the switch being open, the car was propelled so rapidly on the siding as to cause violent jarring and jolting. The Justice in ordering a nonsuit said to the jury, "It is settled as a legal question that one who rides upon the platform of a car, and is injured by being thrown from it as the car rounds a curve, is guilty of contributory negligence." In other words, that the mere fact of voluntarily riding upon the front platform of a car constituted negligence, per se. But the court held otherwise, saying: "In our opinion this was not a correct statement of law when applied to a street railroad car, whether propelled by horses, electricity or otherwise. Riding upon the platform of such cars is too much encouraged by transportation companies and too much indulged in by the public, for the court to say, as a matter of law, that the mere riding upon the platform of such a car is conclu-

sive evidence of negligence, or is negligence per se, or is negligence in law. It depends upon too many other circumstances and conditions for a court to lay down any hard and fast rule in regard to it; but it is a fact which should ordinarily be submitted to the jury in connection with all of the other circumstances of the case."

The principle enunciated in this case and the reasons therefor, are as clearly applicable to the situation of a passenger riding upon the running board as to one riding upon the platform.

In *San Antonio Traction Co.* v. *Bryant*, 30 Texas Civ. App. 437, the Maine rule is applied to the running board, and the court say: "It is not negligence per se to stand upon the platform, steps or running board of an electric street car which is crowded; and the weight of authority supports the rule that it is not contributory negligence as a matter of law for a passenger to stand upon the platform of a car or running board, whether there be vacant seats or not in the inside of the car, and whether the passenger be standing on the platform, running board or steps, the question of contributory negligence is held to be in a majority of cases, for the jury to determine." See also Fort Wayne Traction Co. & Hardendrof (Ind.) St. Ry. Reps. Vol. 164-172. Joyce on Electric Law, section 540; Thompson on Negligence 3, sections 3572-3577. The last two authorities are precisely in point.

It is not the result of the Maine rule that a passenger assumes no risk by riding on the platform or running board of a moving car, for it is well settled law that he must assume all the usual and obvious perils attendant upon his position. It simply declares that the question of a passenger's negligence and assumption of risks, while riding upon the platform or running board of a street car, shall be submitted to the jury as a question of fact.

Another defense suggested is, that the plaintiff's intestate must have had knowledge of the proximity to the track of the pole upon which he was injured, or by the exercise of due care ought to have known it. This would undoubtedly afford a good defense if established, but it was a question for the jury, *Withee* v. *Traction Co.*, 98 Maine, 61, and upon this proposition the jury found in favor of the plaintiff. Upon this contention we find no adequate reason for dis-

turbing the verdict. It may be conceded that the decedent had a general knowledge that the poles in the vicinity where he was injured were near the track, but such knowledge, unless he knew they were near enough to be dangerous to one standing on the running board with due care, would not charge him with contributory negligence. *Withee* v. *Traction Co.*, supra; *Nugent* v. *B. C. & M. Railroad*, 80 Maine, 62; *Powers* v. *Boston*, 154 Mass. 60; *Ferren* v. *Old Colony Railroad Co.*, 143 Mass. 197; *Wheeler* v. *Company*, 70 N. J. L. 725; 58 Atlantic R. 927; 3 Street Railway Reports, 631; *Hesse* v. *Company*, 54 Atlantic Reporter, 299.

The only other defense interposed is that upon the back of each seat was plainly and legibly written the words, "Avoid accidents; wait until the car stops," which the defendant claims the plaintiff must have seen, and was, therefore, direct notice to him not to occupy the running board while the car was in motion, and that, if he did so, he assumed the risk of whatever might happen, and was also guilty of contributory negligence in doing a forbidden act. While the evidence in the case might have justified the jury in finding a waiver of the notice, if construed as the defendant contends, yet it is unnecessary to consider this question, as the notice will not bear the construction urged. This notice must be construed to have been intended by the defendant as a caution to passengers against alighting from a car in motion, and not as an exemption from its own negligence. If not so intended, it was calculated to so impress the mind of the ordinary passenger,

An allusion to the reason for the notice seems to determine its purpose. One can move about upon the surface of a moving body, subject only to those dangers incident to the motion. But it is a universal law, that, if a person alights from a moving vehicle, he is subject to the inevitable tendency of being hurled to the ground in the direction of the motion. Jumping from moving cars, with frequent injury, always has been, and is now, a practice of such common occurrence, that the notice upon the back of the seats was undoubtedly intended to operate as a check upon the natural inclination of passengers to alight from a car before it stops, when approaching a stopping place.

Motion overruled.

INHABITANTS OF ROCKPORT *vs.* INHABITANTS OF SEARSMONT.

Knox. Opinion February 25, 1908.

Insane Persons. Illegal Commitment to Hospital. Recommitment. Expenses of Commitment and Support in Hospital. Liability of Town of Pauper Settlement. Pauper Notices. Notice to Town of Pauper Settlement. R. S., chapter 27, section 37; chapter 144, sections 24, 42.

The case at bar is an action brought by plaintiff town to recover certain expenses incurred by it in committing one Grace E. Farnham to the Insane Hospital, whose pauper settlement was alleged to be in the defendant town, also to recover the sums paid by the plaintiff town for the support of the said Farnham in said hospital. The case has once before been before the Law Court on questions involving the legality of the original commitment of said Farnham to said hospital, and the constitutionality of Revised Statutes, chapter 144, section 42, providing for a recommitment in cases where the original commitment was unlawful. The Law Court held that original commitment of the said Farnham was illegal, the recommitment legal and the statute constitutional.

The statute authorizing a recommitment in express terms provides for the recovery of all the expenses of the illegal commitment and support of the person so committed. This statute when the same was declared constitutional gave legal force to the plaintiffs' account and made it actionable precisely as it would have been if the original commitment had been legal, and brought it within the same rule with respect to the effect of notice as would have applied, if it had been an ordinary account for pauper supplies.

When a person unlawfully committed to the Insane Hospital has been legally recommitted, the expenditures under the illegal commitment are revived and at once come within the application of Revised Statutes, chapter 27, section 37, pertaining to notice and limitation of actions in pauper cases.

When a person unlawfully committed to the Insane Hospital, has been legally recommitted, the town committing has a right of action against the town liable for the support of such person for the recovery of any of the expenditures specified in Revised Statutes, chapter 144, section 42, "incurred within three months before notice given to the town chargeable," whether such notice is given before the date of the recommitment or after, provided the suit is commenced within two years after the cause of action accrues.

The notice to be given by one town to another under the provisions of Revised Statutes, chapter 27, section 37, is not required to be of any particular form, and when such notice is accompanied by an explanatory

letter the notice and the letter should be construed together and if they together contain the essential information required by the statute they constitute a sufficient notice if properly addressed and signed.

In the case at bar, *held:* That the notice and explanatory letter when construed together, were sufficient in form and in substance and must be regarded in law as having stated the facts.

On exceptions by defendants. Overruled and judgment for plaintiffs.

Writ dated March 2, 1905. Plea, the general issue.

The case as stated by the bill of exceptions, is as follows:

"This action is brought to recover the expense of commitment of one Grace E. Farnham to the Insane Hospital in Augusta and for her support therein from January 20, 1904, to November 30, 1904, being one hundred and fifty-three dollars and eighteen cents ($153.18) and interest, amounting in all to one hundred and seventy-six dollars and thirteen cents ($176.13) at the time of the trial, for which sum a verdict was rendered in favor of the plaintiffs.

"At the September term A. D. 1905 of said court, this case came on for trial and by agreement of parties was sent to the law court on report of the evidence and the decision of the Law Court is reported in 101 Maine, 257.

"The case again came on for trial, at the September term 1907 of said court, and was tried before a jury together with another case brought by the same plaintiffs against the same defendants to recover the expenses of all of the support of the same person in the Insane Hospital to November 30 1906 on which they recovered two hundred eighty dollars and fifty cents ($280.50) and interest being the amount not included in the account in the first suit.

"It was admitted that Grace E. Farnham was committed to the Insane Hospital at Augusta by the municipal officers of the town of Rockport on the 20th day of January A. D. 1904 and that said commitment was illegal. It was further admitted that said Grace E. Farnham was recommitted to said Insane Hospital by the Judge of the Municipal Court of the City of Augusta on the 14th day of January A. D. 1905, and that said recommitment was legal.

"At the trial the plaintiffs by their counsel offered in evidence

the following notice and letter which were objected to by defendants' counsel:

"To the Overseers of the Poor of the Town of Searsmont, in the county of Waldo, in the State of Maine:

"Gentlemen:

You are hereby notified that Grace E. Farnham, aged 21 years, daughter of Ansel D. Farnham, an inhabitant of your town, having fallen into distress, and in need of immediate relief in the town of Rockport, the same has been furnished by said town of Rockport on account and at the proper charge of the town of Searsmont where said Grace E. Farnham has legal settlement; you are requested to remove said Grace E. Farnham or otherwise provide for her, without delay, and to defray the expense of her support up to this date which are ———

"Dated at Rockport, this 25th day of Jan. A. D. 1904.

Yours respectfully,

FRED W. ANDREWS (ch. bd.)

Overseer of the Poor of Rockport.

Rockport, Jan. 25, 1904.

"Overseers of Poor, Searsmont.

"Gentlemen:

"Inclosed find notice account Grace E. Farnham daughter of Ansel D. Farnham. The lady above referred to was committed to the Insane Hospital for this town last Thursday. At the time of her commitment she was residing with her sister Mrs. Lufkin and upon examination after calling evidence we concluded that for her good and all others interested, we caused her to be committed to the Insane Hospital at Augusta, where we trust after a short time she may be returned to her friends.

Respectfully,

FRED W. ANDREWS

(ch. bd.) Selectmen."

"The presiding Justice against the objection of the defendants admitted the foregoing notice and letter in evidence, to which ruling the defendants' counsel then and there excepted.

"The plaintiffs by their counsel also offered in evidence the following notice, which was objected to by the defendants' counsel:

"To the Overseers of the Poor of the town of Searsmont, and to said Town in the County of Waldo in the State of Maine:

"You are hereby notified that Grace E. Farnham, aged about twenty-one years, daughter of Ansel D. Farnham, a person having her legal settlement in said Town of Searsmont, has fallen into distress in said Town of Rockport, and upon complaint duly made, has by virtue of section 16 and following sections of chapter 144 of the Revised Statutes of Maine, been committed to the Insane Hospital at Augusta, Maine, and the same has been done and the expense of examination, commitment and support in said asylum, by virtue of the provisions of said statute, been furnished and paid by the town of Rockport on the account and at the proper charge of said town of Searsmont, where said Grace E. Farnham has her legal settlement, and you are requested forthwith to reimburse said town of Rockport for the amount paid therefor, and to assume the board and expense of said Grace E. Farnham, at said hospital, or hereafter reimburse said town of Rockport, as they may be required to pay the same. The sum so expended to this date is one hundred twenty and forty-three one hundredths ($120.43) dollars.

Dated Rockport, Maine, this 28th day of December, 1904.

FRED W. ANDREWS,
CORYDON S. YORK.

Municipal Officers, Board of Examiners and Overseers of Poor of said Town of Rockport.

"The presiding Justice against the objection of the defendants admitted the foregoing notice in evidence to which ruling the defendants by their counsel then and there excepted.

"It is admitted that both of these notices were received by the overseers of the poor of the town of Searsmont, and denials of pauper settlement on the usual printed blanks seasonably returned by them to the overseers of Rockport.

"No other notice was served on the defendant town prior to the commencement of this suit.

"The plaintiffs then introduced in evidence the following notice:

"To the Overseers of the Town of Searsmont, in the County of Waldo, State of Maine:

"You are hereby notified that Grace E. Farnham, aged about twenty-one years, daughter of Ansel D. Farnham, a person having her legal settlement in the Town of Searsmont, has fallen into distress in the Town of Rockport, and upon complaint duly made was committed to the Maine Insane Asylum at Augusta, Maine; that said commitment being illegal, the said Grace E. Farnham was on the day of January, 1905, recommitted to said Hospital.

"That the expense of examinaton, commitment and support at the insane Hospital, both for the commitment and recommitment has, under the provisions of the Statutes of the State of Maine been furnished by the Town of Rockport, as if incurred for the ordinary expenses of a pauper, on account and at the proper charge of said Town of Searsmont, where the said Grace E. Farnham has her legal settlement, and you are requested forthwith to reimburse said Town of Rockport therefor, or hereafter reimburse said Town of Rockport as they may be required to pay the same.

"Dated Rockport, Me., this 27th day of February, 1905.

FRED W. ANDREWS,
CORYDON S. YORK.

Municipal Officers, Board of Examiners and Overseers of the Poor of said Town of Rockport.

"It is admitted that the last notice was not sent to the overseer of the poor of Searsmont until after the date of this writ, and in the second suit, under the instructions of the court, the plaintiffs were permitted to recover and did recover the expenses of support of said Grace E. Farnham for three months next prior to the giving of this notice, but not the item of $32.75 paid January 7th, 1905, charged in the first suit.

"It was admitted that the expenses of the original commitment of Grace E. Farnham to the Insane Hospital and of her support in the Hospital charged in the account annexed to the writ were paid by the plaintiffs.

"The presiding Justice ruled that these notices were sufficient to enable the plaintiffs to recover all of the items charged in the account annexed to the writ with interest and instructed the jury to render a verdict for the plaintiffs for the sum of one hundred seventy-six dollars and thirty-six cents ($176.36) if they found that the legal pauper settlement of Grace E. Farnham was in the defendant town, to which ruling and instructions of the presiding Justice the defendants by their counsel then and there before the jury retired excepted and still do except."

At the time of the filing of the bill of exceptions, the parties also stipulated as follows:

"It is agreed that if the court find that the action can be maintained, judgment shall be entered for such sum as the court find is legally recoverable, otherwise judgment shall be entered for defendants."

Arthur S. Littlefield, for plaintiffs.

R. F. Dunton and J. E. Moore, for defendants.

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

SPEAR, J. This cause was before the court in 101 Maine, 257, involving the legality of the original commitment of a person to the Maine Insane Hospital, and the constitutionality of R. S., chapter 144, section 42, providing for a recommitment. This section reads: "When a person has unlawfully been committed to a hospital and recommitted under the three preceding sections, the person or town liable for the support of such person, had his original commitment been lawful, is liable for the expenses of the examination and commitment under such unlawful commitment, for the support of such person thereunder, for the expenses of the examination and recommitment under the three preceding sections, and for support thereafterward furnished under such recommitment, and such liability shall extend to the town of such person's settlement, and to any person ultimately liable for such patient's commitment and support under a lawful commitment."

The original commitment was held to be illegal, the recommitment legal and the statute constitutional.

A question also arose as to what notice if any, under this statute should be required to be given by the town committing, to the town liable for the support of the person committed, having a pauper settlement therein. Upon this point the court held: "While chapter 144 is silent as to the requirements of any pauper notices, either in the original or the recommitment proceedings, yet we think the entire scheme of the chapter is based upon the theory that the expenses and support incurred under it are in the nature of pauper supplies.

"In fact section 24 expressly provides that these expenses shall be recovered 'as if incurred for the expense of a pauper.'

"We are therefore inclined to the opinion that the proceedings under R. S., chapter 144, with respect to expenses and support of a person committed to the asylum by the town committing and not the pauper residence of such person, comes within the purview of R. S., chapter 27, with reference to the notice required by one town to another in case of furnishing pauper supplies." The opinion should have stopped here but it did not, and in appending another sentence by way of illustration of the rule, and not intending to limit the effect of the notice required, left the precise scope of its application ambiguous. By the use of the word "only" in this sentence, the right of the plaintiff town to recover for expenses and support might be interpreted to be limited to a period of three months prior to the 27th of February 1905. But such was not the logic or intention of the opinion, as will be clearly seen by reading it, nor should it now be so construed.

The statute authorizing a recommitment in express terms provides for the recovery of all the expenses of the illegal commitment and support of the person so committed. This statute when declared constitutional gave legal force to the account and made it actionable precisely as it would have been if the original commitment had been legal, and brought it within the same rule with respect to the effect of notice as would have applied, if it had been an ordinary account for pauper supplies.

As was said in the opinion, "a recommitment having been made . . . . then the statute takes effect and covers the

whole proceeding as one transaction, the recommitment being but a continuation of the proceedings of the original commitment." In other words, by recommitment the expenditures under the illegal commitment were revived and at once came within the application of R. S., chapter 27, section 37 pertaining to notice and limitation of actions, in pauper cases.

Now, applying this section with respect to notice, which is all the opinion intended to do, then it follows that the plaintiff town had a right of action for the recovery of any of the expenditures, specified in section 42, chapter 144, "incurred within three months before notice given to the town chargeable," whether such notice was given before the date of the recommitment, or after, provided the suit was "commenced within two years after the cause of action accrued."

This cause came before the court in the first instance as already stated, to test the legality of the original commitment, and the constitutionality of R. S., chapter 144, section 42, and, as stipulated, both these questions having been decided in the affirmative, was ordered to stand for trial.

At the subsequent trial at nisi the plaintiffs, in support of their claim under the rule laid down in the opinion, that the cause came within the statute regulating the proceedings for the recovery of pauper supplies, offered in evidence a notice and letter, admitted to have been sent by the overseers of the plaintiff town and to have been received by the overseers of the defendant town, dated the 25th day of January 1904, relating solely to the proceedings of the illegal commitment and of a date long prior to the time of the recommitment. The defendant objected to the admission of this notice and letter upon two grounds. First, because the notice was given and received, and the expenses sued for were all incurred and paid for, before the date of the recommitment proceedings, and at a time when the plaintiffs could not have maintained their action against the defendants. *Kittery* v. *Dixon*, 96 Maine, 368. Second, because the notice if otherwise admissible was not sufficient in substance to meet the requirements of the statute. The presiding Justice overruled both objections, admitted the evidence and the cause comes here upon exceptions to that ruling.

The first ground of objection has already been disposed of. The notice was competent evidence. Was it sufficient? The statute requires that a notice to be sufficient shall state "the facts respecting the person chargeable." The notice and letter, to the admission of which the exceptions were taken, are as follows:

"To the Overseers of the Poor of the Town of Searsmont, in the County of Waldo, in the State of Maine:

Gentlemen:

You are hereby notified that Grace E. Farnham, age 21 years, daughter of Ansel D. Farnham, an inhabitant of your town, having fallen into distress, and in need of immediate relief in the town of Rockport, the same has been furnished by said town of Rockport on account and at the proper charge of the town of Searsmont where said Grace E. Farnham has legal settlement; you are requested to remove said Grace E. Farnham or otherwise provide for her, without delay, and to defray the expenses of her support up to this date which are — — —

Dated at Rockport, this 25th day Jan. A. D. 1904.

Yours respectfully,

FRED W. ANDREWS, (ch. bd.)

Overseer of the Poor of Rockport.

Rockport, Jan. 25th, 1904.

Overseers of the Poor, Searsmont.

Gentlemen:

Inclosed find notice account Grace E. Farnham daughter of Ansel D. Farnham. The lady above referred to was committed to the Insane Hospital for this town last Thursday. At the time of her commitment she was residing with her sister Mrs. Lufkin and upon examination after calling evidence we concluded that for her good and all others interested, we caused her to be committed to the Insane Hospital at Augusta, where we trust after a short time she may be returned to her friends.

Respectfully,

FRED W. ANDREWS,

(ch. bd.) Selectmen."

It is not claimed by the plaintiffs that the notice alone is sufficient to charge the defendants but it is contended that the notice and the explanatory letter which accompanied it are to be read together as one document, and when so construed, constitute a notice complying with all the requirements of the statute. It is well settled that the notice and letter should be construed together. No particular form of notice is required by the statute. A letter not purporting to be a notice at all which contains the essential information required by the statute is sufficient if properly addressed and signed. "The notice should contain the substance of that which the statute requires but no particular form is necessary." *Kennebunkport* v. *Buxton*, 26 Maine, 66.

It seems to us that the letter did contain a statement of the facts respecting the person chargeable as they appeared at the time to exist. But the defendant does not so much contend that the facts stated are not sufficient in themselves but that "the very important fact respecting the commitment of Grace E. Farnham is not stated in either of the notices or the letter, and that is the admitted fact that the commitment was illegal." Hence, it appears that the chief objection to the sufficiency of the notice is not that it contains an inadequate statement of facts if true, but that the statements purporting to be facts are not true, the original commitment being admitted to be illegal, and therefore no commitment at all. But the very object of the remedial statute was to cure the defects of the illegal commitment by a legal recommitment, and thus make valid all the proceedings of the illegal commitment, and place them upon precisely the same ground as if they had been legal, with respect to the liability of the defendant town.

The fact of commitment was stated in the notice. The illegality of commitment was cured by invoking the aid of the remedial statute. The commitment thus cured was the one referred to in the letter. The notice, which includes the letter, must therefore be regarded in law as having stated the facts.

Some other technical defects appear upon the face of the notices but they all seem to have been waived by the admission that "both these notices were received by the overseers of the poor of the town

of Searsmont and denials of pauper settlement on the usual printed blanks were seasonably returned to them by the Overseers of Rockport." As the defendants' counsel has raised no point upon these informalities and, as by the well settled law, they seem to have been cured by waiver, we deem it unnecessary to discuss them.

Our conclusion is that the notice and letter of January 25, when construed together, are sufficient in form and substance to meet the requirements of the statute and were properly admitted in evidence. A notice dated Dec. 28, 1904, was also admitted in evidence subject to the same objection interposed to the admission of the notice already discussed and the same reasons dispose of it.

From the exceptions it appears that the two notices admitted, cover all the items claimed by the plaintiffs in their account, and that the writ is dated within two years after the cause of action accrued; that is, within two years from the date of the first item charged in the plaintiff's account. Every item charged had also accrued before the date of the writ. The plaintiffs, therefore, regardless of the notice which was given after the date of the writ, are entitled to recover the full amount sued for. In accordance with the agreement, the entry must be,

Judgment for the plaintiff for $176.36.

QUESTIONS AND ANSWERS

QUESTIONS SUBMITTED BY THE SENATE OF THE STATE OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, MARCH 27, 1907, WITH THE ANSWERS OF THE JUSTICES THEREON.

The Legislature of Maine has by the Constitution of Maine, "full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor that of the United States."

It is for the Legislature to determine from time to time the occasion and what laws and regulations are necessary or expedient for the defense and benefit of the people; and however inconvenienced, restricted or even damaged, particular persons and corporations may be, such general laws and regulations are to be held valid unless there can be pointed out some provision in the State or United States Constitution which clearly prohibits them.

Legislation to restrict or regulate the cutting of trees on wild or uncultivated land by the owner thereof, etc., without compensation therefor to such owner, in order to prevent or diminish injurious droughts and freshets, and to protect, preserve and maintain the natural water supply of springs, streams, ponds and lakes, etc., and to prevent or diminish injurious erosion of the land and the filling up of the rivers, ponds and lakes, etc., would not operate to "take" private property within the inhibition of the Constitution.

While such legislation might restrict the owner of wild and uncultivated lands in his use of them, might delay his taking some of the product, might defer his anticipated profits and even thereby might cause him some loss of profit, it would nevertheless leave him his lands, their product and increase, untouched and without diminution of title, estate or quantity. He would still have large measure of control and large opportunity to realize values. He might suffer delay but not deprivation. While the use might be restricted, it would not be appropriated or "taken." Such legislation would be within the legislative power and would not operate as a taking of private property for which compensation must be made.

STATE OF MAINE.

IN SENATE, March 27, 1907.

Ordered: The Justices of the Supreme Judicial Court are hereby requested to give to the Senate, according to the provisions of the Constitution in this behalf, their opinion on the following questions to wit:

In order to promote the common welfare of the people of Maine by preventing or diminishing injurious droughts and freshets, and by protecting, preserving and maintaining the natural water supply of the springs, streams, ponds and lakes and of the land, and by preventing or diminishing injurious erosion of the land and the filling up of the rivers, ponds and lakes, and as an efficient means necessary to this end, has the legislature power under the Constitution.

1. By public general law to regulate or restrict the cutting or destruction of trees growing on wild or uncultivated land by the owner thereof without compensation therefor to such owner;

2. To prohibit, restrict or regulate the wanton, wasteful or unnecessary cutting or destruction of small trees growing on any wild or uncultivated land by the owner thereof, without compensation therefor to such owner, in case such small trees are of equal or greater actual value standing and remaining for their future growth than for immediate cutting, and such trees are not intended or sought to be cut for the purpose of clearing and improving such land for use or occupation in agriculture, mining, quarrying, manufacturing, or business or for pleasure purposes or for a building site; or

3. In such manner to regulate or restrict the cutting or destruction of trees growing on wild or uncultivated lands by the owners thereof as to preserve or enhance the value of such lands and trees thereon and protect and promote the interests of such owners and the common welfare of the people?

4. Is such regulation of the control, management or use of

private property a taking thereof for public uses for which compensation must be made?

In Senate Chamber Mar. 27, 1907.

Read and passed.

F. G. FARRINGTON, Secretary.

TO THE SENATE OF MAINE:

The undersigned Justices, in obedience to the requirement of the Constitution, severally give the following as their advisory opinion upon the questions of law submitted to the Justices of the Supreme Judicial Court by the Senate Order of March 27, 1907.

We find that the legislature has by the Constitution "full power to make and establish all reasonable laws and regulations for the defence and benefit of the people of this State, not repugnant to this Constitution, nor that of the United States." Const. of Maine, Art. IV. Part III. sec. 1. It is for the legislature to determine from time to time the occasion and what laws and regulations are necessary or expedient for the defence and benefit of the people; and however inconvenienced, restricted or even damaged, particular persons and corporations may be, such general laws and regulations are to be held valid unless there can be pointed out some provision in the State or United States Constitution which clearly prohibits them. These we understand to be universally accepted principles of constitutional law.

As to the proposed laws and regulations named in the Senate order, the only provision of the United States Constitution having any possible application to such legislation by a State would seem to be that in the XIVth Amendment. As to that provision we think it sufficient to quote the language of the United States Supreme Court in *Barbier* v. *Connolly*, 113 U. S. 27, where, speaking of the XIVth Amendment, the court said: "But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of a State, sometimes termed its 'police power', to prescribe regulations to promote the health, peace, morals, education and good order of its people, and to legislate so as to increase the industries of the State, develop its

resources and add to its wealth and prosperity." It may be added that the proposed laws and regulations would not discriminate between persons or corporations but only between things and situations, with a classification not merely arbitrary but based on real differences in the nature, situation and condition of things.

We think the only provisions in the State Constitution that could be reasonably invoked against the proposed laws and regulations are the guaranteed right of "acquiring, possessing and defending property", and the provision that "Private property shall not be taken for public uses without just compensation." (Dec. of Rights, secs. 1 and 21). If, however, the proposed legislation would not conflict with the latter provision, it evidently would not with the former; hence only the latter one need be considered.

The question of what constitutes a "taking" of private property in the constitutional sense of the term has been much considered and variously decided. In the earlier cases and in the older States the provision has been construed strictly. In some States in later cases it has been construed more widely, to include legislation formerly not considered within the provision. Still more recently, however, the tendency seems to be back to the principles enunciated in the earlier cases. In Massachusetts, one of the earliest States to adopt the constitutional provision, and in Maine, adopting the same provision in succession, the courts have uniformly considered that it was to be construed strictly as against the police power of the legislature.

Commonwealth v. *Tewksbury*, 11 Met. 55, decided in 1846, was a case where the legislature prohibited the owners from removing "any stones, gravel or sand" from their beaches in Chelsea as necessary for the protection of Boston Harbor. The Court held that the statute did not operate to "take" property within the meaning of the Constitution, but was "a just and legitimate exercise of the power of the legislature to regulate and restrain such particular use of property as would be inconsistent with or injurious to the rights of the public." *Commonwealth* v. *Alger*, 7 Cush. 53, decided in 1851, was a case where the defendant was prohibited by statute from erecting and maintaining a wharf on his own land (flats) beyond certain

fixed lines. The court held that the defendant's title to the land (flats) was a fee simple, and that but for the statute he would have had full right to erect and maintain wharves upon any part of it where they would not obstruct navigation. It was not claimed that the proposed wharf would obstruct navigation, but rather admitted that it would not. The court further held, however, that the statute was within the legislative power and not forbidden by any clause in the Constitution. The question was considered at length in an opinion by Chief Justice Shaw, and the principle stated as follows, viz. (p. 84).

"We think it a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this Commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government and held subject to those general regulations which are necessary for the common good and general welfare. Rights of property like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from right of eminent domain," etc.

In the case *Wadleigh* v. *Gilman*, 12 Maine, 403, decided in 1835, only fifteen years after the adoption of our Constitution, there was upon the plaintiff's land a wooden building. A city ordinance was passed by legislative authority prohibiting the erection of wooden buildings within certain limits which included the plaintiff's building. After the passage of the ordinance the plaintiff moved his building to another place within the same inhibited limits. The defendant as City Marshal, acting under the ordinance, entered upon the plaintiff's land and took the building down. The court

held the ordinance valid and the defendant protected, and declared as follows, p. 405: "Police regulations may forbid such a use and such modifications of private property as would prove injurious to the citizens generally. This is one of the benefits which men derive from associating in communities. It may sometimes occasion inconvenience to an individual, but he has compensation in participating in the general advantage. Laws of this character are unquestionably within the scope of the legislative power without impairing any constitutional provision. It does not appropriate private property to public uses, but merely regulates its enjoyment." In *Cushman* v. *Smith*, 34 Maine, 247, decided fifteen years later, in an elaborate opinion by Chief Justice SHEPLEY, the court said of the contitutional provision in question: (p. 258.) "The design appears to have been simply to declare that private property shall not be changed to public property, nor transferred from the owners to others for public use without just compensation." In *Jordan* v. *Woodward*, 40 Maine, 317, it was said by the court at p. 324: "Strictly speaking, private property can only be said to have been taken for public uses when it has been so appropriated that the public have certain and well defined rights to that use secured, as the right to use the public highway, the turnpike, the ferry, the railroad and the like." The same doctrine was recognized in *Preston* v. *Drew*, 33 Maine, 558; *State* v. *Gurney*, 37 Maine, 156; *Boston and Maine R. R. Co.* v. *County Commissioners*, 79 Maine, 386; and as late as 1905 in *State* v. *Robb*, 100 Maine, 180.

There are two reasons of great weight for applying this strict construction of the constitutional provision to property in land: 1st, such property is not the result of productive labor, but is derived solely from the State itself, the original owner; 2nd, the amount of land being incapable of increase, if the owners of large tracts can waste them at will without State restriction, the State and its people may be helplessly impoverished and one great purpose of government defeated.

Regarding the question submitted in the light of the doctrine above stated (being that of Maine and Massachusetts at least) we do not think the proposed legislation would operate to "take"

private property within the inhibition of the Constitution. While it might restrict the owner of wild and uncultivated lands in his use of them, might delay his taking some of the product, might defer his anticipated profits, and even thereby might cause him some loss of profit, it would nevertheless leave him his lands, their product and increase, untouched, and without diminution of title, estate or quantity. He would still have large measure of control and large opportunity to realize values. He might suffer delay but not deprivation. While the use might be restricted, it would not be appropriated or "taken."

In the following cases, restrictive statutes for the protection of property and other material interests of the people were held to be within the police power, and not a taking of private property, viz: Limiting the height of buildings though the owner owns usque ad coelum. *Welch* v. *Swasey*, 193 Mass. 364. Prohibiting the erection of wooden buildings within specified limits, *Wadleigh* v. *Gilman*, 12 Maine, 403. Even when the owner had begun to erect the building before the statute was enacted. *Salem* v. *Maynes*, 123 Mass. 372. Authorizing the destruction of buildings without compensation to prevent the spread of a conflagration. *Am. Print Works* v. *Lawrence*, 23 N. J. L. 9. Prohibiting the further use of buildings and appliances for brewing purposes although they had been erected and fitted for that purpose when brewing was a lawful business. *Mugler* v. *Kansas City*, 123 U. S. 623. Prohibiting the erection of fences on one's own land to gratify spite against others. *Karasek* v. *Peier*, (Wash.) 50 L. R. A. 345; *Smith* v. *Morse*, 148 Mass. 407. Prohibiting the wasteful burning of natural gas by the owner. *Townsend* v. *State*, (Ind.) 37 L. R. A. 294. Prohibiting the use of artificial means by the owners of gas wells to increase the natural flow of the gas from them. *Manufacturer's Gas Co.* v. *Indiana Natural Gas Co.*, 155 Ind. 467, 50 L. R. A. 768. Authorizing dams for the purpose of re-claiming swamp lands where the effect was to oblige land owners to construct and maintain dikes to protect their lands from the water raised. *Manigault* v. *Springs*, 199 U. S. 473. Prohibiting one from allowing weeds to grow on his own land. *St. Louis* v. *Gault*, 179

Mo. 8, 63 L. R. A. 778. Limiting the quantity of land any person or family may cultivate within city limits. *Summerville* v. *Presley*, 33 S. C. 56. Prohibiting the flow of water from a private artesian well except for certain specified beneficial purposes, as irrigation or domestic use. Ex parte Elam, Cal. 91 Pac. Rep. 811. In *Windsor* v. *State*, (Md.) 64 At. Rep. 288, a statute restricted owners of private oyster beds in taking oysters from them. It was held constitutional and not a taking of private property. The court, quoting from Judge Story, said: "Property of every kind is held subject to those regulations which are necessary for the common good and general welfare. And the legislature has the power to define the mode and manner in which one may use his property."

The foregoing considerations lead us to the opinion at present that the proposed legislation, for the purposes and with the limitations named in the Senate order, would be within the legislative power and would not operate as a taking of private property for which compensation must be made.

March 10, 1908. Respectfully submitted,

LUCILIUS A. EMERY
WM. P. WHITEHOUSE
SEWALL C. STROUT
HENRY C. PEABODY
ALBERT M. SPEAR
LESLIE C. CORNISH

Mr. Justice WOODARD, one of the Justices of the Court when the Senate order was passed, died before the foregoing opinion could be prepared. His successor, Mr. Justice KING, was not appointed for several months after the passage of the Senate order and holds that, therefore, the Senate has not required any opinion from him.

LUCILIUS A. EMERY.

TO THE HONORABLE SENATE OF THE SEVENTY THIRD LEGISLATURE.

By an order of the Senate passed March 27, 1907, the Justices of the Supreme Judicial Court were requested to give to the Senate their opinion on certain questions, involving the power of the legislature, under the constitution, to prohibit, regulate or restrict the cutting or destruction of trees growing on wild or uncultivated land by the owner thereof without compensation therefor to the owner, in order, as an efficient means necessary to the end, to promote the common welfare of the people of Maine by preventing or diminishing injurious droughts and freshets, and by protecting, preserving and maintaining the natural water supply of the springs, streams, ponds and lakes and of the land, and by preventing or diminishing injurious erosion of the land, and the filling up of the rivers, ponds and lakes. The Seventy Third Legislature adjourned finally on the following day, March 28, 1907, and the order was received by me April 6, 1907, nine days after the adjournment of the Legislature. I now respectfully make the following answer to the order.

The constitution provides, Art. VI. sect. 3, that the Justices "shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the Governor, Council, Senate or House of Representatives." By this constitutional provision, of course, the Justices are not obliged to give their opinion unless the inquiries relate to "important questions of law", nor unless they are made upon "solemn occasions." And as I shall undertake briefly to show hereinafter, if the Justices are not obliged to answer the questions, if they do not relate to important questions of law, or if the occasions are not solemn, it would be improper and inexpedient for them to give their opinion. And if this be so, they have no right to give an opinion, and may properly decline and should decline to do so.

So that I must first inquire whether the constitutional exigency has arisen, which requires, or in other words, which makes it proper for me to give my opinion on the questions presented. And this involves the further inquiry, who is to decide? Is the order of the Senate conclusive upon the Justices, or have the Justices, each for

himself, an independent right, equal with that of the Senate, to determine the Question? These alternatives were very carefully considered by all the Justices in their opinions in answer to an order of the House of Representatives, found in 95 Maine, 564. And a majority of those then in commission were firmly of the opinion that the Justices, each for himself, must determine whether the condition exists which requires the giving of an opinion. Among the Justices who were then of that opinion were the late Chief Justice WISWELL, and Justice FOGLER, both since deceased, and Justice POWERS, since resigned. The conclusions thus expressed by the majority of the Justices were based not only upon a careful analysis of the constitutional provision itself and the relations existing between the legislative and judicial departments of the government, but also upon the unanimous opinion of the Justices who composed the court in 1891, 85 Maine, 546, as well as upon the opinions of the courts in Massachusetts and New Hampshire, under similar constitutional provisions, 122 Mass. 600; 126 Mass. 557; 148 Mass. 623; 56 N. H. 574; 67 N. H. 600.

But, since I have been advised that I alone of the present Justices hesitate to answer the questions submitted to by the Senate, I have carefully reviewed the constitutional questions involved, and it is with sincere regret, after reconsideration and much reflection, that I feel compelled to say that the opinion of the majority of the Justices in 95 Maine, 564, and the reasons given therefor, which I then subscribed, but which I need not repeat, seem to me to be sound and compelling, and that I cannot do otherwise than adhere to them. When under the constitution I am asked, as a member of that court which the constitution makes both independent and co-ordinate with the other branches of the government, and of that court whose interpretation of the Constitution is binding upon all the branches of the government, to give my opinion to either of those branches, I think I am bound to interpret what the constitution means by "important questions of law", and by "solemn occasions", and by that interpretation to determine whether the question is important and the occasion solemn.

There can be no doubt that the order under consideration pre-

sents important questions of constitutional law. The only question is, is the occasion solemn? I make no question but that when either branch of the legislature asks the opinion of the Justices touching pending legislation, or it may be even, upon matters concerning which that branch may be expected to act, and can act, it is a solemn occasion within the meaning of the constitution. On the other hand it is my conviction that when there is no pending legislation touching which the opinion of the Justices is asked, or when it is demonstrably clear that the body asking the opinion neither expects nor intends to act upon it, and therefore has no occasion to be advised, it is not a solemn occasion.

I cannot conceive it to have been the intention of the framers of the constitution, or of the people who adopted it, that the Justices should be required by a branch of the legislature to give their opinion on questions of law merely for the information of the public, or for the possible use of future legislatures. Each legislature will judge for itself what advice it needs, and what subjects it will legislate upon.

I hold that it is not a solemn occasion, within the meaning of the constitution, unless the body asking the questions is in a position to act later in the light of such opinions as may be given. The constitution implies, I think, that the opinion may be of some use to the body requiring it, in the performance of its constitutional functions. If not, there is no occasion, solemn or otherwise, for the opinion.

As already stated, the order now being considered was passed March 27. The legislature adjourned March 28. The legislative history of these two days, which is now a part of the recorded history of the State, shows that the legislature was on the eve of adjournment when the order was passed. It had so far completed its work, and the hour of expected final adjournment was so near, that by no possibility could the opinion of the Justices have been obtained before such adjournment. And apparently there was not then, nor has there been since, any reason to expect the legislature to be reconvened. I am therefore, I think, compelled to conclude that the Senate requested the opinion of the Justices not for use in

any expected action, to be taken by itself, but for the future use of the public, or of future legislatures. If so, I think the occasion was not a solemn one. And in this connection, I refer again to the opinion of the majority of the Justices in 95 Maine, 564, and to the reasons given and to the authorities cited therein. And I may add, that even if it was a solemn occasion when the order was passed, it had ceased to be such nine days before the order came to me.

To my mind it is manifestly improper for the Justice to express their opinions on questions of law concerning the right of citizens, except in the performance of their judicial functions, unless it be in the case of a constitutional solemn occasion as I have conceived it to be defined. I think that this provision of the constitution should be read and construed in the light of that fundamental provision of law that the citizen shall not be deprived of his life, liberty, property or privileges, except by the "law of the land," that law "which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial."

Any answers to the questions before me will vitally affect the interests of many hundreds of property owners, and a vast amount of property. To lay down a rule which deprives a man of his property or restricts him in the use of it, is in effect to deprive him of his property. But the Justices are asked to determine whether such rule may be laid down. They are asked to do this under circumstances which preclude argument. The persons to be effected are virtually to lose the protection of the law of the land. They are not suitors. They are not to be heard before they are comdemned. There is to be no inquiry, and judgment is to be rendered before, and not after trial.

The answer usually given to this proposition is that the Justices are not bound by their opinions thus given, that they are opinions simply, and not law, and that when actual cases arise, and suitors are in court and are heard, the Justices as a court are at perfect liberty to lay down such doctrine and render such judgment as may then seem to them meet. It may be so. Nevertheless, it is my belief that while human and judicial nature remain as we know them to be, the opinion of the Justices will quite likely be the judg-

ment of the court. And in any event, it must be said that the right of the citizen is likely to be prejudiced, if not prejudged.

These considerations, of course, should not and do not prevent full force being given that provision of the constitution which is under consideration. Either branch of the legislature may require the opinion of the Justices upon solemn occasions, and in such case the citizen must be content to be prejudiced, and practically prejudged. And, no doubt, when such opinions are asked upon such solemn occasions, as I understand the constitution to mean, they may so serve the public good, that individual interests ought to yield the rightful advantage of being heard.

But the considerations I have named do demonstrate, I think, the expediency and necessity of limiting the giving of these extra judicial opinions to such occasions as fall fairly within the spirit as well as the language of the constitution. And they emphasize what seems to me to be the impropriety of giving such opinions, unless when required by the constitution, as well as when requested by another branch of the government.

With great deference to your Honorable body, the undersigned, a Justice of the Supreme Judicial Court, for the reasons stated, feels compelled most respectfully to decline to give an opinion upon the questions submitted.

March 2, 1908.

ALBERT R. SAVAGE.

REVISED RULES

OF THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

At the June term, A. D. 1908, of the Supreme Judicial Court held at Portland for the State, all the Justices of the Court being present,

Ordered—That the following rules and orders be established and recorded as the rules respecting the modes of trial and the conduct of business in suits at law and in equity.

SUITS AT LAW AND IN THE LAW COURT.

I.

ADMISSION OF ATTORNEYS OF THE COURTS OF OTHER STATES.

Members of the bar of other States may be admitted to practice in the manner and upon the conditions prescribed by statute.

II.

TIME OF THE ENTRY OF ACTIONS.

No civil action shall be entered after the first day of the term, unless by consent of the adverse party and by leave of the court,

or unless the court shall allow the same upon proof that the entry was prevented by inevitable accident or other sufficient causes; and in all cases the Christian and surname of the parties and of each trustee shall be entered upon the docket. Writs are to be filed before entry of the actions and shall not be taken from the files, except by special leave of court. Any action may be made a mis-entry at any time during the first term, upon proof that the action was settled before the sitting of the court.

III.

ENTRY OF THE ATTORNEY'S NAME ON THE CLERK'S DOCKET. CHANGE OF ATTORNEY.

Upon the entry of every action or appeal, the name of the plaintiff's or appellant's attorney shall be entered at the same time on the docket; and after entry of the action or appeal, and within the time allowed by law, the attorney of the defendant or appellee shall cause his name to be entered on the same docket as such attorney, and if it be not so entered the defendant or appellee may be defaulted. If either party shall change his attorney, pending the suit, the name of the new attorney shall be substituted on the docket for that of the former attorney and notice thereof given to the adverse party in writing. Until such notice of a change of an attorney, all notices given to or by the attorney first appointed shall be considered in all respects as notice to or from his client, excepting only such cases in which by law the notice is required to be given to the party personally. Nothing in this rule, however, shall be construed to prevent either party from appearing for himself in the manner provided by law, but subject to all the rules governing attorneys in like cases so far as applicable.

IV.

AMENDMENTS IN MATTERS OF FORM.

Amendments in matters of form will be allowed, as of course, on motion; but if the defect or want of form be shown as cause of demurrer, the court will impose terms on the party amending.

V.

AMENDMENTS IN MATTERS OF SUBSTANCE.

Amendments in matters of substance may be made, in the discretion of the court, on payment of costs or such other terms as the court shall impose; but if applied for after joinder of an issue of fact or law, the court will in its discretion refuse the application or grant it upon special terms; and when either party amends, the other party shall be entitled to amend if his case requires it. No new count nor amendment of a declaration will be allowed, unless it be consistent with the original declaration and for the same cause of action.

VI.

PLEAS AND MOTIONS IN ABATEMENT.

Pleas and motions in abatement, or to the jurisdiction, in actions originally brought in this court, must be filed within two days after the entry of the action, the day of the entry to be reckoned as one, and if alleging matter of fact not apparent on the face of the record, shall be verified by affidavit.

VII.

OBTAINING A RULE TO PLEAD.

Either party may obtain a rule on the other to plead, reply, rejoin, etc., within a given time to be prescribed by the court; and if the party so required neglect to file his pleadings at the time, all his prior pleadings shall be struck out and judgment entered of nonsuit or default, as the case may require, unless the court for good cause shown shall enlarge the rule.

VIII.

TIME OF FILING AMENDMENTS OR PLEADINGS.

When an action shall be continued with leave to amend the declaration or pleadings, or for the purpose of making a special plea, replication, etc., if no time be expressly assigned for filing

such amendment or pleadings, the same shall be filed in the clerk's office by the middle of the vacation after the term when the order is made; and in such case the adverse party shall file his plea to the amended declaration, or his answer to the plea, replication, etc., as the case may be, by the first day of the term to which the action is continued. If either party neglect to comply with this rule, all his prior pleadings shall be struck out and judgment entered of nonsuit or default, as the case may require, unless the court for good cause shown shall allow further time for filing such amendment, or other pleadings.

IX.

SPECIFICATIONS OF DEFENSE.

Parties pleading the general issue may be required to file, in addition thereto, a brief specification of the nature and grounds of their defense, and shall in all cases be confined on the trial of the action to the grounds of defense therein set forth; and all matters set forth in the writ and declaration which are not specifically denied shall be regarded as admitted for the purposes of the trial.

X.

DENIAL OF SIGNATURES AND PARTNERSHIPS.

No party shall be permitted at the trial of any cause to call for proof of the signature or execution of any paper declared on or filed in set-off, or mentioned in specifications filed by either party, or of the existence of a partnership alleged in the writ, declaration or specifications of defense, when the names of the members thereof are set forth, unless such party, at least ten days before such trial, shall make and file affidavit that he has reason to believe, and does believe, that such signature or execution is not genuine, or that said paper has been mutilated or altered since it was executed, or that such partnership does not exist. A witness examined in chief only as to the signature to or execution of a paper, shall be cross examined by the adverse party only as to such signature or execution.

XI.

SPECIFICATIONS BY PLAINTIFF.

In actions of assumpsit on the common counts, a specification of the matters to be proved in support thereof shall be filed, on motion of the defendant, within such time as the court orders. One copy of such specification, and one copy of the account in actions on account annexed, shall be furnished for the court, one for the jury and one for the adverse party.

XII.

TRUSTEE DISCLOSURES.

In cases commenced by trustee process, when any trustee shall present himself for examination, he or his attorney shall give written notice thereof to the attorney for the plaintiff, or in his absence cause the same to be noted on the docket; and upon motion the court may fix a time for the disclosure to be made. Before the disclosure is presented to the court for adjudication, there shall be minuted upon the back thereof the names of the counsel for the plaintiff, and for such trustee, with the date of the service of the writ upon him and the number of the action upon the docket.

XIII.

COSTS UPON CONTINUANCE.

Unless for cause shown, no costs shall be allowed either party for any term at nisi prius when a case is continued by agreement of parties entered on the docket. When a case is under an order of reference to a referee or auditor, costs shall be allowed for the terms at which the rule is issued and the report filed, but not for the intervening terms. Costs shall be allowed for only one term in the Law Court.

XIV.

TIME FOR MAKING MOTIONS FOR CONTINUANCE.

Motions for continuance of any civil action shall be made at the opening of the court on the morning of the second day of the term

unless the cause shall come in course to be disposed of in the order of the docket on the first day. But when the cause or ground of the motion shall first exist or become known to the party after the time prescribed by this rule, the motion shall be made as soon afterward as it can be made, according to the course of the court; and whenever an action is continued on such motion, after the time above prescribed, the party making the motion shall not be allowed any costs for his travel and attendance for that term, unless the continuance is ordered on account of some fault or misconduct in the adverse party.

XV.

AFFIDAVIT TO SUPPORT MOTIONS FOR CONTINUANCE.

No motion for a continuance based on the want of material testimony will be sustained, unless supported by an affidavit which shall state the name of the witness, if known, whose testimony is wanted, the particular facts he is expected to prove, with the grounds of such expectation, and the endeavors and means which have been used to procure his attendance or deposition, to the end that the court may judge whether due diligence has been used for that purpose.

No counter affidavit shall be admitted to contradict the statement of what the absent witness is expected to prove; but any of the other facts stated in such affidavit may be disproved by the party objecting to the continuance. No action shall be continued on such motion if the adverse party will admit that the absent witness would, if present, testify to the facts stated in the affidavit and will agree that the same shall be received and considered as evidence on the trial in like manner as if the witness were present and had testified thereto. Such agreement shall be made in writing at the foot of the affidavit, and signed by the party, or his attorney. The same rule shall apply, *mutatis mutandis*, when the motion is based on the want of any other material evidence that might be used on the trial.

XVI.

EVIDENCE TO SUPPORT MOTIONS BASED ON FACTS.

No motion based on facts will be heard unless the facts are verified by affidavit, or are apparent from the record or from the papers on file in the case, or are agreed and stated in writing signed by the parties or their attorneys. The same rule will be applied as to all facts relied on in opposing any motion.

XVII.

MOTIONS FOR NEW TRIALS.

Motions for new trials must be in writing and assign the reasons therefor.

When a motion is made to have a verdict set aside as against law or the evidence, it must be filed during the term at which the verdict is rendered. The party making it shall cause a report of the whole evidence in the case to be prepared and present the same to the presiding Justice for his signature within such time as he shall by special order direct, and, if no such special order is made, it must be done within ten days after the adjournment of the court; if not so done, the Justice shall not be required to sign it and the motion may be regarded as withdrawn, and the clerk, at a subsequent term, may be directed to enter judgment on the verdict.

When a motion for new trial is made for any other cause, it may be filed with the clerk at any time before final judgment, and the clerk shall give immediate written notice thereof by mail or otherwise to the adverse party or his attorney. The evidence in support thereof shall be taken within such time and in such manner as the court at the next ensuing term shall order, or the motion will be regarded as withdrawn.

XVIII.

EXCEPTIONS.

Exceptions to the admission or exclusion of evidence must be noted at the time the ruling is made, or all objections thereto will be regarded as waived.

Exceptions to any opinion, direction or omission of the presiding Justice in his charge to the jury must be noted before the jury retire, or all objections thereto will be regarded as waived.

XIX.

MOTIONS IN ARREST OF JUDGMENT IN CRIMINAL CASES.

Motions in arrest of judgment in criminal cases shall be filed and presented to the court for adjudication during the term at which the accused has been found guilty, whether exceptions be or be not filed and allowed; and if not so presented, the right to file the same shall be considered as waived.

XX.

TIME OF FILING MOTIONS, PRESENTING PETITIONS, ETC.

Motions, petitions, reports of referees, applications for commissioners to take depositions, surveys, or for views by the jury in cases touching the realty, and all like applications, shall be made and presented at the opening of the court on the morning of the second day of the term; *provided*, that when the cause or ground of such motion or other applications shall first exist or become known to the party after the time in this rule appointed for making the same, it may be made at any subsequent time. But motions or applications such as from their nature require no notice previous to granting the same may be made at the opening of the court on the morning of each day.

XXI.

OBJECTIONS TO REPORTS.

Objections to any report offered to the court for acceptance shall be made in writing and filed with the clerk, and shall set forth specifically the grounds of the objections; and these only shall be considered by the court.

XXII.

NOTICE PREVIOUS TO MOTIONS.

When any motion is made in relation to any civil action at the times specifically assigned for such motions by these rules, no previous notice need be given to the adverse party. But if notice has not been given the court will allow time to oppose the motion if the case shall require it. When, however, for any special cause, such motion may be made at a subsequent time, it will not be heard unless seasonable notice thereof shall have been given to the adverse party.

XXIII.

DEPOSITIONS TAKEN IN TERM TIME.

Depositions may be taken for the causes and in the manner by law prescribed, in term time as well as in vacation, *provided* they be taken in the town in which the court is holden and at an hour when the court is not actually in session. Neither party shall be required during term time to attend the taking of a deposition at any other time than is above provided, unless the court upon good cause shown shall specially order the deposition to be taken.

XXIV.

COMMISSIONS TO TAKE DEPOSITIONS.

The court will grant commissions to take the depositions of witnesses and will appoint the commissioners. In vacation a commission may be issued upon application to any Justice of the court in the same manner as may be granted in term time; or either party, upon application to the clerk, may obtain a like commission; but, in the latter case, unless the parties shall agree on the person to whom the commission shall issue, the commission shall be directed to any Judge of any court of record. In each case the evidence by the testimony of witnesses shall be taken upon interrogatories to be filed in the clerk's office by the party applying for the commission, and upon such cross interrogatories as shall be filed by the adverse party. A copy of all the interrogatories shall be annexed to the

deposition. No such commission shall issue except upon interrogatories filed as aforesaid by the party applying and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within fourteen days from the service of such notice.

No deposition taken out of the State without such commission shall be admitted in evidence unless the same was taken by some justice of the peace, notary public, or other officer legally empowered to take depositions or affidavits in the State or country in which the deposition was taken, nor unless the adverse party was present, or was duly and seasonably notified, but unreasonably neglected to attend.

XXV.

FILING DEPOSITIONS.

Depositions shall be opened and filed by the clerk at the term for which they are taken. If the action in which they are to be used shall be continued, such depositions shall remain on file and be subject to objections when offered at the trial as at the term when filed; and if not so left on the files they shall not be used by the party who originally produced them. The party producing a deposition may, if he see fit, withdraw it during the same term in which it is originally filed, in which case it shall not be used by either party.

XXVI.

USE OF COPIES OF DEEDS.

In actions touching the realty, office copies of deeds material to the issue, from the registry of deeds, may be read in evidence without proof of their execution where the party offering the same is not a grantee in the deed, nor claims as heir, nor justifies as servant of the grantee or his heirs.

XXVII.

NOTICE TO PRODUCE WRITTEN EVIDENCE.

Where written evidence is in the hands of the adverse party, no evidence of its contents will be admitted unless previous notice to

produce it on trial shall have been given to such adverse party or his attorney, nor will counsel be allowed to comment upon a refusal to produce such evidence, without first proving such notice.

XXVIII.

TRIAL LIST AND ORDER OF TRIALS.

Immediately after the call of the continued docket, a trial list of all actions to be tried by the jury shall be made, and a time assigned for the trial of each action upon the list, and all other actions shall be tried or otherwise disposed of in the order in which they stand upon the docket. Any action shall be considered in order for trial at the return term, when the party desiring it shall have given written notice thereof to the adverse party. Such notice must be given by a plaintiff thirty days, and by a defendant ten days, before the sitting of the court. Cases brought up from an inferior court by appeal or by removal shall be in order for trial at the term of entry without such notice.

XXIX.

COPIES FOR THE LAW COURT.

No cause standing for oral argument on the law docket will be heard until each of the sitting Justices has been furnished with a copy of the case, printed or fairly and legibly written or typewritten on good paper of the size of 8 x 10 1-2 inches, containing the substance of all the material pleadings, facts and documents on which the parties rely.

One copy only of the case will be required in cases submitted upon written arguments or briefs not read to the court.

In cases of facts agreed and stated by the parties, or reported by consent of the parties, it shall be the duty of the plaintiff to furnish the papers or abstracts for the court; and in all other cases the same shall be done by the party who moves for a new trial, or who holds the affirmative upon the question to be argued. If the party whose duty it is to furnish the papers neglects so to do, the adverse

party may furnish them. If the party whose duty it is neglects to furnish them, as required by this rule, he shall not have any costs for that term, and further he shall be liable to be nonsuited, defaulted, or have judgment entered against him for want of prosecution, or such other judgment as the case may require.

XXX.

BRIEFS FOR THE LAW COURT BEFORE ORAL ARGUMENT.

Counsel for each party, before or at the commencement of the oral argument of each case, shall furnish to each sitting Justice and also to the reporter of decisions a concise, succinct and separate brief or summary of all the points of law to be made in the argument, noting under each point the authorities to be cited to sustain it; and, in cases on report, facts agreed, or on a motion for a new trial, or on appeal in equity, a concise brief or summary of the facts as claimed, but not a recital of the evidence.

Such briefs and all written arguments shall be printed or fairly and legibly written or typewritten, on good paper, of the size of 8 x 10 1-2 inches.

In cases standing for oral argument, each party shall also file a copy of such brief or summary, for the use of the adverse party, with the clerk of the Law Court, or furnish the same to opposing counsel within the following times: for the Augusta and Bangor terms, two days before the opening of court; for the Portland term, two days before the opening of the term in cases from Androscoggin, Aroostook, Cumberland, Franklin, Hancock and Kennebec counties; on or before the fifth day of the term in cases from Knox, Lincoln, Oxford, Penobscot and Piscataquis counties; and on or before the tenth day of the term in cases from Sagadahoc, Somerset, Waldo, Washington and York counties; unless in any case the time is extended by the court for good cause.

If both parties have neglected to comply with this rule, the case, when it is reached in its order on the docket, will be continued, or the parties will be ordered to argue in writing, or judgment will be immediately entered at the discretion of the court. If one party

has complied with the rule, and the other has not, only the party complying will be heard in oral argument, and the other party will be ordered to argue in writing, or the case may be decided without argument by the other party, at the discretion of the court.

XXXI.

TAXATION OF COSTS.

Bills of costs shall be taxed by the clerk upon a bill to be made out by the party entitled to them, if he shall present such bill; otherwise upon inspection of the proceedings and files. No costs shall be taxed without notice to the adverse party to be present, provided he shall have notified the clerk in writing of his desire to be present at the taxation thereof.

XXXII.

DAY OF RENDITION OF JUDGMENT.

All judgments on whatever day given shall date and be entered as of the last day of the term unless upon written motion stating the reason therefor an earlier day be specially ordered.

XXXIII.

CUSTODY OF PAPERS BY THE CLERK.

The clerk shall be answerable for all records and papers filed in court, or in his office; and they shall not be lent by him, nor taken from his custody, unless by special order of court; but the parties may at all times have copies. No original writ or process filed in the clerk's office shall be taken from the files for the purpose of service, but attested copies thereof shall be made for that purpose and the expense thereof shall be included in the taxable costs. Depositions may be withdrawn by the party producing them at the same term at which they are filed; but while remaining on the files they shall be open to the inspection of either party at all reasonable hours.

XXXIV.

FILING PAPERS AND RECORDING JUDGMENTS.

In order to enable the clerks to make up and complete their records within the time prescribed by law, it shall be the duty of the prevailing party forthwith to file with the clerk all papers and documents necessary to enable him to make up and enter the judgment and to complete the record of the case. If the same are not so filed within three months after judgment shall have been ordered, the clerk shall make a memorandum of the fact on the record, and the judgment shall not be afterwards recorded unless upon a petition to the court at a subsequent term and after notice to the adverse party, the court shall order it to be recorded. No execution shall issue until the papers are filed as aforesaid. When a judgment shall be recorded upon such petition the clerk shall enter the same, together with the order of court for recording it, among the records of the term in which the order is passed, with apt references in the index and book of records of the term in which the judgment was awarded, so that the same may be readily found. When so recorded the judgment shall be considered in all respects as of the term in which it was originally awarded. The party delinquent in such case shall pay to the clerk the costs of recording the judgment anew, the costs on the petition and also the costs of the adverse party, if he shall attend to answer thereto.

XXXV.

WRITS OF VENIRE FACIAS.

Every venire facias shall be made returnable into the clerk's office by ten o'clock in the forenoon of the first day of the term, and the jurors shall be required to attend at that time, unless some Justice of the court shall designate a different day or hour, and in such case the venire shall specify such day and hour. Venires issued in term time may be made returnable forthwith or upon any day or hour as ordered by the court.

XXXVI.

CAPIAS UPON INDICTMENTS AND SCIRE FACIAS UPON RECOGNIZANCES.

On indictments found by the grand jury, the clerk shall, ex-officio, issue a capias without delay. In vacation, he shall also issue capias against respondents not under bail, when requested by the county attorney. When a respondent has been sentenced to imprisonment but the mittimus has been stayed pending exceptions, or when a prisoner has been admitted to bail awaiting the decision of the Law Court on his exceptions, the clerk upon receipt of the certificate of decision of the Law Court overruling the exceptions shall issue the mittimus forthwith.

When default is made by any party under recognizance in any criminal proceeding, the clerk shall in like manner issue a scire facias thereon, returnable to the next term, unless the court shall make a special order to the contrary and when not otherwise provided by statute.

XXXVII.

DECISION OF CASES WHERE THERE IS DISAGREEMENT.

In case of a disagreement of the members of the court in a cause argued orally or otherwise, the papers in the case shall be submitted to the members of the court not present at the term; and the decision shall be made by all members of the court, unless the counsel, or either of them, at the term when the case is entered, shall enter their dissent thereto upon the docket.

XXXVIII.

EXAMINATION OF WITNESSES, ETC.

The examination and cross-examination of each witness shall be conducted by one counsel only on each side, except by special leave of the 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 the court.

XXXIX.

ORDER OF EVIDENCE.

A party having rested his case cannot afterward introduce further evidence except in rebuttal, unless by leave of the court.

XL.

LIMITATION OF TIME FOR ARGUMENT.

In all trials of causes, whether by jury or by the court, the closing arguments of the counsel of the respective parties shall be limited to one hour on each side, unless before the commencement of the arguments, for good cause, the court shall allow further time, which shall in all cases be fixed and definite.

Oral arguments before the Law Court, including the reading of briefs and arguments in reply, are limited to one hour for each side, unless for cause shown the court shall fix a longer time before the arguments are begun.

XLI.

ATTORNEYS NOT TO BE BAIL NOR WITNESSES.

No attorney shall give bail nor recognize as principal or surety in any criminal matter in which he is employed as counsel or attorney, nor shall he become bail in any civil suit.

No attorney or counsellor shall be permitted to take any part in the conduct of a cause before a jury in which he is a witness for his client, except by special leave of the court.

XLII.

ASSESSMENT OF DAMAGES BY CLERK.

When the defendant is defaulted by agreement to be heard in damages by the clerk or an assessor instead of the presiding Justice or a jury, the clerk or assessor may, on reasonable notice, hear the parties in vacation and assess the damages; and judgment may be entered on such assessment as of the term of the default without the right of a party aggrieved to have the assessment returned to the next term for acceptance or rejection, unless such right is reserved.

XLIII.

ESTABLISHING TRUTH OF EXCEPTIONS.

A party desiring to establish before the Law Court the truth of exceptions presented to a Justice at nisi prius and not allowed by him shall within ten days after notice of refusal to allow them file in the court where they were taken his petition supported by affidavit and setting forth in full the bill of exceptions presented and all material facts relating thereto, and give a copy thereof to the opposite party or his attorney of record. A transcript of so much of the official stenographer's notes as relates to the exceptions must be filed with the petition. The affidavit may be made by the party or his attorney of record but must be positive, based upon actual knowledge and not upon information or belief.

Within ten days after being served with a copy of the petition the opposite party may if he desire file in the same court an answer verified by a similar affidavit and setting forth any material facts against the petition.

Upon motion of either party any Justice of the court may appoint a commissioner to take the depositions of such witnesses as may be produced by either party, the depositions to be filed in the court where the exceptions were taken.

The case thus made shall be entered and heard at the next law term upon certified copies as in other cases. If the truth of the exceptions be established they will be heard and judgment rendered thereon as if originally allowed.

XLIV.

DISPOSITION OF DORMANT CASES, ETC.

Cases remaining on the docket for a period of two years or more with nothing done, shall be dismissed for want of prosecution unless good cause be shown to the contrary. Motions for further continuance for judgment after the term of the default, must be in writing stating the reasons therefor. Motions for renewal of orders of notice must also be in writing stating the reasons why the former order was not complied with.

XLV.

STIPULATIONS IN RULES OF REFERENCE.

In references of cases by rule of court no stipulation will be allowed for a review by the court of the decision of the referee upon any question of law or fact submitted; but the referee may find the facts and report questions of law for decision by the court.

XLVI.

NATURALIZATION.

The second day of each term of the court for any county is fixed as the stated day on which final action may be had on petitions for naturalization as provided by Act of Congress approved June 29, 1906.

SCHEDULE OF FEES.

ATTORNEYS.

Writ of attachment, including power of attorney, declaration, attorney's fee and blank,	$3.54
Libel, petition or complaint,	3.50
Writ of replevin and bond,	4.58
Travel: For every ten miles to and from court, observing the rule prescribed in R. S., Chap. 117, Sec. 14,	.33
Attendance: For each term until the action is disposed of, except as otherwise provided in these rules,	3.50

No costs shall be allowed after a defendant is defaulted and the action continued for judgment.

Law Court: Travel and attendance as at nisi prius terms, but for one term only.

If the plaintiff prevails, he may tax one attorney's fee in addition to that embraced in his writ.

If the defendant prevails, he may tax one attorney's fee for the issue in fact, and one for the issue in law.

Transcripts of cases made by the official stenographer and printed copies, certified by the clerks to the Law Court, may be taxed in the bill of costs at the rate paid to the stenographers and the printers respectively, together with compensation to the clerks for preparing manuscripts and correcting proof at the rate of ten cents per printed page.

CLERK.

For use of Counties.

Copy of writ, libel or other process, or abstract thereof, together with copy of order of notice thereon,	$1.00
Entry, nisi prius,	.60
Exemplifying copies, not less than	1.00
Commission to referee, auditor, surveyor or other officer appointed by the court,	.50
Warrant to make partition,	1.00
Process to enforce a lien on personal property,	1.00
Each certificate attached to renewed execution,	.25
Copy of decree of divorce or certificate of same,	1.00
Computing damages and taxing costs,	.25
Writ of execution,	.15
Execution for possession,	.25
Writ of restitution,	.40
Writ of supersedeas,	.50
Writ of protection,	1.00
Writ of seisin of dower,	1.00
Subpœna,	.10

MISCELLANEOUS.

Service as taxed by the officer, subject to correction.

Surveyors, commissioners and other officers appointed by the court, fees as charged by them, subject to correction.

Cost of reference as reported by the referee.

For hearing in damages or in costs, the clerk shall have such reasonable compensation as a Justice of the court may allow, and the same shall be taxed in the bill of costs.

Advertising notices, the amount paid to the publisher, subject to correction.

Witnesses, fees as per certificate filed, and depositions as taxed by the magistrate, subject to correction.

When the register of probate, register of deeds or clerk of courts by request brings his books or papers into court to be used on the trial of a cause instead of copies, the usual witness fee may be taxed for him.

Appeals: In cases brought up by appeal, the prevailing party in this court will be allowed costs as taxed in the court below, subject to revision if objected to, together with additional costs of this court.

Defendant: When the defendant recovers costs he may tax the same fees and charges as are specified in the foregoing schedule so far as the same may apply.

EQUITY RULES

I

THE COURT.

The court held by one Justice may sit in equity in any county on any day not prohibited by statute.

II.

THE CLERK.

The clerks of the court shall act as clerks in chancery and may, as of course, issue such processes and make and enter such orders as do not require the consideration of the court. They may keep for equity causes a separate docket upon which they shall minute in detail all proceedings in the cause, with the date, and by whom each order is made.

III.

RULE DAYS.

Rule days shall be held the first Tuesday of each month at ten o'clock in the forenoon at the court house in each county for the proper dispatch of equity business, when and where all processes shall be returnable, unless otherwise ordered by the court or directed by statute.

IV.

THE BILL.

Bills shall be drawn succinctly and in paragraphs numbered seriatim, and without prolixity or unnecessary repetition. The confederacy clause, the charging part, and the jurisdictional clauses may be omitted.

The prayer for answer may be omitted, unless discovery is sought or answer upon oath is desired. The prayer for relief shall state the specific relief sought and may also ask for general relief. The prayer for process shall contain sufficient information for the proper frame thereof.

Bills shall be addressed:

"To the Supreme Judicial Court. In Equity.

A. B., of————————, complains against C. D., of————————, and says:

First:—" etc.

V.

VERIFICATION.

Bills for discovery and those praying for injunction must be verified by oath.

VI.

PROCESS.

Process shall not issue until the bill is filed, unless the bill is inserted in a writ, when no special process shall issue until the writ is filed.

Upon the filing of a bill, subpœna shall issue and be returnable as provided by statute, or as the court may order.

VII.

SERVICE ON NON-RESIDENTS.

When it shall appear that a defendant is and resides out of the State, the clerk on application of the plaintiff at any time after filing the bill shall enter an order for the defendant to appear and answer the bill, if in any of the States of the United States, or the Territory of Arizona or New Mexico, or in any of the Provinces of the Dominion of Canada, within one month; if in any other part of North America including the West India Islands, or in Europe or Egypt, within two months; if in any other part of the world,

within three months, after the date of the service of the order upon him, if personally served, or after the last publication of the order, if served by publication only. A copy of the order and of the bill attested by the clerk shall be served on such defendant in person within three months from the date of the order by an officer qualified to serve civil processes in the place where served, or in any foreign country by such officer, or by any consul, vice-consul or consular agent of the United States in such foreign country, or by any person specially appointed by the court to serve the order; or the order and attested copy of the bill shall be published three times in different weeks, all within thirty days after the date of the order, in some newspaper published in the county where the suit is pending. The return of personal service shall be verified by the affidavit of the person making the service. In case of service by an officer, his authority shall be certified by the clerk of a court of record, if within the United States or any of its possessions, and if without the United States or its possessions, by such a clerk, or by a United States consul, vice-consul, or consular agent.

VIII.

APPEARANCE.

Appearance shall be entered on the docket by the party or his counsel or filed with the clerk.

IX.

PLEADINGS IN DEFENSE.

Pleadings in defense may omit formal clauses not essential to the merits of the cause.

X.

ANSWERS.

Answers shall be concise and direct in statement, and shall fully and particularly answer each paragraph of the bill; and shall be paragraphed and numbered to conform thereto so far as may be.

Answers not in compliance with this rule may be stricken from the files and a new answer ordered with costs, or the bill may be taken pro confesso for want of an answer.

Answers shall be entitled:

"In the Supreme Judicial Court, In Equity,
A. B. v. C. D.

The answer of C. D., who answers and says:
First:—" etc.

XI.

JURY TRIALS.

If the defendant desires any issues of fact submitted to a jury, he shall at the close of his answer make such claim, and succinctly state such issues. If the plaintiff desires any issues of fact submitted to a jury, he shall make such claim at the end of his replication, and succinctly state the issues.

XII.

JURATS.

Oaths to bills and answers shall be upon the affiant's own knowledge, information or belief; and, so far as upon information and belief, that he believes his information to be true.

XIII.

DISCOVERY, ETC.

Discovery and answer, when necessary to the entering of a proper decree, may be required; and to enforce the same a writ of attachment may issue by special order of the court, on which the defendant will be bailable on a bond with sufficient sureties given to the plaintiff in such sum as the court may order, which is to be returned with the writ. In case of neglect of the defendant to enter his appearance according to the statute, the bond shall be forfeited, and may be enforced by petition and notice thereon; and on a summary hearing, damages may be assessed and an execution issue therefor; and a new writ of attachment may issue on a special order therefor, on which he will not be bailable.

XIV.

DEMURRERS AND PLEAS.

Defenses by demurrer or plea may be inserted in an answer; and unless the plaintiff sets such defenses for hearing before a single Justice in order that proper amendment may be speedily had, (and such defenses prevail in the Law Court,) no amendment on account thereof shall then be allowed, except upon terms.

XV.

CERTIFICATIONS.

Demurrers and pleas shall not be filed until certified by counsel to be in good faith and not intended for delay; and if pleas, that they are true in fact.

XVI.

ANSWERS TO CROSS-BILLS.

The answer to a cross-bill shall not be required before answer is made to the original bill.

XVII.

REPLICATIONS.

The replication shall state in substance that the allegations in the bill are true and that those in the answer are not true.

XVIII.

SIGNATURE OF COUNSEL.

Counsel shall sign all pleadings as a guaranty of good faith.

XIX.

EXCEPTIONS TO BILLS.

Exceptions to bills may be filed within twenty days after return day, and to answers within ten days after notice that they have been filed, and shall be disposed of by reference to a master, or otherwise,

as the court may direct. Costs, double and treble, may be awarded on exceptions and execution issued therefor as the court may order.

XX.

AMENDMENTS.

Amendments as to parties shall be made under order of court. Other amendments may be made before issue as of course. After issue, amendments may be allowed by the court with or without terms.

XXI.

BILLS OF REVIVOR, ETC.

Amendments may serve the purpose of bills of revivor, or bills supplemental or bills of that nature, but they shall be served as such bills should be served.

XXII.

SETTING CASES FOR HEARING.

When a demurrer is filed, the court upon motion of either party may set the cause for hearing upon bill and demurrer at any time. When a plea or answer is filed, the court upon motion of the plaintiff may set the cause for hearing upon bill and plea, or bill and answer, at any time. When a replication is filed to a plea or answer, the court upon motion of either party may set the cause for hearing upon bill, plea or answer, and evidence, but such hearing shall not be had until after sixty days from the filing of the replication unless by consent. If a jury trial has been duly asked for in the answer or replication and is moved for in the motion for a hearing, the court in setting the cause for hearing may in its discretion order a jury trial and frame the issues therefor. The cause shall in such case be in order for trial at the jury term next after such sixty days in the county where the case is pending. Any time fixed for hearing or trial may be extended for good cause shown.

XXIII.

OVER-RULED DEFENSES.

A defense interposed in one form and overruled shall not afterwards be sustained upon subsequent pleadings in the same case.

XXIV.

ORAL EVIDENCE.

At any hearing or trial in equity the evidence of witnesses may be presented by oral testimony or by depositions, or both. When oral testimony is given it shall be reduced to writing by the court stenographer, certified by him and filed with the depositions.

XXV.

DOCUMENTARY EVIDENCE.

Deeds and other instruments in writing or copies of them certified by counsel may be filed with the clerk and notice given twenty days before the hearing or trial, and may then be admitted in evidence without proof of execution if otherwise admissible, unless the execution is denied, or fraud in relation thereto be alleged, and notice given within ten days after notice that they are filed.

Copies of any votes, entries or other records upon the books of any corporation, or of any papers on its files attested by its clerk may be received as evidence, instead of the books and papers unless it shall appear that the opposite party or counsel has been denied access to them at reasonable hours.

XXVI.

PRODUCTION OF DOCUMENTS.

When books, papers or written instruments material to the issue are in possession of the opposite party and access thereto is refused, the court upon motion, notice and hearing, may require their production for inspection. Extracts from any books, papers or instruments thus produced, verified by counsel, may be filed as documentary evidence by either party, instead of the originals.

XXVII.

ALLEGATIONS NOT TRAVERSED.

All allegations of fact well pleaded in bill, answer or plea, when not traversed, shall be taken as true.

XXVIII.

DECREES.

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.

XXIX.

FORMS OF DECREES.

Drafts of orders and decrees shall be entitled with the name of the county, the date of the hearing, the docket number of the cause, and the names of the parties, and may then proceed substantially as follows: "This cause came on to be heard (or, to be further

heard, as the case may be,) this day and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed, as follows, viz: (Here insert order or decree.)" No part of the pleadings, the master's report, or any prior proceeding, need be recited or stated.

XXX.

MASTER.

When any matter shall be referred to a master, he shall, upon the application of either party, assign a time and place for a hearing, which shall be not less than ten days thereafter; and the party obtaining the reference shall serve the adverse party, at least seven days before the time appointed for the hearing, with a summons signed by the master requiring his attendance at such time and place, and make proof thereof to the master; and thereupon, if the party summoned shall not appear to show cause to the contrary, the master may proceed *ex parte*; and if the party obtaining the reference shall not appear at the time and place, or show cause why he does not, the master may either proceed *ex parte*, or the party obtaining the reference shall lose the benefit of the same at the election of the adverse party.

XXXI.

COMPENSATION OF MASTER.

The compensation to be allowed to masters for their services shall be fixed by the court in its discretion in each case, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation, but when it is allowed he shall be entitled to an attachment for the amount against the party ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

XXXII.

EXCEPTIONS TO MASTER'S REPORT.

When exceptions shall be taken to the report of a master, they shall be filed with the clerk at once and notice thereof be forthwith given to the adverse party, and the exceptions shall then be set for argument. In every case the exceptions shall briefly and clearly specify the matter excepted to and the cause thereof; and the exceptions shall not be valid as to any matter not so specified.

XXXIII.

COSTS.

When a party is entitled to costs, his counsel shall tax each item of the bill in a fair handwriting, referring to the documents on file or inclosed with it as proofs, and give notice thereof. The opposing counsel may, within two days after notice, make his objections to the same in writing and give notice. A reply may be made in writing and the bill filed with the inclosed papers for the decision of the clerk, who will make his decision in writing, from which either party may appeal and submit the papers to a Justice of the court for decision. The clerk may regard costs as correctly taxed, when the opposing counsel certifies in writing on the back of the bill that he does not find cause to object, or when no objections are made within two days after notice of taxation.

XXXIV.

RESPONSIBILITIES OF ATTORNEY.

The attorney making the application shall be personally responsible for the payment of fees to commissioners, examiners, stenographers, or magistrates taking testimony; to the clerk for his fees; and for costs imposed as terms of amendment or relief. When it shall be made to appear by the affidavit of a person interested, that an attorney who is so liable has, after request, neglected to pay, he shall, unless good cause is shown for such neglect, be suspended from practice in equity cases until payment is made. When any

attorney or counsel shall violate the great confidence reposed in him by these rules, he will be suspended in like manner until the further order of court.

XXXV.

VERIFICATION OF COPIES.

Copies required by these rules may be verified by signature of counsel, who will be held responsible for the accuracy thereof.

XXXVI.

NOTICES.

Notices required by these rules shall be served in writing, signed by counsel, and delivered to the opposing counsel, or left at his office, when he has one in the same city or village; and in other cases shall be properly directed to him and placed in the post office and postage paid. Copies are to be preserved and produced, and the original will in all cases be regarded as received when the counsel giving the notice produces a memorandum, made at the time on the copy retained, of its having been delivered or sent by mail on a day certain, unless the reception is positively, and not for a want of recollection, denied on affidavit. Either party may designate on the docket the name of his counsel to whom notices are to be given, and in such case none will be good unless given to him. In case of a change of such counsel, notice will be given thereof, and the change noted on the docket.

XXXVII.

APPLICATIONS ACTED UPON.

When an application for an injunction or for any order or decree under the statute or these rules, is made to one Justice of the court and the same has been acted upon by him, it shall not be presented to any other Justice.

XXXVIII.

WRITS OF INJUNCTION.

Writs of injunction, preliminary, pending the suit, or perpetual, may be granted according to the principles of equity procedure and as authorized by the statute and may be in the form annexed with such changes as the case may demand.

XXXIX.

RE-HEARINGS.

Applications to the discretion of the court for a re-hearing may be made on petition, verified as required by rule XII, setting forth particularly the facts, the name of each witness, and the testimony expected from him. The petitioner can examine only witnesses named, except to rebut the opposing testimony. The petition having been presented to a Justice of the court and by him allowed, may be filed and the same proceedings had thereon as on an original bill. If the decree has not been executed, such Justice of the court may suspend its execution until the further order of court by a writ of supersedeas or order, on the petitioner's filing a bond, with sufficient sureties, in such sum and approved in such manner, as he may direct, conditioned to perform the original decree in case it shall not be materially modified or reversed, and pay all intermediate damages and costs.

XL.

INTERLOCUTORY HEARINGS.

When the decision of a Justice is desired upon any interlocutory matter, the clerk shall forward to him the papers in the cause and enter his decision as soon as received.

XLI.

OTHER PROCEDURE.

All equity proceedings not provided for by statute or these rules shall be according to the usual course of proceedings in equity.

FORMS.

WRIT OF ATTACHMENT.

State of Maine.

{ SEAL. }

To the sheriffs of our counties and their deputies :

We command you to attach the body of A. B., of———, in our county of———, so that you have him before our Supreme Judicial Court, at———, within and for our county of———, on——— the———of———next, at———o'clock in the———noon, to answer for an alleged contempt in not [*here insert the cause*], and you may take a *bond with sufficient sureties to C. D., the party injured, in the sum of———, conditioned that he then and there appear and abide the order of court.

Hereof fail not and make due return of this writ, with your doings thereon, at the time and place aforesaid.

Witness,———, Justice of our said court, the———day of———, in the year of our Lord nineteen hundred and———.

———, *Clerk.*

WRIT OF INJUNCTION.

State of Maine.

{ SEAL. }

———, ss.

To the sheriffs of our counties and their deputies :

We command you to make known to A. B., of———, in our county of———, that C D., of———, in the county of———, has filed his bill in

(*When the party is not entitled to bail, that part of the writ is to be omitted.)

equity before our Supreme Judicial Court, in the county of———, therein alleging [*here insert the allegations in the bill showing the cause for issuing the writ*], and that in consideration thereof, he, the said A. B., and his attorneys and agents, are strictly enjoined and commanded by our said court, under the penalty of fine or imprisonment as the court may order therein, absolutely to desist and refrain from [*here insert the acts enjoined*] and from all attempts, directly or indirectly, to accomplish such object until the further order of our said court.

Hereof fail not and forthwith make due return of this writ, with your doings thereon, to our court, where the bill is pending.

Witness, ———, Justice of our said court, the ——— day of ———, in the year of our Lord nineteen hundred and ———.

———————, *Clerk.*

(When the injunction is to be perpetual, the writ is to be varied accordingly.)

SUBPŒNA.

{ SEAL. } *State of Maine.*

———, ss.

To A. B., of ——— :

GREETING.

We command you to appear before our Supreme Judicial Court, at ———, in the county of ———, on next ——— rules, viz., Tuesday, the ——— day of ——— next, then and there to answer to a bill of complaint, there exhibited against you by C. D., of ———, and abide the judgment of said court thereon.

And we further command you to file with the clerk of said court for said county of ———, within ——— days after the day above-named for your appearance, your demurrer, plea or answer to said bill, if any you have.

Hereof fail not under the pains and penalties of the law in that behalf provided.

Witness, ———, Justice of our said court, at ———, the ——— day of ———, in the year of our Lord ———.

———————, *Clerk.*

OATH.

———, ss.

——— 19—.

Then personally appeared ——— and made oath that he has read the above ——— and knows the contents thereof, and that the same is true of his own knowledge, except the matters stated to be on information and belief, and that, as to those matters, he believes them to be true.

Before me,

——— ———.

SUMMONS TO SHOW CAUSE.

{ SEAL. } *State of Maine.*

———, ss.

To the sheriffs of our several counties, or either of their deputies:

GREETING.

We command you that you summon ——— ——— (if he may be found in your precinct,) to appear before the Supreme Judicial Court to be holden ———, at ———, in the County of ———, on———, the ——— day of ———, A. D. 19—, at ——— o'clock in the ——— noon, then and there to show cause, if any he have, why an injunction ——— should not be granted as prayed for in the bill of complaint ——— of ———.

Hereof fail not, and make due return of this writ, with your doings thereon into our said court.

Witness, ———, Justice of said court, at ——— aforesaid, the ——— day of ———, in the year of our Lord one thousand nine hundred and ———.

——— ———, *Clerk.*

EQUITY FEE BILL.

ATTORNEYS.

Drawing and filing bill or answer, including attorney's 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 formal decree dismissing bill,	1.00
Drawing and filing other decrees when not requiring material alteration, each,	5.00
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
Subpœna,	.25
Copies of 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.

The foregoing rules, including fee bills and forms, shall be recorded in Vol. 103 of the Maine Reports, and shall take effect and repeal all former rules on the first Tuesday of December, in the year nineteen hundred and eight.

By all the Justices.

Attest:

Lucilius A. Emery,
Chief Justice Presiding.

CHARLES FULLER WOODARD

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT, AT BANGOR, JUNE 3, 1908, IN MEMORY OF THE

HONORABLE CHARLES FULLER WOODARD,

LATE ASSOCIATE JUSTICE OF THE SUPREME JUDICIAL COURT, WHO DIED ON THE SEVENTEENTH DAY OF JUNE, A. D. 1907, IN THE FIFTY-NINTH YEAR OF HIS AGE.

SITTING: EMERY, C. J., SAVAGE, PEABODY, CORNISH, KING, BIRD, JJ.

The exercises were opened by Hon. FRANKLIN A. WILSON, of Bangor, who presented the following resolutions which were prepared by HUGH R. CHAPLIN, Esq., of Bangor.

CHARLES F. WOODARD, late an Associate Justice of the Supreme Judicial Court, was born in Bangor, Maine, April 19, 1848, and died there June 17, 1907.

Having been educated in common school, academy, college and law school, he was admitted to the Penobscot Bar Oct. 1, 1872, and from that time until his elevation to the Bench in 1906, he was engaged in the active practice of his profession.

The Penobscot Bar has unanimously adopted the following resolutions:

Resolved: That CHARLES F. WOODARD was proud of his profession; was fully in sympathy with its highest ideals; was mindful of the responsibility resting upon a lawyer and that the position which he attained at the Bar and among his fellow men is abundant proof that he was equal to that responsibility.

Resolved: That in his death the State has lost a high minded and upright citizen; the Bench a Judge who would have graced it;

and the Bar a former member, who by an active, manly and vigorous practice of his profession for 34 years, had placed himself in its front rank.

In presenting these resolutions, MR. WILSON said:

May it please Your Honors:

There has fallen to me, as president of the Penobscot Bar, a duty, yet in this case not so much a duty as a labor of love. The Bar has adopted resolutions commemorative of the life and character of the Hon. CHARLES FULLER WOODARD, a member of the Supreme Judicial Court of the State of Maine, who died on June 17, 1907, in the 59th year of his age, his commission as a Justice of this court being dated Dec. 14, 1906, and I have been deputed to present these resolutions to the court of which, at the time of his decease, he was an honored member.

MR. WOODARD was born in Bangor, April 19, 1848, attended the public schools in Bangor, prepared for college at Phillips-Exeter Academy, graduated from Harvard University in 1870, and took his degree from the Harvard Law School in 1872. After some time spent as a student in the office of PETERS & WILSON, he was admitted to the Penobscot Bar at the October term, 1872, and entered upon the practice of his profession, at first alone, and afterwards as a member of the firm of WILSON & WOODARD. Later, upon the retirement of the senior member of that firm, MR. WOODARD continued to practice alone until his appointment to the Bench of the Supreme Judicial Court.

His practice was almost wholly on the civil side of the court, and his services in the later years of his life were sought to a large extent by the larger corporations having litigation and business in the eastern section of the State, although he was frequently called to other and the most remote counties of the State. His practice was active, constant, laborious and successful, whether his success be measured by the pecuniary returns, or, as he would have preferred to be judged, by his standing as a lawyer and the impression he made upon the administration of justice in the sphere in which his lot was cast.

I am perhaps justified in thinking that I knew MR. WOODARD better than any person outside his own family circle. I had full opportunity to observe him under all the varying circumstances of his professional life, ending only with his death.

The brief period, during which he held a commission as an Associate Justice of this court was spent almost entirely under the shadow of an illness which was to end in death, but the few days spent in this court-room in hearing arguments of counsel and engaging in consultation with his Associates, gave to both Bench and Bar high assurance of future usefulness. MR. WOODARD expressed himself on that occasion as glad to exchange the contests and exacting labors of the practicing lawyer for the calmer atmosphere and quiet surroundings of the court-room and consulting chambers so useful and necessary for the honest, conscientious performance of judicial functions. His career seemed destined to be honorable and useful so that at the end he would be able to say, "I have done the State some service." Those of us who are taking part in these exercises know that MR. WOODARD'S message to us, if one were permitted, would be: "Speak of me as I am." "Report me and my cause aright."

MR. WOODARD'S intellectual equipment was strong naturally, unusually so, and his acquirements through the judicious use of his opportunities for cultivation through contact with schools, teachers, books, men and professional work were the best obtainable. Few in our day have such opportunities as he enjoyed, and he approached them in a serious spirit, bent upon making use of all attainable ends to cultivation along professional lines. He never ceased to study. His cases were prepared with all possible thoroughness, and perhaps his strongest point was thoroughness of preparation, which led so easily up to a logical presentation of his case in the argument.

As a lawyer MR. WOODARD entertained a wholesome scorn for fraud and detestation of those who would perpetrate it either upon court or opposing counsel. His grasp of the law and of legal methods was ever strong. The profession of law always has been, is, probably always will be, a stepping stone to political preferment in this country, but the game of politics had for him no fascination,

and he said himself that he was unfitted for it and it for him, and as years increased upon him, he came to regard a political career with a degree of aversion akin to disgust. His independent nature was in revolt at the thought of wearing any shackles restraining absolute freedom of thought and expression after his conscience had once acted upon any question and he had wisely or unwisely believed that independence of thought and action in political life seriously militated against a prosperous political career. Yet he was ambitious, but his ambition ran in the line of his profession, and when the Judgeship came to him, it was especially gratifying that it came at a time when he was so seriously ill as to absolutely preclude the possibility of any self-seeking upon his part.

The combination of mental and physical strength in our deceased friend was such in the natural order of things as to give an assurance of long years of usefulness and probable eminence in his new position but for reasons inscrutable to us, man's wisest plans are brought to naught and our friend has seen "the last of earth." It was said recently on the induction of a Chief Justice to the Supreme Court in a foreign country, "He is a just man and walks in his integrity," and it struck me on reading it, to be the fairest, most comprehensive epitome of the life and professional character of CHARLES F. WOODARD.

In these perilous times when encroachments are made and threatened to be made upon the liberty of individual citizens in the Republic, the hope of all classes must continue to be, as it has ever been in the past, in an able, independent, honest judiciary. To such a body of men our deceased friend would have been a pillar of strength. No hope of reward, no fear of punishment, no clamor of demagogues, no cries of the mob, no intimidation of wealth or power could have swerved him from the path of the impartial administration of justice. The rights of the rich and the poor alike would be steadfastly maintained and nothing rightly belonging to the State would be wrongfully taken from it. The people have always respected the judiciary in an extraordinary degree, and it will continue to do so when constituted as it now is, and far be the day when the respect for the judiciary ceases to make its abode in the hearts of the people.

In bidding farewell to my pupil, my business associate and my friend, I affirm my belief that whilst we regret that his judicial life was so brief, we reaffirm our belief that the influence which one so true, so just, so good, exerted, has not been exerted in vain, but shall in some form or shape be felt forever. It is not in the order of things that such a life should have been lived in vain.

From the earliest times of which authentic records remain, the theme of death has evoked from philosophers and poets curious speculations, treatises and songs calculated to console the living and reconcile them to the sad event of bereavement. We have lost a lawyer of the first rank, a man of unimpeachable integrity, a Judge of high promise.

In thinking what the gain to him may be, I quote what has consoled many a wounded heart:

> "To die, is landing on some silent shore
> Where billows never break, nor tempests roar,
> Ere well we feel the tender stroke, 'tis o'er."

JOHN R. MASON, Esq., of Bangor, then addressed the Court as follows:

There is a verse in one of the Odes of Horace which has been freely translated thus:

> "He who is upright, kind and free from error
> Needs not the aid of arms or men to guard him,
> Safely he moves a child to guilty terrors,
> Strong in his virtues."

It is of such a man as this that I always think when I recall the memory of CHARLES FULLER WOODARD, and I love to feel that he was built upon the plan of the ideal man whom the poet immortalized in verse.

He was upright and of unspotted honor, as every man, with whom he had social or business relations, will bear witness. His ideals were high and his scorn of meanness was profound. He was

kind to all and his heart was great. And of ripe experience and mature judgment in affairs of magnitude he was, I believe, as free from error as often happens to most men.

In his youth and early manhood he had enjoyed the best opportunities for a thorough and liberal education at Exeter and at Harvard University from which he received the degree of Bachelor of Arts in 1870 and Bachelor of Laws in 1872, and in both his academic and law courses he maintained a high rank.

Eminently successful in the practice of his profession he was thrice offered a seat upon the Bench of the Supreme Judicial Court which I believe to have been the goal to which he always looked with longing eyes, and twice, for compelling personal reasons, he was obliged to decline the honor. Then when at last the time came when he felt himself at liberty to accept that great position and took his seat upon the Bench, the prize he had coveted his whole life long, fairly won, he was stricken with mortal illness after but two days of service in court. Truly the angel of death smote swiftly and surely. But he had won the highest honor in his life work that could be conferred by this great commonwealth, and his kindly, useful, honest life was fully rounded out and complete,

He was my life-long and very dear friend, perhaps by inheritance, for our fathers before us were close friends, and to me his death comes as a cruel personal loss, but I am happy in the remembrance that I enjoyed his friendship, the friendship of one so worthy of affection and respect.

In his death the Bench and Bar alike have suffered and both alike will mourn his loss. On him be peace.

MATTHEW LAUGHLIN, Esq., of Bangor, was the last speaker on the part of the Bar.

MR. LAUGHLIN said:

May it please the Court:

We have met to pay the well-deserved tribute of regard and affection to the memory of one who was a member of this court but for so short a time that we can best speak of him as one of our Bar.

Soon after Brother WOODARD's admission, he took a prominent position at our Bar, and reached the very first rank at the Bar of our State. It is true he had in early life unusual opportunities,—a good classical and legal education, ample means, and he formed an excellent partnership; but no one ever attained success more through his individual merit solely without any adventitious aids. Having none of the graces or arts of the orator, he was always a formidable opponent. He won his cases on their merits. He despised any sham or pretence, and would scorn to win favor by any sacrifice of principle, dignity, or self-respect.

If, as has been said by someone, genius is only the capacity to take infinite pains, it is especially true in the field of legal learning, a field of such boundless limits that all the most gigantic mind can hope to accomplish is, perhaps, to outstrip slightly all competitors.

Judge WOODARD was endowed with an intellect rare among men, and that, together with "a capacity to take infinite pains," gave him his commanding position at the Bar. That he, himself, thought hard work is the key to success was frequently shown by his sagacious predictions that a young lawyer would or would not succeed, according as he did or did not apply himself to his books.

He always practised law in an honorable way and on an elevated plane, winning and retaining the confidence of the Bar and of the court in a most remarkable degree. He wanted no trophies won by any but fair means. Although cut off in the prime of life, his fame as a lawyer is secure. It is peculiarly sad that he could not have been spared to round out his career by long service on the Bench, a position he might have sooner reached had he desired, a position that he finally gladly accepted, feeling that judicial duties, if equally exacting and laborious, are much less harrassing than those of a practising lawyer.

After his appointment, his friends suggested a banquet in his honor, and he replied in his characteristic and modest way that he would have no honors shown him until he had earned them, repeating the adage of putting on and laying aside the armor; yet scarcely had he put on the armor, when the fatal stroke came leav-

ing it always to be conjectured what would have been his measure of renown as a Judge. That it would have been high is the universal opinion of those who knew him best, equipped as he was with extended legal knowledge, large experience, sturdy independence, undaunted and inflexible courage, and that conspicuous sense of fairness and justice always manifested by him.

His nature was much better understood by his friends than by the public generally. His natural austerity of manner and the intensity with which he kept his mind fixed upon his business gave many the impression that he was cold and unsympathetic. Just the reverse was true. He was a person of humane and kindly nature, and he always responded gladly and generously, but not ostentatiously to all calls for charity. This fact should be especially emphasized for while all would concede his distinguished ability, some might not do justice to this most estimable trait of his character. His was a singularly pure and upright life. There is no need that the mantle of charity should be thrown over any of his acts.

I have intentionally spoken with brevity, endeavoring to give him no meed of undeserved praise, for I can but feel that if it were permitted him to give direction to the course of proceeding here today to us, his friends, standing, as it were, sorrowfully around his bier, and painting a word picture of his life, he would give the same admonition as did the great warrior to the artist, who was about to paint his portrait for posterity, "Paint me just as I am."

Chief Justice EMERY then responded for the Court as follows:
Brethren of the Bar:

For the third time in the brief history of this court room we have assembled here to do honor to the memory of a deceased Justice of the court. In the first instance we mourned the death of one who died in the fullness of his years, in the late evening of a long and well rounded life spent in the service of the people. In the second instance, we sought to do grateful honor to one who died when scarely past the meridian of life, yet who by nearly 14 years of judicial service had made a lasting impress upon the jurispru-

dence of our State. In this third sad instance we mourn one who was taken from us at the very outset of his judicial career, to the bitter disappointment of us all who had hoped so much of good from his appointment to the Judicial Bench.

This occasion is one of unusual sadness. We cannot comfort ourselves with grateful recollections of years of judicial service by Justice WOODARD. Our high and well justified hopes for such service have been without fruition; we have only the memory of his heroic but unavailing struggle to conquer disease, not so much that he might live as that he might serve. Receiving his appointment while prostrate with the sickness which later proved mortal, he strove valiantly to surmount his illness of body that he might soon enter upon the work assigned him. His Associates all gladly assured him that his share of the work would be most willingly borne by them until his full recovery, but none the less he chafed under the restraint of his bodily weakness.

His first judicial duty, fully performed, was in considering the question submitted to the Justices by the House of Representatives concerning the modes of taxing railroad companies. He was then in a hospital in Boston, and though he was assured that his illness would excuse him from considering the questions, he refused to be excused and asked that they be sent him there. He made an independent consideration apart from the rest of us and his concurrence in the answers added much to their strength. He first met with his Associates at the general consultation a year ago, held in the beautiful room assigned to him for his Court Chambers in the upper part of this building. Though evidently still suffering somewhat from disease he gave us the benefit of his good judgment and learning, and was of material assistance. We all felicitated ourselves upon the vigorous and well trained mind that had come to our aid and support, and we fondly hoped, that, as he assured us, he would soon be in full physical vigor and fully able to carry on his share of the court work. Despite his physical feebleness he seemed eager to enter upon the work. He sat with us for only two days hearing arguments, when he found he had over-rated his bodily strength and must rest. We regretfully saw him leave the court room at

the close of that second day, sick in body and sad in spirit. We never saw him again. When, the next morning, word came to us of his relapse we sadly looked at one another, still hoping somewhat but fearing much more. Our grief was the greater from the fear that his earnest desire to take up his work had led him to fatal over-exertion. We are still haunted with that fear and it increases our sadness.

Justice WOODARD, however, rendered good and honorable service at the Bar, not only to his clients but to the court and the people. Always himself strictly honorable and faithful, he stimulated honor and faith in others. As he appeared to the court he was not artful, but strong. He relied upon the strength of his case, not upon strategy. He never sought ambuscade but always met his opponent upon the broad high way and in the full light of day. The question then, was not which had the most skill, but which had the better cause. In the 20 years that he tried many and always important cases before the court since I became a Justice, I cannot recall one lost by any slip, or want of skill or care. He was borne down only by the strength of the case against him. Further, he never won or sought to win a case by artifice. What could be said fairly in support of his case he always said, but never anything unfairly. His arguments and briefs were always complete and strong without attempts to mislead. The authorities he cited were always to the point, and his analysis of seeming opposing authorities was always fair as well as clear.

While a single volume of the Maine Reports will contain his name and his work as a Justice of the Court, his name and work as Counselor of the Court appears in many of the volumes. He left there his impress on our jurisprudence.

I can add nothing to what has been so well and lovingly said of his personal and professional merits by his companions of the Bar. His high standing in the city and State was attained by his high character, without the aid of office. He will longer be remembered, and by many more people, as plain CHARLES F. WOODARD than as Justice WOODARD. He did his work and made his mark as a man, and his work and his character, rather than his office, will be his

monument. A monument like that, simple and plain but lofty, may be more observed and last longer than one more adorned with titles of office.

Our sorrow over his pathetic illness and death is deep. Your sympathy and your eulogies of him are grateful. Your resolutions shall be inscribed upon our records as a memorial to future generations of lawyers and Judges, and the court will now stand adjourned for the day.

The response of the Chief Justice concluded the exercises and the Law Court adjourned for the day.

MEMORANDUM

The second term of Honorable SEWALL C. STROUT, of Portland, as a Justice of the Supreme Judicial Court, expired on the twelfth day of April, A. D. 1908. Advancing years compelled him to decline a third appointment. His retirement was deeply regretted by Bench, Bar and the whole State. During his fourteen years on the Bench, Mr. Justice STROUT discharged all the judicial duties devolving upon him with great ability, skill, fidelity and strict impartiality, and won from all the high encomium "Well done, good and faithful Judge."

Honorable GEORGE E. BIRD, of Portland, was appointed a Justice of the Supreme Judicial Court on the second day of April, A. D. 1908, his appointment taking effect April thirteenth, A. D. 1908.

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"An index, O, my kingdom for an index."
Xerxes.

ABATEMENT.

An appeal from the estimate of damages by the municipal officers of a city for land taken for the site of a public library building is not an "action" within the statute R. S., chapter 89, section 8, providing for the survival of actions after the death of a party, and there is no statute providing for the survival of such an appeal, hence the death of the appellant pending the appeal abates the appeal, and the proceedings under it cannot be carried on by the representatives of the appellant. *Hayford* v. *Bangor*, 434.

ACCORD AND SATISFACTION.

See RELEASE.

ACCOUNT.

See STATUTE OF LIMITATIONS.

ACCOUNTING.

Sales made by a defendant under a trade name resembling that of a plaintiff to persons who knew the goods were manufactured by the defendant, and also sales made to persons at a distance who had no knowledge of the plaintiff's existence, cannot be assumed to be injurious to the plaintiff if the goods themselves are not impressed with deceptive marks.
Shoe Co. v. *Shoe Co.*, 334.

In determining the profits made by a defendant corporation in unfair competition with a plaintiff, it is ordinarily proper to include in the cost of manufacture and sale reasonable sums paid in good faith, as salaries to managing officers; but where such managing officers are practically the corporation and are the parties really guilty of the unfair competition, sums drawn by them as salaries should not be included in the cost of manufacture and sale.
Shoe Co. v. *Shoe Co.*, 334.

In addition to the profits made by a defendant in unfair competition with a plaintiff by the use of the latter's trade-marks, trade-name, etc., the plaintiff may also recover for losses in his own business caused by such unfair competition. If such loss results partly from such unfair competition and partly from other causes independent of the defendant and his acts, the plaintiff can recover only for so much of the loss as he shows to have resulted from the defendant's unlawful acts. It is not necessary, however, for him to prove such loss, in separation from the rest, with precision or definiteness. It is sufficient for him to adduce enough evidence to enable the tribunal to make a reasonable probable estimate by the exercise of intelligent judgment.
Shoe Co. v. *Shoe Co.*, 334.

A master in chancery ruled that he could not allow for a loss which resulted partly from unfair competition and partly from other causes independent of the defendant and his acts, because the evidence did not enable him to draw a definite line between the loss resulting from the unlawful acts of the defendant and that resulting from concurrent causes for which the defendant was not responsible. *Held:* That this ruling was erroneous as being too strict and that the case should be recommitted to the master to make, if possible, a reasonably probable estimate of such loss. *Shoe Co.* v. *Shoe Co.*, 334.

ACKNOWLEDGMENT.
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ADVANCEMENTS.
See CONTRACTS. DESCENT AND DISTRIBUTION.

ADVERSE POSSESSION.

Where one occupies a portion of a lot of land under a colorable title acquired by deed and delivered and recorded, his occupancy extends to the whole of the land included in the deed. He being in possession under a paper title containing a specific description by metes and bounds claiming the whole, and openly and notoriously exercising control of the premises, is presumed to be doing so to the extent of his claim. *Hornblower* v. *Banton*, 375.

The rule of constructive possession is not applicable unless the lots are inclosed by a common fence embraced under one general description in the deed or in some such way merged in one parcel so that the occupation of a portion thereof could not be reasonably referred to anything less than the tract. *Hornblower* v. *Banton*, 375.

The presumption of constructive possession must be limited to circumstances which would reasonably create it. It cannot, without evidence to support it, be extended to distinct lots held under different deeds though the colorable title may be in the same person, nor to separate contiguous tracts of land described in the same deed. *Hornblower* v. *Banton*, 375.

AFTER ACQUIRED PROPERTY.

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AGENCY.

See BROKERS. HUSBAND AND WIFE. PRINCIPAL AND AGENT. SALES.

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See APPEAL. PARTNERSHIP. PLEADINGS. PROCESS.

AMICUS CURIAE.

The term amicus curiae implies the friendly intervention of counsel to remind the court of some matter of law which might otherwise escape its notice and in regard to which it might go wrong. Such an intervention is granted not as a matter of right but of privilege and the privilege ends when the suggestion has been made. *Hamlin* v. *Meeting House*, 343.

An amicus curiae has no control over the suit, and has no right to bring the case from one court to another or from a single Justice to the Law Court by exceptions, appeal or writ of error. *Hamlin* v. *Meeting House*, 343.

When a person, without title or interest, and not named as a party defendant in a bill of equity, voluntarily appears to resist the bill, such person can be regarded, at best, simply as amicus curiae and as amicus curiae cannot appeal. *Hamlin* v. *Meeting House*, 343.

APPEAL.

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An appeal from a municipal court or trial justice vacates the judgment of that court and removes the whole case to the appellate court to be tried and judgment rendered de novo upon both law and fact. *Willet* v. *Clark*, 22.

In considering and disposing of a case upon appeal from a municipal court or trial justice the appellate court can allow amendments to pleadings and new pleas to be filed as fully as if the case had been originally brought in that court except as to dilatory pleas. *Willet* v. *Clark*, 22.

Upon an appeal of an action of trover from a municipal court or trial justice where the general issue alone had been pleaded in the lower court, the appellate court can allow to be filed as brief statement that the title to the property described in the declaration was in the defendant. *Willet* v. *Clark*, 22.

On an appeal from the decree of the Judge of Probate refusing to grant letters to the plaintiff as surviving partner to close up the partnership affairs of the firm of John H. Tighe, deceased, and the plaintiff, the question submitted to the determination of the presiding Justice was whether or not the partnership between the said Tighe and the plaintiff was dissolved during the lifetime of the said Tighe or continued until his death. The presiding Justice found that no partnership existed between the said Tighe and the plaintiff at the time of the death of said Tighe. The plaintiff then excepted.

Held : (1) That the plaintiff's exceptions only raised the question whether there was any evidence upon which the finding and ruling of the presiding Justice could be based.

(2) That the question submitted to the decision of the presiding Justice involved an issue of fact, not simply an inference of law from facts admitted or proved.

(3) That there was evidence to support the finding of the presiding Justice, and that the sufficiency of such evidence was a question of fact upon which the finding of the presiding Justice is conclusive. *Costello* v. *Tighe*, 324.

Upon all questions of fact the finding of a master in chancery has all the weight of a jury verdict, not to be set aside or reversed unless the evidence reported shows the finding to be clearly wrong. *Shoe Co.* v. *Shoe Co.*, 334.

In taking an account of the profits made by a defendant in unlawful competition with a plaintiff by infringement of the latter's trade-marks, trade-name, etc., it is not to be assumed that all the profits of the defendant in his business were through such unlawful competition, and a finding by the master that certain profits were not so made will not be set aside in the absence of convincing evidence to the contrary. *Shoe Co.* v. *Shoe Co.*, 334.

The right of appeal is given for the purpose of correcting errors and it is important for the security of judgments that this right of appeal should be subject to the reasonable limitations of the statute.
Mudgett's Appeal, 367.

The court cannot continue a trust otherwise ended, nor create a trust for the purpose of saving an appeal from an estimate of damages for land taken by a city after the death of the appellant trustee. *Hayford* v. *Bangor*, 434.

APPEAL AND ERROR.

See APPEAL. EXCEPTIONS. VERDICT.

APPEARANCE.

See LOGS AND LUMBER.

APPELLATE COURTS.

See APPEAL. TROVER.

ARREST.

See INTOXICATING LIQUORS. OFFICERS.

An officer making an arrest upon a criminal charge may also take into his possession the instruments of the crime and such other articles as may reasonably be of use as evidence upon the trial. The title to the property remains in the owner, but the lawful possession is temporarily in the officer for evidentiary purposes, subject to the order of court. *Getchell* v. *Page*, 387.

ASSIGNMENTS.

See JUDGMENT. LOGS AND LUMBER. MORTGAGES. REPLEVIN.

An assignee of a chose in action brought an action of assumpsit in the name of the assignor, against the defendant to recover for certain coupon books sold and delivered by the assignor to the defendant to be paid for in money. The defendant contended that the sale and delivery of the coupon books disclosed a special agreement and consequently special assumpsit was the only appro-

priate remedy and also that the action could not be maintained in the name of the assignor. *Held:* That assumpsit was properly brought and that the action was maintainable in the name of the assignor.

Rogers v. *Brown*, 478.

ASSUMPSIT.

See ASSIGNMENTS. "BOARD." EVIDENCE. EXECUTORS AND ADMINISTRATORS. LANDLORD AND TENANT.

ASSUMPTION OF RISK.

See MASTER AND SERVANT.

ATTACHMENT.

See EXECUTION. LOGS AND LUMBER.

An attachment of real estate is not made by any acts on the land itself, but solely by the officer writing a return on the writ that he has attached the real estate. *Bryant* v. *Knapp*, 139.

When an officer has attached real estate by writing a return on the writ, this must be followed by filing in the proper registry of deeds an attested copy of the return of attachment, etc., as provided by Revised Statutes, chapter 83, section 60, but the attachment is made when the return is written. The return is the attachment and the only attachment. *Bryant* v. *Knapp*, 139.

It is undoubtedly true that the officer's return must state affirmatively that he has attached, but no particular set of words or phrases are required to be employed to accomplish this result. If the affirmative appears from a fair construction of the whole return, it is sufficient. *Bryant* v. *Knapp*, 139.

In an action against a personal defendant, and also against a "certain dwelling house and the land on which it stands" described in the writ and owned by one Sherburne, who was not a party to the writ, and brought to enforce the plaintiff's statutory lien on said dwelling house and land, the officer's return on the writ, so far as it related to an attachment of real estate, was as follows: "Piscataquis, ss: February 8, 1906. By virtue of this writ, I have attached as the property of the within named defendant, Herbert E. Knapp, all the real estate he owns also all the right title and interest he has to all real estate in said county of Piscataquis and also to attach the dwelling house and land on which it stands, owned by Edgar A. Sherburne of said Milo, situated in said Milo Village on the westerly side of a street running southerly from Spring Street (so called) being on the next lot south of the lot owned by C. F. Stanchfield, in Milo Village, and on which said Stanchfield

has built a dwelling house; and within five days thereafter has filed an attested copy of my return on this writ so far as relates to the attachment, in the office of the Register of Deeds, for this county, together with the names of the parties in this writ, with the value of the defendants property, which I am hereby commanded to attach, the date of said writ, and the court to which the same is returnable.

"Abial E. Leonard, Deputy Sheriff."

Held: That this return constituted a valid attachment of the Sherburne dwelling house and land as real estate. *Bryant* v. *Knapp*, 139.

When an officer has attached personal property which by reason of its bulk cannot be immediately removed, he is not required to file in the office of the clerk of the town in which the attachment was made, a full copy of his return upon the writ but only "so much of his return on the writ, as relates to the attachment, with the value of the defendant's property which he thereby commanded to attach, the names of the parties, the date of the writ, and the court to which it is returnable." The statute, R. S., chapter 83, section 27, does not require the copy filed with the town clerk to contain a statement that the property attached could not be removed by reason of bulk. *Brogan* v. *McEachern*, 198.

When an officer's return on a writ of attachment, on which no actual attachment was made, fails to show that he made a nominal attachment by attaching a chip as the property of the defendant, but does show that a summons was duly served upon the defendant, such officer will be permitted to amend his return in relation to the nominal attachment so as to accord with the fact when in his official capacity he states that he made a nominal attachment. *Swift* v. *Hawkins*, 371.

When a nominal attachment only is made on a writ of attachment, a hearing as to the physical fact of attaching a chip as the property of the defendant would be an idle ceremony. Such an attachment is a legal fiction and cannot be denied when stated in the return. *Swift* v. *Hawkins*, 371.

ATTORNEY AND COUNSELLOR.

See VERDICT.

Counsel may employ wit, satire, invective and imaginative illustration in his arguments before the jury, both in civil and criminal trials, but in this the license is strictly confined to the domain of facts in evidence. *State* v. *Martel*, 63.

A violation of the rule that counsel in his argument is strictly confined to the domain of facts in evidence, may be ground for a new trial on motion of the party whose rights are prejudiced, or exceptions may lie to the action of the court in omitting or declining to interfere with the misconduct of counsel when objections are interposed. *State* v. *Martel*, 63.

When counsel violates the rule that his argument must be strictly confined to the domain of facts in evidence, and objections are interposed, and the court does interfere and does what is proper to prevent any unjust influence being left on the minds of the jury from anything said by counsel not warranted by the evidence, then a new trial on the ground of misconduct of counsel must be sought by motion and not by exceptions. *State* v. *Martel*, 63.

AUTOMOBILES.

See WAYS.

AVERMENTS.

See BONDS.

BAIL.

A recognizance on appeal is an official record, and to be effective must be signed by the magistrate. *Walker* v. *Goding*, 400.

A recognizance taken by a magistrate or municipal court on appeal must be returned to the court to which the appeal is taken. Without it the appellate court has no jurisdiction to proceed further and the appeal may properly be dismissed, on motion. *Walker* v. *Goding*, 400.

Reasons suggested why an appellee ought to be allowed to take advantage of the appellant's failure to have a recognizance on appeal returned and filed cannot be considered when based on allegations of facts not stated in the case. *Walker* v. *Goding*, 400.

BANKRUPTCY.

See TRUSTEE PROCESS.

When a person is entitled to a dividend from an estate in a United States bankruptcy court, an attempt by a creditor of such person to invoke the trustee process of a State court is an interference with the paramount Federal authority and an obstruction of the orderly administration of the bankrupt estate. *Savings Bank* v. *Alden*, 230.

BANKS AND BANKING.

See CORPORATIONS. DECEIT. TAXATION.

"BOARD."

See LANDLORD AND TENANT.

The word board in the ordinary acception of the term, covers both room rent and table board. A boarder is ordinarily one who has food and lodgings in another's house or family for a stipulated price. If it has the narrower meaning, it is usually designated table board. *Heron* v. *Webber*, 178.

BONDS.

See GUARDIAN AND WARD. PARTNERSHIP.

The penal part of a bond alone constitutes, prima facie, a right of action, the breach being the non-payment of the money. *York* v. *Stewart*, 474.

In debt on bond, it is not necessary for the plaintiff in his declaration to count upon any other than the penal part of the instrument, leaving the condition to be pleaded by the defendant if it affords him any defense.
York v. *Stewart*, 474.

In an action upon the official bond of a town treasurer, it is sufficient to declare in the writ only upon the penal part of the bond and allege a breach by the non-payment thereof. *York* v. *Stewart*, 474.

BOUNDARIES.

When a monument which formerly marked a division line no longer exists, and its location on the face of the earth is in dispute, it is permissible to show that at one time when the monument was in existence a measurement was made from the monument to a certain point, and also to show where that certain point was, in order that by measuring back from such point the same distance the location of the monument may be ascertained.
Williamson v. *Gooch*, 402.

BROKERS.

If a real estate broker procures and produces a purchaser ready and willing and able to complete the purchase on the authorized terms and through the fault of the owner, the sale is not consumated the commission is due.
Hartford v. *McGillicuddy*, 224.

A defendant, in 1896, placed in the hands of the plaintiff, a real estate agent, certain real estate to be sold at a given price and for selling the same the plaintiff was to have a commission. The defendant never withdrew the property from the hands of the plaintiff, and there was no express revocation of the contract by the defendant and no revocation by implication or by law.

In 1906, after having made several unsuccessful efforts to sell the same, the plaintiff effected the sale of the property on the authorized terms but the defendant refused to make the conveyance. The plaintiff then brought suit to recover his commission. The verdict was for the plaintiff.

Held: (1) That the relation between the parties was that of principal and agent, and while no definite period of time was expressly agreed upon during which the agency was to continue yet the agency being established for a particular purpose, to wit, to sell the real estate, it was presumed to continue until the sale was effected, and the burden was on the defendant to rebut this presumption. Cases involving the question of reasonable time within which an offer of reward is held to continue, are not analogous. (2) That the special findings by the jury that the defendant in 1896 authorized the plaintiff to sell the land in question for $2800 and that he procured a purchaser for the land at that price, as well as the general verdict, are sustained by the evidence. (3) That the fact that a partner of the would be purchaser had attempted to buy direct of the owner and the owner had refused to sell, should not deprive the plaintiff of his commission as he had no knowledge of that fact and acted in good faith.

Hartford v. *McGillicuddy*, 224.

BURDEN OF PROOF.

See EVIDENCE. EXECUTORS AND ADMINISTRATORS. REAL ACTIONS.

BY-LAWS.

See FISH AND FISHERIES. TOWNS.

CARRIERS.

See COMMON CARRIERS.

CASES CITED, EXAMINED, ETC.

Benjamin v. *Webster*, 65 Maine, 170, examined, 405
Hilton v. *Lothrop*, 46 Maine, 297, overruled in part, 410
Perry v. *Chesley*, 77 Maine, 393, distinguished, 405
Savings Bank v. *Herrick*, 100 Maine, 494, affirmed, 29
Waterman v. *Dockray*, 56 Maine, 52, approved, 474

"CAUSE OF ACTION."

A cause of action is neither the circumstances that occasioned the suit nor the remedy employed, but a legal right of action. *Anderson* v. *Wetter*, 257.

CHANCERY.

See EQUITY.

CHECKS.

See CORPORATIONS. FRAUD.

CHILD BY ADOPTION.

See WILLS.

CHOSE IN ACTION.

See ASSIGNMENTS.

CLAMS.

See FISH AND FISHERIES. TOWNS.

COMMISSIONS.

See BROKERS.

COMMITMENT TO INSANE HOSPITAL.

See PAUPERS.

COMMON CARRIERS.

Where the assigned place of work of an employee of a street railroad company is at a distance from his home, he may, notwithstanding such employment, be a passenger with the rights of a passenger while riding in the cars of the company from his home to his assigned place of work.

Hebert v. *Street Railroad Co.*, 315.

An employee of a street railroad company is a passenger while riding on a regular street car of the company from his home to his assigned place of work, if he so rides of his own volition and not by the direction of the company and pays his fare in coupons for fare issued to him by the company as a part of his wages. *Hebert* v. *Street Railroad*, 315.

In an action by a passenger against a street railroad company for injuries received through a derailment of the car, it is sufficient to allege generally that such derailment was caused by the negligence of the company or its servants without more particular specification.
Hebert v. *Street Railroad Co.*, 315.

It is too narrow a construction, and against good public policy, to hold that it is negligence, per se, on the part of a passenger riding on a trolley car, not to anticipate that a pole may be permitted to stand so near the railroad track, that he cannot, in an erect position and careful manner, pass from one seat in the car to another over the running board without danger of injury from collision with such pole. *Cameron* v. *Street Railway*, 482.

It establishes a safer rule of law, to require street railroads to exercise a degree of care sufficient for the protection of their passengers with respect to poles and other obstacles along their rights of way when such protection involves only a question of pecuniary outlay, than to hold that such railroads may be permitted, for the mere purposes of saving expenditure, to continue the maintenance of a structure which may be calculated sooner or later to result in the injury or death of a passenger. *Cameron* v. *Street Railway*, 482.

A street railroad owes to its passengers a duty with respect to the proximity to the track of poles and other permanent structures, and that whether, in case of an injury to one of its passengers by coming in contact with a pole or other structures, the defendant was negligent in the location and maintenance thereof, is a question of fact for the jury.
Cameron v. *Street Railway*, 482.

The chartered rights of a street railway company, the location of its tracks and poles, and approval of the same by the railroad commissioners, are proceedings, assuming them to be in all respects legal, intended to bestow upon it the right to exist, not to destroy, to confer upon it the right to exercise all the privileges of its franchise, but not immunity from its negligence.
Cameron v. *Street Railway*, 482.

A notice on the back of each seat in a street car on which a plaintiff's intestate was riding at the time of his injury, in legible letters, plainly to be seen, "Avoid accidents; wait until the car stops," must be construed to have been intended as a caution to passengers against alighting from a car in motion, and not as an exemption of the street railway from its own negligence.
Cameron v. *Street Railway*, 482.

COMMON LAW.

See INTOXICATING LIQUORS.

CONDEMNATION.

See EMINENT DOMAIN.

CONDITIONAL JUDGMENT.

See MORTGAGES.

CONDITIONAL SALES.

See EVIDENCE.

CONSIDERATION.

See CONTRACTS.

CONSTITUTIONAL LAW.

See EMINENT DOMAIN.

The people of the State have not given the legislature power to exempt any particular person or corporation from the operation of the general law of the State or to impose special conditions or limitations upon rights of action against a particular person or corporation. *Milton* v. *Railway Co.*, 218.

Private and Special Laws, 1891, chapter 116, section 3, providing that no action shall be maintained against a particular street railway company therein named, for injuries caused by its neglect of duty to keep in repair those parts of the street of a town occupied by its railway, unless one of its directors had twenty-four hours actual prior notice of the defect and subsequent notice of the injury within fourteen days, is to that extent unconstitutional and void. *Milton* v. *Railway Co.*, 218.

The Legislature of Maine has by the Constitution of Maine, "full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor that of the United States." *Opinions of the Justices*, 506.

It is for the Legislature to determine from time to time the occasion and what laws and regulations are necessary or expedient for the defense and benefit of the people; and however inconvenienced, restricted or even damaged, particular persons and corporations may be, such general laws and regulations are to be held valid unless there can be pointed out some provision in the State or United States Constitution which clearly prohibits them. *Opinions of the Justices*, 506.

CONSTRUCTION.

See DEEDS. EASEMENTS. SALES. STATUTES. TAXATION. WILLS.

CONTINUANCE.

See PLEADING.

CONTRACTS.

See ASSIGNMENTS. "BOARD." BROKERS. COVENANTS. DEEDS. EQUITY. EVIDENCE. EXECUTORS AND ADMINISTRATORS. LANDLORD AND TENANT. LOGS AND LUMBER. MORTGAGES. PRINCIPAL AND AGENT. RELEASE. SALES. SPECIFIC PERFORMANCE.

When a child has released all his claims as heir at law against the estate of his parent and in consideration thereof has received from the parent an advancement and certain releases of causes of action and among the releases was a promise by the parent not to institute criminal proceedings against the child, such promise does not invalidate the advancement. While illegality of part of the consideration may prevent the enforcement of an executory contract, it does not undo an executed contract. *Hilton* v. *Hilton*, 92.

While any consideration, however small, may be regarded as sufficient to support a contract, yet the effect of a consideration when proved or admitted, and the effect of the evidence offered to prove such contract are entirely different propositions. *Liberty* v. *Haines*, 182.

When the voluntary promise of a defendant to perform a gratuitous service is nudum pactum, he cannot be held liable for its non-performance as a breach of contract. *Brawn* v. *Lyford*, 362.

A defendant conveyed his farm to the plaintiffs and assigned to them his interest in a policy of fire insurance to the extent of the buildings insured, reserving the insurance on the personal property covered by the policy. After the deed and assignment were signed, the defendant promised to send the assigned policy by mail to the local agents to obtain the assent of the insurance company. He neglected to do this and seven days later the buildings were destroyed by fire. The plaintiffs then brought a special action of assumpsit against the defendant to recover the amount of the insurance on the buildings, with interest from the date of the fire.

Held: That the promise of the defendant to send the policy to the agents of the insurance company for its assent to the assignment was without consideration and that the defendant was not liable for the non-performance of his promise as a breach of contract. *Brawn* v. *Lyford*, 362.

If it satisfactorily appears from the terms of a contract and all the circumstances, that the parties thereto actually intended to make the time specified an essential element of the contract and that the consequences of the failure of performance must have been contemplated by the parties at the time of the execution of the contract, such an express stipulation as to time will be held decisive of the question in a court of equity as well as in a court of law. *Telegraphone Corporation* v. *Telegraphone Co.*, 444.

CONTRIBUTION.

See HUSBAND AND WIFE.

CONTRIBUTORY NEGLIGENCE.

See COMMON CARRIERS. MASTER AND SERVANT.

CONVERSION.

See TROVER.

COSTS.

See LOGS AND LUMBER.

When in a real action for the recovery of land, the defendant files the plea puis darrien continuance and the plaintiff accepts such plea, the plaintiff is the prevailing party up to the time of filing the plea and is entitled to costs up to that time. After that time the defendant is the prevailing party and is thereafter entitled to costs. *Poland* v. *Davis*, 472.

COURTS.

See APPEAL. BAIL. EXCEPTIONS. PLEADING. TRIAL. VERDICT. WILLS.

When a person entitled to a dividend from an estate in a United States bankruptcy court, has made a voluntary assignment of such dividend to a creditor then such creditor may upon petition be allowed to intervene and have the validity of his assignment and the justice of his claim determined by the court of bankruptcy in which the matter is pending. *Savings Bank* v. *Alden*, 230.

COVENANTS.

See DEEDS.

A recital in a quitclaim deed at the close of the description of the land as follows, "and being a part of the land purchased by me of the town of Foxcroft" does not constitute a covenant by the grantor that he then has the title to the land. *Manson* v. *Peaks*, 430.

CORPORATIONS.

See FRAUD. LIENS. MUNICIPAL CORPORATIONS. STREET RAILWAYS.

It is competent for a board of directors to establish a mutual understanding that one of their number shall be the active agent of the board in the management of the property and the conduct of the business affairs of the corporations; and it is not indispensible that such an understanding should be created by a formal vote or proved by a formal record, but it may be inferred from the situation and conduct of the parties. *York* v. *Mathis*, 67.

It is not error on the part of a jury and the presiding Justice to draw the inference that the president of a corporation had acquired the authority to bind the corporation by the habit of acting with the assent and acquiesence of the board of directors, and to find that the repairs made on a building owned by the corporation were made by "consent of the owner" given through its president its authorized agent, within the meaning of R. S., chapter 93, section 29. *York* v. *Mathis*, 67.

If the drawer of a check is the treasurer of a corporation and signs it as such the implied representation that there are funds in the drawee bank to meet it is his own, for which he is personally responsible. And he is so responsible, though he only signs the check in blank and leaves it with another person to fill out and deliver on deposit. *Banking Co.* v. *Cunningham*, 455.

CRIMINAL LAW.

See ATTORNEY AND COUNSELLOR. EXCEPTIONS. INDICTMENT. INTOXICATING LIQUORS.

The plea of nolo contendere when accepted by the court is, in its effect upon the case, equivalent to the plea of guilty. The judgment of conviction follows upon such a plea as well as upon a plea of guilty, and such a plea if accepted, cannot be withdrawn and a plea of not guilty entered except by leave of court. *State* v. *Siddall*, 144.

When a respondent has pleaded nolo contendere and the plea has been accepted by the court, and the respondent afterwards desires to withdraw such a plea and have a plea of not guilty entered, the whole matter is in the sound discretion of the presiding Justice and the Law Court will not interfere except in a case of abuse of that discretion. *State* v. *Siddall*, 144.

Where, on two indictments for illegal sale of intoxicating liquors against the same defendant, the defendant in one case pleaded nolo contendere, but on his acquittal in the other case on the same state of facts he asked leave to withdraw his plea in the former case and plead not guilty and leave was refused, *held* that there was no abuse of discretion in refusing leave to withdraw the plea of nolo contendere. *State* v. *Siddall*, 144.

DAMAGES.

See ABATEMENT. ACCOUNTING. EMINENT DOMAIN. MASTER AND SERVANT. NAVIGABLE WATERS. VERDICT.

DEATH.

See PLEADING.

Immediate death caused by wrongful acts was unknown to the common law as a cause of action. Under the statute of this State passed in 1891 and following Lord Campbell's Act in England (1847), it was made so. The common law gave to the personal representatives a right of action to recover for conscious suffering up to the time of death, but nothing for the death itself. The statute does not apply in case of conscious suffering and gives damages only for the death itself which must follow immediately. The statute did not create a new remedy for an existing cause of action but created a cause itself where none existed before. When thus created, a new cause of action arose with different parties in interest, different ground of suit, different rule of damages, different application of funds and different period of limitation. *Anderson* v. *Wetter*, 257.

DECEIT.

See CORPORATIONS. FRAUD.

To support an action for deceit, the plaintiff must show that the defendant intentionally made false representations to him, with the intent that he should act upon them, or in such a manner as would naturally induce him to act upon them, that the representations were material, and that they were known to the defendant to be false, or being of matters susceptible of knowledge, were made as of a fact of his own knowledge, that the plaintiff was thereby induced to give credit or part with property, that he was deceived, and that he was injured. *Banking Co.* v. *Cunningham*, 455.

DECLARATION.

See BONDS. PARTNERSHIP.

DECREES.

See JUDGMENT. WILLS.

When a decree has been entered by a single Justice, in accordance with the advisory verdict of a jury, sustaining a plaintiff's lien claim, and an appeal is taken and such decree is not shown by the appellant to be clearly erroneous, it will be affirmed. *York* v. *Mathis*, 67.

DEEDS.

See COVENANTS. EASEMENTS. MORTGAGES.

True Lovett of Bridgton, in consideration of the sum of nineteen dollars paid by Samuel Andrews and Jedediah Kimball "a committ of the Society cald Perticuler Baptist in said Town of Bridgton, or their successors in that office for the time being," conveyed "Unto the said Samuel and Jedediah" a certain tract of land in said town, "to have and to hold, the aforegranted premises to the said Samuel and Jedediah and to their successors in office to their use and behoof forever," the covenants being in the following terms: "And I do covenant with the said Samuel and Jedediah and their successors in office, that I am lawfully seized in fee of the aforegranted premises; that I have good right to sell and convey the same to the said Samuel and Jedediah and to their successors; and that I will warrant and defend the same premises to the said Samuel and Jedediah, their assigns forever, against the lawful claims and demands of all persons."

Held: (1) That it was the intention of the grantor to convey the property to the grantees, not in their individual right, but as trustees for the Perticuler Baptist Society, the word "committ" meaning committee, and being equivalent to trustees, and the words "successors in office" providing for a continuance of the trust.

(2) That the deed contains no words of qualification or limitation, nothing to indicate that under any circumstances the estate is to determine. There is no mention of any restricted purpose for which the property is to be used. It is a conveyance to the committee named and to their successors in office, to their use and behoof forever, and a fee simple in trust was granted, although no words of limitation to heirs were used.

Hamlin v. *Meeting House*, 343.

Where one, not then having a title to real estate, gives a mere quitclaim deed thereof with only a convenant of non-claim, a title afterward acquired by him does not pass to the grantee in such prior deed. *Manson* v. *Peaks*, 430.

A grantee, without notice, under a deed given after the title was acquired by the grantor, has a better title than the grantee under a quitclaim deed without convenant of warranty given before the title was acquired by the grantor.

Manson v. *Peaks*, 430.

DEMURRER.

See EQUITY. INDICTMENT. LOGS AND LUMBER. PLEADING.

DESCENT AND DISTRIBUTION.

See EXECUTORS AND ADMINISTRATORS. WILLS.

By Revised Statutes, chapter 77, sections 4, 5 and 6, when a parent and child (of age) agree in writing that the transfer of certain property and property rights from the parent to the child shall be deemed an advancement equivalent to the whole amount of the child's share as heir in the parent's estate such agreement will bar the child from any share in such estate.

Hilton v. *Hilton*, 92.

An acknowledgment by a child in writing that he receives the transfer of certain property rights and certain releases of causes of action from his parent in full of all demands he "claiming as heir or otherwise has or may have against the estate of" the parent, is an acknowledgment that he receives them as an advancement of his whole share as heir of his parent, and bars his claim to any share after the parent's death. *Hilton* v. *Hilton*, 92.

Where a parent makes advancement to a child in bar of all claims of such child as heir in the parent's estate, and after the death of the parent, the other heirs for a time admitted to some extent the claims of such child to a share in the estate does not estop them from afterward denying his right to further share. *Hilton* v. *Hilton*, 92.

DISMISSAL AND NONSUIT.

See EXCEPTIONS. HUSBAND AND WIFE. TRIAL. WILLS.

DIVESTMENT OF TITLE.

See WILLS.

DIVISION LINE.

See BOUNDARIES.

DOUBLE TAXATION.

See TAXATION.

DRAINS AND SEWERS.

See MUNICIPAL CORPORATIONS.

DRAMSHOPS.

See INTOXICATING LIQUORS.

EASEMENTS.

The plaintiff acquired title to certain lots of land at Sullivan Harbor, Maine, lying north of the county road, comprising what is known as the Hotel Cleaves Lot, and also as appurtenant to these lots "a right of way for all purposes of a way over a piece of land forty feet wide in every part, lying easterly of and adjoining said lots and extending from the northeast corner of the last described lot to the county road." The plaintiff's house is situated about thirty feet from the dividing line between his lot and the forty feet strip. The fee of this forty feet strip of land known as the avenue or boulevard, is in the defendant Braman, subject to the easement above described in favor of the plaintiff. The Braman property known as the Manor Inn, is situated at the northerly end of this forty feet strip at a distance of about 160 feet from the county road. The defendants built a fence within the limits of this forty feet strip and on either side of it and at the southerly end near the line of the county road, erected two stone pillars about fourteen feet apart with two short sections of fence connecting each of them at an angle with the southerly end of the fence on either side of the avenue. A passageway fourteen feet in width is thus afforded from the county road northerly over the avenue.

Held: (1) That the plaintiff acquired by his deed, not merely a personal right of way available for his own use, but a right of way appurtenant to his house and lot available for the use of himself his family and his guests, but that he was not entitled to use the whole forty feet strip unless reasonably necessary for the purposes of a way.

(2) That in the use and enjoyment of his easement, the plaintiff was not limited to a single passage way back and forth over his land to this forty feet avenue, but that he had a right to pass onto that forty feet strip over his land, at all feasible points from the north end of his east line to the south end of it down to the county road; and that after passing from the county road onto the forty feet avenue, he had a right to go onto his own land at all feasible points in the east line thereof.

(3) That the declarations of the guests at the plaintiff's hotel made at the time of leaving and tending to show that they left on account of the fence were admissible in evidence as expressive of the motive and reason for their action. *Cleaves* v. *Braman*, 154.

EMINENT DOMAIN.

See ABATEMENT. APPEAL. CONSTITUTIONAL LAW.

In a case where important rights affecting a community are involved, and the substantial rights of all are protected, an objection which at most is only technical, is entitled to but little weight.

Water District v. *Water Co.*, 25.

The right of appeal from the estimate of damages by the municipal officers for land taken for the site of a public library building, is neither a common law nor a constitutional right, but is solely a statutory right and can extend no farther than the statute provides. *Hayford* v. *Bangor*, 434.

Only persons having an estate or interest in land taken at the time of the taking can appeal from the estimate of damages by municipal officers. Persons succeeding to the estate or interest of a deceased appellant cannot prosecute that appeal. *Hayford* v. *Bangor*, 434.

Legislation to restrict or regulate the cutting of trees on wild land or uncultivated land by the owner thereof, etc., without compensation therefor to such owner, in order to prevent or diminish injurious droughts and freshets, and to protect, preserve and maintain the natural water supply of springs, streams, ponds and lakes, etc., and to prevent or diminish injurious erosions of the land and the filling up the rivers, ponds and lakes, etc., would not operate to "take private property within the inhibition of the Constitution. *Opinions of the Justices*, 506.

While legislation to restrict or regulate the cutting of trees on wild or uncultivated lands by the owner thereof might restrict the owner in his use of them, might delay his taking some of the product, might defer his anticipated profits and even thereby might cause him some loss of profit, it would nevertheless leave him his lands, their product and increase, untouched and without diminution of title, estate or quantity. He would still have large measure of control and large opportunity to realize values. He might suffer delay but not deprivation. While the use might be restricted, it would not be appropriated or "taken." Such legislation would be within the legislative power and would not operate as a taking of private property for which compensation must be made. *Opinions of the Justices*, 506.

EQUITY.

See ACCOUNTING. CONTRACTS. DECREES. MORTGAGES. RECEIVERS. REFERENCE. SPECIFIC PERFORMANCE. TRUSTS.

When a cause in equity is heard on bills and answers, the court is limited to the consideration of such facts as are properly charged, and are admitted. *Bailey* v. *Worster*, 170.

When a complainant in a bill in equity merely states that he "is informed and believes" that certain facts are true, the form of charging is fatally defective. *Bailey* v. *Worster*, 170.

When a defendant answering a bill says that "he has no information as to the correctness of the complainant's statements," and makes no other denial, it is not a sufficient traverse of an allegation well charged. *Bailey* v. *Worster*, 170.

Statements of facts in a bill, under information and belief merely are not to be taken as true under Chancery Rule XXVII, though not traversed by a sufficient answer. *Bailey* v. *Worster*, 170.

The objection of the want of necessary parties to a bill in equity may be raised by demurrer, either general or special, and when it is raised by special demurrer, it is proper that the demurrer should suggest the names of the parties omitted. *Strout* v. *Lord*, 410.

The objection to the want of necessary parties to a bill in equity may be taken at the hearing, or suggested at any time by the court. *Strout* v. *Lord*, 410.

A demurrer to a bill in equity for want of necessary parties is not available unless the bill on its face discloses the want of necessary parties. *Strout* v. *Lord*, 410.

Where a bill in equity was brought after a mortgagee's death to redeem from a mortgage on which foreclosure proceedings had been commenced and it did not appear on the face of the bill that the time for redemption had expired and that the mortgage had become completely foreclosed when the bill was brought. *Held:* That it did not appear on the face of the bill that the devisees of the deceased mortgagee were necessary parties and that a demurrer for want of necessary parties was not sustainable. *Strout* v. *Lord*, 410.

It is a well settled doctrine that ordinarily, a court of equity will not actively interfere by its decree to enforce a forfeiture and that its refusal so to do rests upon the same principle upon which the court acts when it refuses to enforce a contract which is unequal, unjust or has any inequitable features and incidents. *Telegraphone Corporation* v. *Telegraphone Co.*, 444.

In a proceeding in equity relating to a patent right, *held* that jurisdiction was properly retainable on the ground of the absence of an adequate remedy at law. *Telegraphone Corporation* v. *Telegraphone Co.*, 444.

ESTATES.

See DESCENT AND DISTRIBUTION. EXECUTORS AND ADMINISTRATORS. WILLS.

ESTOPPEL.

See DEEDS. DESCENT AND DISTRIBUTION. MORTGAGES. OFFICERS.

EVIDENCE.

See ACCOUNTING. APPEAL. ARREST. EASEMENTS. EXCEPTIONS. EXECUTORS AND ADMINISTRATORS. GAMING. HUSBAND AND WIFE. INTOXICATING LIQUORS. LOGS AND LUMBER. MASTER AND SERVANT. NAVIGABLE WATERS. REAL ACTIONS. RELEASE. VERDICT.

When material and otherwise admissible, a letter which is received by due course of mail, purporting to come in answer from the person to whom a prior letter has been duly addressed and mailed, is admissible without specific proof of the genuineness of the signature. And the rule is the same, whether the signature be written or typewritten. *Lancaster* v. *Ames*, 87.

The presumption of genuineness arising when a letter, with the signature either written or typewritten, is received by due course of mail purporting to come in answer from the person to whom a prior letter has been duly addressed and mailed, may be strengthened by internal evidence in the contents of the letter itself. *Lancaster* v. *Ames*, 87.

The phrase "burden of proof" like the phrase "ordinary care" is a relative term and must be considered, not only in the light of the conflict of evidence, but also with reference to the subject matter to which the burden of proof relates. And with respect to ordinary merchandise accounts and payments thereof, and of cases involving simple issues of fact, the rule is well established that where a substantial conflict of testimony appears, the verdict will not be disturbed. *Liberty* v. *Haines*, 182.

There is, however, a class of cases, such as proving the existence and contents of a lost will, or proving an agreement to bequeath by will, or mutual mistakes sufficient to justify the reformation of an instrument, where in order to sustain the burden of proof the rule is that the evidence must be clear, convincing, conclusive, and such as to satisfy the mind of the court. And this requirement does not militate against the rule that in civil suits a preponderance of the evidence is all that is required.
Liberty v. *Haines*, 182.

In that class of cases such as proving the existence and contents of a lost will, or proving an agreement to bequeath by will, etc., the rule which obtains in the ordinary case is so varied in every common law jurisdiction, at least, that although all the while it only requires a preponderance of the evidence, yet to establish a preponderance, the proof must be clear, convincing and satisfactory. *Liberty* v. *Haines*, 182.

In an action to recover for clapboards sold, a bundle of the clapboards was introduced at the trial as an exhibit by the defendant as a sample of the clapboards put up by the plaintiffs under their contract with the defendant. The plaintiffs claimed that the clapboards exhibited did not come from those

furnished by them. Upon this issue a witness was asked as to the appearance of the clapboards shown compared with other clapboards manufactured by the plaintiffs which he had seen before. The witness answered "They were not standard as far as dressing and grading." The same witness was also asked the following question: "What as compared to the clapboards you saw at the Moody barn, for instance, that were showed you by Mr. Trask?" The reply was "I thought they were an older lot." *Held:* That these answers were descriptive only, and not opinion evidence on a matter requiring expert knowledge. *Damren* v. *Trask*, 204.

Where on an issue whether a sale of furniture was conditional or not, *held:* That certain receipts given by the vendor and accepted by the defendant when installments were paid, in which the furniture was described as leased, were properly admitted as being in the nature of an admission, their weight being for the jury. *Lazarovitch* v. *Tatilbum*, 285.

Where on an issue whether a sale of furniture was conditional or not, *held:* That a mortgage of the furniture given by the defendant to a third person subsequent to the conditional sale, was properly excluded as having no probative force on the question of title and being a mere self serving act. *Lazarovitch* v. *Tatilbum*, 285.

On an issue as to whether or not the southwestern of the two Ensign Islands in West Penobscot Bay is within the boundary of the Muscongus Grant, *held:* That the three historical works "Williamson's History of Maine," "Williamson's History of Belfast" and "Farrow's History of Islesboro" were properly used in evidence and were entitled to such weight as authorities as they might have on the question whether or not the aforesaid island is within the boundary of the Muscongus Grant. *Lazell* v. *Boardman*, 292.

Self-serving acts and declarations of a former owner of land, when upon it, pointing out the monuments and location of his line are not admissable, unless it appears that the declarant is dead. *Williamson* v. *Gooch*, 402.

EXCEPTIONS.

See APPEAL. ATTORNEY AND COUNSELLOR. TRIAL.

Where in an action on the case to recover damages for injuries sustained by a plaintiff and caused by the alleged negligence of the defendant, and the plaintiff recovered a verdict and that verdict has been set aside by the Law Court on the ground that the injury was caused by the plaintiff's want of due care, and the case is again tried and new evidence is introduced by the plaintiff and that evidence is of doubtful admissibility and at least is inadequate to prove that the plaintiff was not bound to have knowledge of conditions existing at the time of the accident, the presiding Justice is justified in ordering a nonsuit. *Bryant* v. *Paper Co.*, 32.

The right of exception under the practice in this State is conferred by statute, and is based upon some opinion, direction or judgment on the part of the court which is erroneous, and adverse and prejudicial to the party excepting.
State v. *Martel*, 63.

When evidence has been admitted in the trial of a cause and it appears that such evidence was absolutely immaterial and without weight upon the issue on trial and that the party excepting thereto was not aggrieved by its admission, exceptions to the admission of such evidence will not be sustained even if the evidence was inadmissible. *Brogan* v. *McEachern*, 198.

When a party takes exceptions to rulings of the presiding Justice it is incumbent on such party to show affirmatively that there was error in such rulings and that he is aggrieved thereby. *Hix* v. *Giles*, 439.

Where the presiding Justice ordered a verdict for the defendant and the plaintiff excepted, *held*: That it did not affirmatively appear from the exceptions that the ruling ordering a verdict for the defendant was erroneous for the reason that the exceptions failed to show what the issue was and upon what ground the ruling was based, and for the further reason that the jury specially found that the plaintiff authorized the sale of the horse in suit.
Hix v. *Giles*, 439.

EXECUTION.

Property in the custody of the law is not subject to seizure and sale on execution. *Chalmers* v. *Littlefield*, 271.

EXECUTORS AND ADMINISTRATORS.

See APPEAL. DESCENT AND DISTRIBUTION. JUDGMENT. WILLS.

Where it is sought to establish an ante mortem contract that results in a post mortem disposition of an estate, the evidence required to establish such contract must come within the rule governing the quality of proof required to establish the reformation of an instrument, to prove the contents of a lost will, or a deed, or an agreement to bequeath by will.
Liberty v. *Haines*, 182.

There is no class in which a higher kind of proof should be demanded than that which seeks to establish oral contracts calculated to subvert the muniments of title and divert the descent of intestate property from its legal channel. No class of cases is more susceptible to the temptation of fraud and none in which it can be more easily practiced. And in this class of cases the contention of any plaintiff must disclose motives of good faith, a claim consistent with the circumstances and probabilities of the situation and be supported by clear, positive and convincing proof.
Liberty v. *Haines*, 182.

A plaintiff brought an action against the estate of a decedent to recover the sum of $13,720, upon an account annexed for services performed, and also to recover $20,000 upon an alleged special promise on the part of the decedent in his lifetime to pay said sum to the plaintiff. The alleged contract for the payment of said sum of $20,000 was oral. The facts as claimed by the plaintiff upon which she sought to recover were as follows: (1) That she engaged in the employment of the decedent from October 1, 1889 to February 22, 1903, as an ordinary servant, for the agreed price of $20 per week; (2) That the decedent in his lifetime and for many years prior to his death was afflicted with a loathsome and highly contagious disease, so noxious in its character that it was fraught with great danger to his attendant, and required unusual and special care; (3) That later after the plaintiff had discovered the nature of the disease with which the decedent was afflicted and had expressed her intention of at once declining to give him further care and attention and of leaving the house, he expressly agreed in consideration that she would remain and continue her services to pay her in addition to the wages before alleged to have been agreed upon, the additional sum of $20,000 and the house. At the trial the plaintiff recovered a verdict for $26,266.17. *Held*: That the plaintiff failed to sustain her alleged contract for $20,000 but was entitled to judgment for $6,266.17, the amount found by the jury in payment for the time she was unquestionably a servant of the decedent.

Liberty v. *Haines*, 182.

A Judge of Probate allowed the fourth account of the administrators of the estate of a deceased intestate. In this account the administrators were allowed for certain items paid under an order of distribution to the twenty-two nephews and nieces of the deceased. In accordance with this order and a previous order of distribution, personal estate amounting to $16,891.67 was distributed to the nephews and nieces per stirpes, whereas the orders should have provided for a distribution per capita. In both petitions for distribution the Probate Court had jurisdiction and all proceedings with reference to said petitions were regular and in accordance with the statute, and the time for appeal from both decrees of distribution had long elapsed.

Held: That these matters were within the jurisdiction of the Probate Court and its decrees not being appealed from were conclusive and that a compliance with the orders of distribution released the administrators from all further liability as to the assets distributed under the orders.

Mudgett's Appeal, 367.

Under the statutes of Maine, the mortgage title to lands held under an unforeclosed mortgage descends on the death of the mortgagee to his executor or administrator like all other personal estate, and not to his heirs or devisees. When such a mortgage afterwards becomes foreclosed the lands thereupon become vested in the heirs or devisees, subject to sale for the purposes of administration, and are to be distributed to the persons who are entitled to

the personal estate. But until foreclosure is complete, the heirs or devisees have no title to the mortgaged estate, and they have no interest in the same except such as they have in personal estate generally.

Strout v. *Lord*, 410.

FACTORS.

See BROKERS.

FELLOW SERVANT.

See MASTER AND SERVANT.

FISH AND FISHERIES.

It is a well settled principle of the common law that the fish in the waters of the State including the sea within its limits as well as the game in its forests belong to the people of the State in their collective sovereign capacity.

State v. *Peabody*, 327.

It is well settled that the legislature of the State representing the people possess full power to regulate and control fisheries by appropriate enactments designed to secure the benefits of this public right in property to all its inhabitants. *State* v. *Peabody*, 327.

Revised Statutes, chapter 41, section 34, as amended by chapter 161 of the Public Laws of 1905 contains no provision expressly prohibiting a person from digging clams within the limits of a town of which he is not a resident, nor does it contain any provision authorizing the inhabitants of a town to adopt any by-law or regulation excluding non-residents from the privilege of applying to the municipal officers for a written permit to take clams in such town. *State* v. *Peabody*, 327.

FIXTURES.

The intention with which an article is annexed to the freehold has come to be recognized as the cardinal rule and most important criterion by which to determine its character as a fixture, and the attendant facts and circumstances are chiefly valuable as evidence of such intention. This controlling intention is not the initial intention at the time of procuring the article in question, nor the secret intention with which it is affixed, but the intention which the law deduces from all the circumstances of the annexation.

Portland v. *N. E. T. & T. Co.*, 240.

A plaintiff city assessed a tax upon the conduits of a defendant telephone and telegraph company, as real estate, and sought to recover such tax. *Held:* That there was nothing in the nature of the conduits, the mode and purpose of annexation or the relation of the parties to each other to warrant the inference that the defendant company intended to relinquish its ownership in these pipes or that the owners of the soil expected to acquire title to them by annexation, and that being laid under a license revocable at the will of the municipal officers so far as any particular highway or location was concerned they did not become a constituent part of the freehold.

Portland v. *N. E. T. & T. Co.*, 240.

FORECLOSURE.

See MORTGAGES.

FORFEITURES.

See EQUITY. MORTGAGES.

FRAUD.

See CORPORATIONS. DECEIT. RELEASE.

When one party has been guilty of an intentional and deliberate fraud by which to his knowledge another party has been misled or influenced in his action, he cannot escape the legal consequences of his fraudulent conduct by showing that the fraud might have been discovered had the party whom he deceived exercised reasonable diligence and care.

Banking Co. v. *Cunningham*, 455.

When the drawer of a check delivers it to the payee, or when he deposits to the credit of his account in one bank his own check drawn upon another bank, a representation is ordinarily implied that there are funds in the drawee bank to meet it, and because of this implied representation, it is a fraud on the part of the drawer to draw and deliver such a check.

Banking Co. v. *Cunningham*, 455.

A corporation of which the defendant was treasurer had an account in the plaintiff bank in Bangor, and another in a bank in Gardiner, in both of which places it was engaged in business. For many months prior to the drawing of the checks which was the basis of the action against the defendant, he had practiced what is known as "kiting" checks between the plaintiff bank and the bank in Gardiner. He deposited daily in each bank checks, drawn on the other bank to meet which the defendant knew there were no sufficient available funds in the drawee bank, and which he knew could only be met by

the deposit of other similar checks. The bank at Gardiner discovered the practice, and finally refused payment of a check drawn upon itself, which the defendant had deposited in the plaintiff bank, and which had been forwarded for collection, and caused it to be protested. Before the plaintiff bank had notice of the nonpayment and protest, it had accepted two other similar checks, credited them on the account of the defendant's corporation and forwarded them for collection. Payment of these checks was refused, and they were in their turn protested. The result was that the plaintiff bank lost the amount of the three checks, less a small balance which was to the credit of the corporation when notice of non-payment was first received.

Held: (1) That the evidence did not warrant a finding that the officers of the plaintiff bank knew of the "kiting" practice. (2) That the plaintiff was induced to give credit to the defendant's corporation by his implied representation, which was false, and that it was deceived thereby. (3) That the defendant was liable in an action for deceit.

Banking Co. v. *Cunningham*, 455.

GAMBLING.

See GAMING.

GAME.

See FISH AND FISHERIES. TOWNS.

GAMING.

The purchase of stocks on margins is a gambling transaction, and is illegal.

Lancaster v. *Ames*, 87.

When money is deposited or loaned to another, for the express purpose of being used in the purchase of stocks on margins, the promise of the one, with whom it is deposited or to whom it is loaned, to repay or to be accountable for it, is based upon an illegal consideration, and cannot be enforced.

Lancaster v. *Ames*, 87.

In an action to recover money deposited by the plaintiff with the defendant, *held* that the evidence shows that the plaintiff deposited his money with the defendant for the express purpose of its being used in buying stocks on margins and that the same was an illegal transaction.

Lancaster v. *Ames*, 87

GARNISHMENT.

See TRUSTEE PROCESS.

GENERAL ISSUE.

See APPEAL. TROVER.

In a real action, under the general issue alone, the defendant may rebut the plaintiff's proof by showing title in himself, or in another, or merely that the plaintiff has no title. *Brown* v. *Webber*, 60.

GRANTOR AND GRANTEE.

See COVENANTS. DEEDS.

GRANTS.

See EASEMENTS.

GUARDIAN AND WARD.

Section 3, chapter 72, R. S., 1883, as amended by chapter 85, Public Laws, 1899, and which is now section 3, chapter 74, R. S., reads as follows: "On application of any surety or principal in such bond, the judge, on due notice to all parties interested may, in his discretion, discharge the surety or sureties from all liability for any subsequent, but not for any prior breaches thereof, and may require a new bond of the principal, with sureties approved by him." *Held:* That said section as amended does not apply to probate bonds that were filed and approved prior to such amendment *Deposit Co.*, *Aplt.*, 382.

HARMLESS ERROR.

See EXCEPTIONS.

HEIRS.

See WIDOW. WILLS.

HIGHWAYS.

See NAVIGABLE WATERS. WAYS.

HUSBAND AND WIFE.

See TRUSTS.

A wife cannot maintain an action against her husband even for services as cook in his logging operations; and when in such action the fact of coverture appears, the action must be dismissed even though the husband does not appear and is defaulted. *Copp* v. *Copp*, 51.

If there is any presumption of agency on the part of the wife to pledge her husband's credit for necessaries, arising from the marriage contract, independent of the conjugal relation and cohabitation, it is rebuttable and may be disproved by the husband. *Steinfield* v. *Girrard*, 151.

The authority of a wife to pledge her husband's credit for necessaries, arising from the martial relation alone, is co-existent and co-extensive with her necessity occasioned by his failure to fulfil his duty in this respect. If his duty has been performed, or no longer continues, then no necessity can legally arise which would entitle the wife to such authority.
Steinfield v. *Girrard*, 151.

When a wife deserts her husband without his fault, she forfeits all right to support and maintenance from him and in such case carries with her no authority to use his credit even for necessaries.
Steinfield v. *Girrard*, 151.

In an action to recover for goods furnished to a defendant's wife his testimony to the effect that he was always willing and prepared to provide a home, and all necessaries, for his wife, and that she was living apart from him, on the date of the purchase of the goods sued for, without fault on his part, was competent and should have been admitted irrespective of the plaintiff's lack of knowledge of the separation. *Steinfield* v. *Girrard*, 151.

A defendant appealed from an order of a municipal court requiring him to contribute to the support of his wife in accordance with the provisions of Revised Statutes, chapter 63, section 7, as amended by the Public Laws of 1905, chapter 123, section 6. *Held:* That the statute does not give the husband the right of appeal in such case. *Cotton* v. *Cotton*, 210.

IMMEDIATE DEATH.

See DEATH.

IMPLIED AUTHORITY.

See CORPORATIONS.

"IMPLIED REPRESENTATIONS."

See CORPORATIONS. FRAUD.

IN CUSTODIA LEGIS.

See EXECUTION. TRUSTEE PROCESS.

When property or money is in custodia legis, the officer holding it is the mere hand of the court; his possession is the possession of the court; to interfere

with his possession is to invade the jurisdiction of the court itself; and an officer so situated is bound by the orders and judgments of the court whose mere agent he is, and he can make no disposition of it without the consent of his own court, expressed or implied. *Savings Bank* v. *Alden*, 230.

Money belonging to a bankrupt estate and in the hands of the trustee in bankruptcy is in the custody of the law and continues in the custody of the law until the trustee in bankruptcy actually pays to distributees the dividends awarded to them. *Savings Bank* v. *Alden*, 230.

INDICTMENT.

See CRIMINAL LAW.

A defendant was indicted by the name of C. H. Libby for violation of the law against the sale of intoxicating liquors. He filed a plea in abatement in proper form, averring that his name was Cyrille H. Libby and not C. H. Libby as in the indictment alleged. The State filed a replication to the effect that the defendant was as well known by the name of C. H. Libby as by that of Cyrille H. Libby. The defendant then demurred to the replication and demurrer was joined. The demurrer was overruled and the replication adjudged good. The demurrer admitted all the facts stated in the replication, and the only question therefore presented was whether a person who is as well known by the initials C. H. as by the name Cyrille H. can be properly indicted in the name of the initials. *Held:* That the indictment was good. *State* v. *Libby*, 147.

INFANTS.

See GUARDIAN AND WARD.

INITIALS.

See INDICTMENT.

INSANE PERSONS.

See PAUPERS.

INSOLVENCY.

See BANKRUPTCY.

INSURANCE.

See CONTRACTS. VERDICT.

INTOXICATING LIQUORS.

See ARREST.

The defendant was indicted and tried as a common seller of intoxicating liquors *Held:* That the evidence of a certain witness for the State was admissible and also that under the circumstances of the case the Internal Revenue records were admissible as evidence competent to show that the defendant if not the owner of the liquors assisted the common seller in the business.
State v. *Martel*, 63.

An officer authorized to execute a warrant properly issued for the search and seizure of intoxicating liquors under R. S., chapter 29, section 49, who finds the liquors complained of and arrests the owner or keeper, may also take and carry away such articles of property as may reasonably be used as evidence of guilt in the trial on the search and seizure process.
Getchell v. *Page*, 387.

An officer who lawfully takes and carries away such articles of property as may reasonably be used as evidence of guilt in the trial on search and seizure process, may also detain such articles to be presented to the grand jury at its next sitting as evidence that the owner or keeper is guilty of maintaining a liquor nuisance, or of keeping a drinking house and tippling shop, or of being a common seller of intoxicating liquors. *Getchell* v. *Page*, 387.

The common law right and duty of officers executing search and seizure processes against intoxicating liquors, issued under R. S., chapter 29, section 49, to take and temporarily detain articles of property as evidence of crime, is not in any way limited or modified by section 55 of the same chapter which specifically makes it the duty of officers executing such process to take "all dumps or appliances for concealing, disguising or destroying liquors," as well as all bottles, drinking glasses and other articles mentioned in the last named section. These statutory provisions are in affirmation of the common law duty of officers, and are not exclusive. *Getchell* v. *Page*, 387.

An officer executing a warrant of seizure and arrest, who takes articles of property to be used as evidence of the crime is not required to make return of such taking, upon his warrant. *Getchell* v. *Page*, 387.

Held: That defendant officers executing a search and seizure process were justified in taking to be used as evidence certain cork stoppers, funnels, copper measures, bottles and mugs, the value of which the plaintiff sued to recover. But the case did not show that two baskets taken, valued at one dollar, were reasonably useful as evidence, therefore the plaintiff was entitled to judgment for the value of the same. *Getchell* v. *Page*, 387.

To support a search and seizure process, the place to be searched must be a locality, definite, certain and fixed, and must be so described in the complaint. *State* v. *Fezzette*, 467.

The word "place" in R. S., chapter 29, section 49, cannot be construed as broad enough to cover the search for and seizure of liquors in a valise alleged merely to be in the possession of a person charged with unlawfully keeping or depositing liquors, but not alleged to be in any definite and fixed locality or place. *State* v. *Fezzette*, 467.

A complaint for a search and seizure process made under R. S., chapter 29, section 49, relating to the unlawful keeping or depositing of intoxicating liquors which fails to designate any place in which they are so kept and deposited otherwise than "in a valise in the possession of the said Fezzette in said Bangor" does not sufficiently allege an offense under that section. *State* v. *Fezzette*, 467.

JUDGES.

See BAIL.

JUDGMENT.

See APPEAL. MORTGAGES. REFERENCE. VERDICT.

When an appeal from the decree of the Probate Court refusing to issue letters testamentary is decided adversely to the appellant, on the ground that it did not appear in the appeal or in the reasons therefor that the will had been allowed or admitted to probate, that judgment is not in law a bar to a petition, filed during the pendency of the appeal proceedings, for leave to enter and prosecute an appeal from the decree refusing to admit the will to probate. *Gurdy, Aplt.*, 356.

Decrees of the Probate Court upon matters within its jurisdiction when not appealed from are conclusive upon all persons. *Mudgett's Appeal*, 367.

Decrees of the Probate Court upon matters within its jurisdiction when not appealed from are in the nature of judgments and cannot be impeached collaterally. *Mudgett's Appeal*, 367.

A judgment is a chose in action and can be assigned in writing by the administrator of the deceased judgment creditor, so that the assignee can maintain an action thereon in his own name. *Manson* v. *Peaks*, 430.

After an otherwise valid judgment in favor of an assignee of a judgment in an action upon the original judgment, the validity or efficacy of the assignment cannot be questioned by the judgment debtor nor by any one claiming under him. *Manson* v. *Peaks*, 430.

JUDICIAL DISCRETION.

See CRIMINAL LAW.

JURISDICTION.

See COURTS. EQUITY. IN CUSTODIA LEGIS. STREET RAILWAYS. TRUSTEE PROCESS. WILLS.

JUSTICES OF THE PEACE.

See APPEAL.

"KITING" CHECKS.

See FRAUD.

LANDLORD AND TENANT.

The tenant of a building is not an insurer against articles being thrown from a window to the injury of persons outside. He is only bound to the exercise of ordinary care. *Carl* v. *Young*, 100.

A declaration setting forth an injury received from an article thrown from a window of a building in the tenancy of the defendant, but not setting forth any facts showing negligence on his part, is not sufficient to sustain the action. *Carl* v. *Young*, 100.

Where a plaintiff in an action on an alleged express contract to pay room rent, recovers a verdict and it appears that the action arose in temper and not in contract, the verdict will be set aside. *Heron* v. *Webber*, 178.

Where a plaintiff alleges that the defendant made an express contract to pay room rent and it appears that no charge for room rent would have been made if harmonious relations between the plaintiff and the defendant had continued, such alleged contract will be closely scrutinized as claims of this kind are not viewed with favor by the court. *Heron* v. *Webber*, 178.

LEGISLATIVE POWER.

See CONSTITUTIONAL LAW.

LIENS.

See CORPORATIONS. LOGS AND LUMBER.

The statute gives a lien to persons performing labor or furnishing materials in erecting or repairing any building "by virtue of a contract with or by consent of the owner," and provides that "if the labor or materials were not furnished by a contract with the owner," he may prevent such lien by giving written notice that he will not be responsible therefor.

York v. *Mathis*, 67.

While the consent required by the statute to constitute the foundation of a lien must be something more than a mere acquiescence in the act of a tenant who for his own convenience makes temporary erections and additions which he has a right to remove during his tenancy, yet if the owner of the building has knowledge that certain repairs are necessary and makes no provision for them, but is present when they are being made by his tenant and gives no notice that he will not be responsible therefor, his consent may be inferred from his conduct considered in connection with all the circumstances of the case. *York* v. *Mathis*, 67.

Facts as shown by the case *held* to constitute a consent by the owner to repairs on a building, within the meaning of Revised Statutes, chapter 93, section 29, giving a lien for labor or materials in repairing a building "by consent of the owner." *York* v. *Mathis*, 67.

LIFE ESTATE.

See WILLS.

LIMITATION OF ACTIONS.

See ADVERSE POSSESSION. STATUTE OF LIMITATIONS.

LIQUOR SELLING.

See INTOXICATING LIQUORS.

"LOG MARKS."

See LOGS AND LUMBER.

LOGS AND LUMBER.

See NAVIGABLE WATERS.

To sustain a logging lien under R. S., chapter 93, section 61, it is not sufficient to state in the writ, outside of the declaration that the suit is brought to enforce the lien. It must be so stated in the declaration itself.

Copp v. *Copp*, 51.

When logs have been attached to enforce a lien claim thereon the owner of logs thus attached may appear and become a party to the suit, and if does thus appear he can challenge by demurrer the sufficiency of the declaration to sustain a lien judgment against his property. *Copp* v. *Copp*, 51.

When a lien judgment against logs is denied, the owner of the logs, if he has appeared, is entitled to costs from the time of his appearance.

Copp v. *Copp*, 51.

Where in an action to enforce a lien for labor on logs marked with a certain mark and a fac-simile of that mark is given in the command in the writ directing the officer to attach such logs, it is not necessary to give the mark a name, and the addition of a name is surplusage. *Brogan* v. *McEachern*, 198.

When the true and actual mark upon logs is correctly given in a writ in an action to enforce a lien for labor on such logs and the logs with that mark are attached and are the logs upon which the lien is claimed, the mark itself identifies the logs, and the name given to that mark is wholly immaterial.

Brogan v. *McEachern*, 198.

Where an order for the amount due him has been given to a laborer who has worked on logs and has a lien thereon for his services and such laborer assigns such order, the assignee thereof becomes the assignee of the claim for wages due such laborer and also of the lien upon the logs for the labor done upon them by such laborer, and may maintain an action in the name of such laborer to enforce the lien. *Brogan* v. *McEachern*, 198.

It is immaterial whether or not an order given to a laborer for the amount due him for his services on logs contains non-lien items when in a suit to enforce the lien of such laborer the action is brought upon the account for labor, and not upon the order, and before trial all non-lien items are eliminated from the account and the verdict is for lien items only.

Brogan v. *McEachern*, 198.

It is a well settled and familiar rule of law that when parties have agreed upon a surveyor to scale logs they will in the absence of fraud or mathematical mistake be bound by the scale made by such surveyor.

Atwood v. *Mfg. Co.*, 394.

Where parties have agreed upon a surveyor to scale logs and the correctness of the scale made by such surveyor is attacked on the ground of fraud or mathematical mistake, the burden of proof is on the party making the attack.
Atwood v. *Mfg. Co.*, 394.

In an action on a written contract under which the plaintiff agreed to cut and haul certain logs for the defendant at $9.00 per thousand feet, the verdict was for the plaintiff for the full amount cut and hauled according to the scale bill of the surveyor agreed upon. The defendant contended that there was both fraud and mathematical mistake in the scale bill. *Held:* That the evidence disclosed no reason for setting aside the verdict.
Atwood v. *Mfg. Co.*, 394.

LOST INSTRUMENTS.

See EVIDENCE.

MARINE MILES.

See MEASUREMENTS.

MARRIAGE.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See TRIAL.

The standard of care which the law requires of the servant is that which a reasonably cautious and intelligent person would exercise under the same circumstances, and the hazards and risks attendant upon his employment which he assumes are those which are open and obvious, of which he has been informed, or which he ought to have known by using reasonable care.
Bryant v. *Paper Co.*, 32.

The defendant was making repairs in the basement of its mill and workmen were engaged in taking down concrete piers by the use of drills and wedges, and dumping the pieces into a hole and leveling up. The adjoining space was used as the pump room, having a wooden floor made of two inch plank where the plaintiff and other employees had occasion to pass day and night in looking after the pump and its gearing. In the afternoon of the day before the accident to the plaintiff hereafter mentioned, the repairing crew, in charge of the foreman, detached a fragment of one of the piers three feet

by two feet in size, weighing three or four hundred pounds. It caught against a shaft and the foreman directed that it be pried off, and it dropped over into the pump room. It made a hole in the floor near where a ladder was usually put up for adjusting the belt on the shaft pulley, and was held suspended by each end and was left there when the workmen quit work in the afternoon. The foreman who had charge of the work knew that this stone had fallen and broken partially through the plank, but he allowed it to remain where it first fell without any safeguard to warn or protect workmen whose duties required them frequently to be at this identical place. Between the time when the stone first fell and the time of the accident to the plaintiff, this piece of stone fell through the floor to the ledge below, leaving a hole about its size and of the depth of from five to ten or twelve feet. The plaintiff had no knowledge of its existence or of the fact that a fragment of stone had fallen on that side of the pier, and the hole in the dim light was not plainly discernible. About three o'clock at night, after the stone had fallen through the floor as aforesaid, while the plaintiff was in the performance of his duties as head fireman on the night force, and was attending to the belts and pulleys, his attention was called to the fact that the belt was off and he went to the usual place for setting the ladder, leaving his lantern ten or twelve feet away. In attempting to put up the ladder he fell into the hole and sustained injuries for which suit was brought. The plaintiff recovered a verdict for $825.

Held: (1) That the condition was not such as would reasonably be anticipated by the plaintiff although he knew that the piers were being taken down in the daytime in the work of repairs.

(2) That the jury were justified in finding that no lack of due care on the part of the plaintiff contributed to his injury.

(3) That the defendant must be held liable not for negligence presumed by the principle res ipsa loquitur, but for negligence in fact proved by the evidence.

(4) That the damages assessed by the jury were not excessive.

Roundy v. *Paper Co.*, 83.

When the master in unloading coal from vessels has furnished his servants safe and suitable appliances to be set up by them for unloading a particular vessel, he is not responsible to one such servant for the negligence of a co-servant in setting up such appliances. *Loud* v. *Lane & Libby*, 309.

When a master in unloading coal from vessels, has furnished his servants safe and suitable appliances to be set up by them and the appliances thus set up fall to the injury of a plaintiff solely because of the negligence of a co-servant in not making them fast to suitable supports, or in not using preventer stays or other precautions against the giving way of such supports, the master is not liable. *Loud* v. *Lane & Libby*, 309.

One is not the less a co-servant of a negligent servant who, in setting up certain appliances, failed to make them fast whereby a plaintiff was injured by having been employed to work with such appliances after they were set up.
Loud v. *Lane & Libby*, 309.

MEASUREMENTS.

A plaintiff claimed the southwestern of the two Ensign Islands in West Penobscot Bay, under a deed from the State of Maine, purporting to convey to her "all the right, title and interest that the said state may have in any and all the islands hereinafter specified situated in Penobscot Bay in said State of Maine." Among the islands enumerated in the deed were the Ensign Islands. The defendants entered the southwestern island and cut and carried away certain growing trees standing thereon and thereupon the plaintiff brought an action of trespass quare clausum to recover damages therefor. The vital question involved was that of title. Among other things it was contended in defense that the island claimed by the plaintiff was included in the Muscongus Grant, executed sometime between 1620 and 1635; and, by the Articles of Separation from Massachusetts, never became the property of the State of Maine. It was conceded that the Muscongus Grant included the island claimed by the plaintiff if within three miles of the main land. It was also agreed that the island claimed by the plaintiff, if measured by statute miles, is more than three miles from the main land and therefore became the property of the State of Maine by the Articles of Separation; but if measured by geographical or marine miles, that it is less than three miles from the main land, and consequently became a part of the Muscongus Grant and was never owned by the State of Maine. *Held:* That the three mile limit should be measured by the marine mile. *Lazell* v. *Boardman*, 292.

MECHANICS' LIENS.

See LIENS.

MILES.

See MEASUREMENTS.

MISCONDUCT OF COUNSEL.

See ATTORNEY AND COUNSELLOR. VERDICT.

MONEY LENT.

See GAMING.

MORTGAGES.

See STREET RAILWAYS.

When, under a bill in equity for the redemption of a mortgage, a decree has been entered fixing the amount of the mortgage indebtedness, and the time within which the mortgagor may redeem, failing which his right to redeem is to be forever foreclosed, if the mortgagor fails to redeem within the time limited, and if there is no waiver of forfeiture, his title is lost.

Brown v. *Webber*, 60.

In a writ of entry brought by the assignee of a first mortgage to recover possession of certain premises, it appeared that both parties derived title from one Oscar E. Perry, who on Jan. 9, 1897 gave a first mortgage thereof to Charles E. Sherman, to secure the payment of $250. Eight months later, he gave a second mortgage to his father Isaac B. Perry conditioned for the latter's support during his life. June 16, 1900, he gave a third mortgage of the same premises to the plaintiff Mitchell, and Dec. 20, 1906, the plaintiff obtained from Charles E. Sherman, an assignment to himself of the first mortgage given to Sherman. Prior to this assignment of the Sherman mortgage to the plaintiff, however, the defendant had obtained from Sherman a written agreement to assign the mortgage to him, the defendant, in consideration of $250, $175 of which the defendant paid to Sherman. But before the assignment to the plaintiff, this agreement between Sherman and the defendant was rescinded and cancelled by a written agreement signed by the parties, and the sum of $175 paid by defendant was refunded to him by Sherman.

Held: (1) That Sherman was fully authorized to execute the assignment in question to the plaintiff; that the defendant is now precluded by his conduct from asserting any claim to the premises by virtue of the Sherman mortgage, and that all of the rights set up by the defendant in the premises, are subject to the plaintiff's claim as assignee of the first mortgage.

(2) That inasmuch as there had been a breach of the condition of the mortgage for non-payment of the debt and the plaintiff had begun foreclosure thereof by publication before the commencement of the action, the court was not required to award a conditional judgment on motion of the defendant, but that the plaintiff was entitled to judgment for possession as at common law.

Mitchell v. *Elwell*, 164.

In litigation in equity concerning personal estate in the hands of executors or administrators, for administration, including unforeclosed mortgages of real estate, ordinarily the heirs or devisees are not necessary parties. They are sufficiently represented by the executor or administrator. This rule applies to proceedings to redeem from such mortgages. *Strout* v. *Lord*, 410.

When a mortgage belonging to a deceased mortgagee has in form become foreclosed, and the validity of the foreclosure is attacked by a bill in equity praying that the foreclosure proceedings be declared null and void and for a redemption, the heirs or devisees have a direct interest, and a right to be heard on that question, and must be made parties. It is otherwise if the mortgage is unforeclosed. *Strout* v. *Lord*, 410.

MOTIONS.

See ATTORNEY AND COUNSELLOR.

MUNICIPAL CORPORATIONS.

See TOWNS.

When the municipal authorities in the process of repairing a public sewer stop up the pipe of one who has lawfully connected with it so that it fills and bursts, the municipality is liable for the damage occasioned thereby. *Googin* v. *Lewiston*, 119.

The power and duty to lay out, make, maintain and repair common sewers in the city of Lewiston is vested by statute in the city council. *Googin* v. *Lewiston*, 119.

The special statute governing the construction of sewers in Lewiston does not require a petition as a prerequisite to the laying out of a sewer. The city council can act of its own motion. *Googin* v. *Lewiston*, 119.

The city ordinance to the effect that the mayor and aldermen shall in no case proceed to construct a sewer until an appropriation therefor shall have been made by the city council is not applicable in the case of a sewer constructed by the city council itself. *Googin* v. *Lewiston*, 119.

R. S., chapter 21, section 2, is not applicable in the case of a sewer constructed many years before its enactment. *Googin* v. *Lewiston*, 119.

An order of the Lewiston city council "that the sewer on Bates Street be continued to Walnut Street" is sufficiently definite as to the termini, one end being the point where the sewer then existing on Bates Street ended, and the other being Walnut Street. *Googin* v. *Lewiston*, 119.

Parol evidence is admissible to locate on the face of the earth the termini of a sewer which were fixed by the record, and to show that the sewer constructed under such an order is the one complained of. *Googin* v. *Lewiston*, 119.

Record evidence of the concurrent action of the two boards of the city counci of Lewiston is essential in showing the laying out of a sewer. But the separate record of the common council is not indispensible in showing the concurrent action of that board. When the city records, kept by the city clerk, who is also the recording officer of the board of aldermen, show that the order for the construction of a sewer was passed by the board of aldermen and "sent down", and later, that the order "came up, passed in concurrence" it is sufficient. The city clerk's record is admissible to show the concurrent action of the common council. *Googin* v. *Lewiston*, 119.

Under chapter 263 of the Private and Special Laws of 1903, the Board of Public Works for the city of Lewiston has all the powers and is charged with all the duties relative to the construction, maintenance, care and control of sewers in that city, which were previously conferred or imposed upon the city council. *Googin* v. *Lewiston*, 119.

The city of Lewiston is answerable in damages for injuries caused by the want of proper maintenance or repair of the public sewers by the Board of Public Works, the same as it would be if the city council, or any other municipal agency, was charged with the duty of their maintenance and repair. *Googin* v. *Lewiston*, 119.

MUNICIPAL COURTS.

See APPEAL.

NAME.

See INDICTMENT.

NAVIGABLE WATERS.

Capability of use for transportation is the criterion as to whether or not a stream is navigable and is a question of fact. *Smart* v. *Lumber Co.*, 37.

A navigable stream is subject to public use as a highway for the purpose of commerce and travel. *Smart* v. *Lumber Co.*, 37.

All streams of sufficient capacity in their natural condition to float boats, rafts or logs, are deemed public highways and as such are subject to the use of the public. *Smart* v. *Lumber Co.*, 37.

Navigable streams which are public highways afford an equal right to each citizen to their reasonable use, and any unreasonable obstruction that prevents or hinders such use, creates a nuisance in law. *Smart* v. *Lumber Co.*, 37.

The circumstances of each case are to be considered in determining the use which individuals may make of public highways, and the same rule prevails in limiting the extent of the right over waters as over land.
Smart v. *Lumber Co.*, 37.

Temporary obstructions of navigable waters are unavoidable and are incident to the legitimate purposes of travel and transportation, and if continued within reasonable limits they do not create a nuisance. But if the encroachment upon the public highway is unreasonable in extent or duration, it is unjustifiable. *Smart* v. *Lumber Co.*, 37.

A mill company has no right to obstruct unreasonably, with logs and lumber, a navigable stream when there are riparian owners who have occasion to use such stream for floating boats and transporting goods to their cottages on such streams. *Smart* v. *Lumber Co.*, 37.

The existing conditions which create the purposes of the public use of navigable streams are subject to change, and the driving and temporary storing of logs although now of principal importance may become secondary in importance to the travel of summer residents and the large transportations of merchandise for their accommodation. In this State, recreation is assuming features and incidents as valuable to the public as trade and manufacturing. *Smart* v. *Lumber Co.*, 37.

When a plaintiff is an owner of land on a navigable stream and has a summer residence thereon, and no highway other than such stream affords him access thereto, and such stream has been unreasonably obstructed with logs and lumber by a defendant mill company, such obstruction not only obstructs the right of such plaintiff in common with others to pass up and down such stream, but also cuts off his right of access to his private property which is a private right appurtenant to his land, and such plaintiff in a legal sense has suffered special damages and is entitled to recover therefor.
Smart v. *Lumber Co.*, 37.

Held: That the Presque Isle Stream above the bridge at Presque Isle Village, for a distance of thirty miles, is a navigable stream in fact, and possesses the character which brings it within the class of streams which, though in point of property are private, are subject to the easement of public highways which individuals have no right unreasonably to obstruct.
Smart v. *Lumber Co.*, 37.

Evidence *held* to show that defendant mill corporation had unreasonably obstructed a navigable stream with logs and lumber, and that the plaintiff, a riparian owner on such stream, suffered special damages thereby.
Smart v. *Lumber Co.*, 37.

NEGLIGENCE.

See COMMON CARRIERS. LANDLORD AND TENANT. MASTER AND SERVANT. TRIAL. WAYS.

"Thoughtless inattention" is the "essence of negligence."

Towle v. *Morse*, 250.

When the facts disclose a situation, dangerous to life or limb, into which, from its very nature, it is practically certain, even prudent men may be induced to enter, and it is practicable to remove such danger, without injuriously interfering with other rights or privileges, then the court should establish, as the law, the rule which prevents injury or loss of life, rather than that which invites or even permits it. *Cameron* v. *Street Railway*, 482.

NEW PLEAS.

See APPEAL.

NEW TRIAL.

See VERDICT.

"NOLO CONTENDERE."

See CRIMINAL LAW.

NOMINAL ATTACHMENT.

See ATTACHMENT.

NONSUIT.

See EXCEPTIONS. TRIAL.

NOTICE.

See PAUPERS.

NUDUM PACTUM.

See CONTRACTS.

NUISANCE.

See NAVIGABLE WATERS.

OFFICERS.

See ARREST. ATTACHMENT. BONDS. INTOXICATING LIQUORS. RECEIVERS. WAIVER.

That part of section 5, chapter 117, Revised Statutes, reading "and no officer is required to arrest a debtor on execution, unless a written direction to do so, signed by the creditor or his attorney, is endorsed thereon, and a reasonable sum for such fees is paid or secured to him, for which he shall account to the creditor as for money collected on execution," provides a right for the officer's benefit, but this right the officer may waive and proceed to enforce the execution as if there were no such statutory provision.

Stewart v. *Leonard*, 128.

In an action against the defendant, a deputy sheriff, for failure to serve an execution by arrest of the judgment debtor therein named, the referee, to whom the cause was duly referred, among other things, reported as follows: "I overrule all the other excuses of the defendant and find the defendant is liable for not serving the execution, unless the fact that the written direction for arrest contained in the letter was not indorsed upon the execution itself, is a legal excuse under the following circumstances, viz: The defendant did not return the execution to the plaintiffs or their attorney for such indorsement, nor did he apprise any of them of the lack of such indorsement, nor did he give any other reason for not serving it other than that the debtor claimed judgment was wrong. He retained the execution as already stated till September 18, after the debtor had left the State. The plaintiffs' attorney supposed the debtor had been arrested as ordered . . . . I submit to the court the question of the defendant's liability upon the foregoing facts."

Held: (1) That the only question before the court under the referee's report is whether the defendant is legally excused from liability for not arresting the execution debtor because there were no written directions to arrest indorsed upon the execution itself.

(2) That the question whether the facts found by the referee supported the plaintiff's declaration is not open before this court, having been passed upon by the referee whose determination thereon is final, in the absence of fraud, prejudice or mistake.

(3) That the defendant waived his right to have the directions to arrest indorsed on the execution and is estopped from claiming the benefit of that right in defense of his liability for not serving the execution by arrest.

Stewart v. *Leonard*, 128.

OPINIONS OF THE JUSTICES.

See CONSTITUTIONAL LAW. EMINENT DOMAIN.

OPTION.

See SALES.

PARENT AND CHILD.

See CONTRACTS. DESCENT AND DISTRIBUTION. GUARDIAN AND WARD.

PARTIES.

See EQUITY.

PARTNERSHIP.

See APPEAL.

It is indispensible to the maintenance of an action of debt on a probate bond given to the Judge of Probate by a surviving partner and which is brought in the name of the Judge of Probate for the benefit of a person who claims as judgment creditor, that the person who originated the suit shall come within the designation and requirements of Revised Statutes, chapter 74, sections 10 and 13. *Burgess* v. *Trust Co.*, 378.

The official bond given by a surviving partner is to secure the proper administration of the firm assets and not the individual liability of the surviving partner. *Burgess* v. *Trust Co.*, 378.

A surviving partner stands in two positions in each of which he may be liable for the debts of the partnership and so subject to an action at law. First, as surviving partner he is individually liable at common law. Second, as administrator of the partnership estate he might be liable by statute. *Burgess* v. *Trust Co.*, 378.

When it is intended that a suit against a surviving partner shall be against him in his purely statutory capacity of surviving partner, the declaration should clearly indicate such intention by proper averments and in such case the judgment should be against him and the goods and estate of the partnership in his hands and under his official administration. *Burgess* v. *Trust Co.*, 378.

When a declaration and a judgment against a surviving partner omits essential recitals distinguishing between his statutory liability under the protection of his probate bond and his common law liability as surviving partner, and the

declaration and judgment together make a consistent record of an action against him individually, the designation "surviving partner" being merely descriptio personae, the record cannot be amended so as to meet the statutory requirements without setting out a different cause of action.
Burgess v. *Trust Co.*, 378.

PASSENGERS.

See COMMON CARRIERS. STREET RAILWAYS.

PATENTS.

See SPECIFIC PERFORMANCE.

PAUPERS.

When a person unlawfully committed to the Insane Hospital has been legally recommitted, the statute authorizing a recommitment in express terms provides for the recovery of all the expenses of the illegal commitment and support of the person so committed. *Rockport* v. *Searsmont*, 495.

When a person unlawfully committed to the Insane Hospital has been legally recommitted, the expenditures under the illegal commitment are revived and at once come within the application of Revised Statutes, chapter 27, section 37, pertaining to notice and limitation of actions in pauper cases.
Rockport v. *Searsmont*, 495.

When a person unlawfully committed to the Insane Hospital, has been legally recommitted, the town committing has a right of action against the town liable for the support of such person for the recovery of any of the expenditures specified in Revised Statutes, chapter 144, section 42, "incurred within three months before notice given to the town chargeable," whether such notice is given before the date of the recommitment or after, provided the suit is commenced within two years after the cause of action accrues.
Rockport v. *Searsmont*, 495.

The pauper notice to be given by one town to another under the provisions of Revised Statutes, chapter 27, section 37, is not required to be of any particular form, and when such notice is accompanied by an explanatory letter the notice and the letter should be construed together and if they together contain the essential information required by the statute they constitute a sufficient notice if properly addressed and signed. *Rockport* v. *Searsmont*, 495.

A pauper notice and explanatory letter sent with the notice when construed together *held* sufficient in form and substance under Revised Statutes, chapter 27, section 37. *Rockport* v. *Searsmont*, 495

PLEADING.

See APPEAL. BONDS. COMMON CARRIERS. COSTS. EQUITY. JUDGMENT. LANDLORD AND TENANT. LOGS AND LUMBER. MORTGAGES. PARTNERSHIP. PROCESS. TROVER. WILLS.

In pleas puis darrein continuance, after the cause has been continued, great certainty is always required and it is not sufficient to say generally that after the last continuance such a thing happened, but the day of continuance must be alleged where the matter of defense arose. *Poland* v. *Davis*, 55.

The omission to state in the plea puis darrein continuance the day of the last continuance is fatal. *Poland* v. *Davis*, 55.

The plea puis darrein continuance waives all former pleadings, and if on demurrer it is adjudged bad, the judgment goes in chief unless the court allows a repleader, on terms, which it may do. *Poland* v. *Davis*, 55.

The plea, puis darrein continuance, *held* to be fatally defective because it did not state the day of the last continuance. *Poland* v. *Davis*, 55.

It is doubtless true that greater liberality than formally is allowed in the matter of amendments, and that mere technicalities are not viewed with favor. But it is also true that well established principles and precedents are not to be lightly set aside. "It will not be wise to depart too far from the established rule of pleading. Constant departure from these rules will soon result in confusion. In the end it will be found that justice will be better subserved by adhering to the remedies provided by law than in departing from them." *Anderson* v. *Wetter*, 257.

Amendments in matters of substance may be allowed under Rule V of "Rules of the Supreme Judicial Court," but this rule also provides that "no new count or amendment of a declaration will be allowed, unless it be consistent with the original declaration, and for the same cause of action." *Anderson* v. *Wetter*, 257.

In an action of tort for causing the death of plaintiff's intestate, the declaration alleged that the suit was brought for the benefit of the estate, that the intestate "died in about three and one half hours," and the amount of the damage claimed was ten thousand dollars. The plaintiff asked leave to amend by substituting for the original declaration a count under Revised Statutes, chapter 89, sections 9 and 10, alleging that the suit was brought for the benefit of the widow and children of the intestate, that death was immediate, and fixing the amount of damages at five thousand dollars. The amendment was allowed and the defendant excepted.

Held: (1) That the original declaration was at common law and not under the statute. It did not allege immediate death and it failed to appear either by inference or direct averment, whether the plaintiff's intestate became unconscious from his injuries or endured conscious suffering while he survived.

(2) That the amendment was not properly allowed, because it introduced a new cause of action. It did not set out the same cause of action with fuller statement and in a more perfect form but alleged a new and distinct cause of action, and such amendments are not allowable.

Anderson v. *Wetter*, 257.

POCKET PEDDLER.

See INTOXICATING LIQUORS.

POWER OF SALE.

See WILLS.

PRESCRIPTION.

See ADVERSE POSSESSION. STATUTE OF LIMITATIONS.

PRESUMPTIONS.

See ADVERSE POSSESSION. EVIDENCE. HUSBAND AND WIFE.

PREVAILING PARTY.

See COSTS.

In a real action to recover land where the plea puis darrein continuance was filed and the plaintiff accepted the plea, *Held:* That the plaintiff was the prevailing party up to the time of filing the plea and the defendant the prevailing party after that time. *Poland* v. *Davis*, 472.

PRINCIPAL AND AGENT.

See BROKERS. HUSBAND AND WIFE. SALES.

Contracts of agency may be terminated by operation of law but such cases fall within one of three classes, a change in the law making the required acts illegal, a change in the subject matter of the contract as the destruction of the property by fire, or a change in the condition of the parties, as by death or insanity. *Hartford* v. *McGillicuddy*, 224.

PRINCIPAL AND SURETY.

See GUARDIAN AND WARD.

PROBATE COURT.

See JUDGMENT. WILLS.

PROCESS.

The statutes of Maine providing for amendments as to plaintiffs do not allow an amendment the effect of which would be to strike out the sole plaintiff in the writ and substitute in his place a new plaintiff.

Clark v. *Anderson*, 134.

In an action of replevin, the defendant was summoned "to answer unto Herbert C. Clark, Treasurer of said City of Rockland, for said City of Rockland, and duly authorized and empowered thereto by a vote of the City Council of said City of Rockland," and the principal in the replevin bond was described therein as "I, Herbert C. Clark, Treasurer of the City of Rockland as principal." *Held:* That Herbert C. Clark, Treasurer of the City of Rockland, is the plaintiff in the action and that the writ cannot be amended by making the City of Rockland the plaintiff in name.

Clark v. *Anderson*, 134.

That part of Revised Statutes, chapter 84, section 11, providing that "in all civil actions the writ may be amended by inserting additional plaintiffs" applies only where a party is to be added to, joined with, the existing plaintiff, or plaintiffs, with a bona fide intention that the action is to be prosecuted by all the plaintiffs, the original as well as the additional ones. It does not apply where the bringing in of a new party plaintiff would make a misjoinder.

Clark v. *Anderson*, 134.

PROVERBS.

"An old dog cannot be coaxed with a crust."

"A good reversion is better than a bad possession."

"Each must fight with the sword that fits his hand."

"A meddlesome man pecks at everything and thrusts his spoon into every dish."

"The mountains breed learned men and the huts of shepherds contain philosophers."

PROXIMATE CAUSE.

See WAYS.

PUBLIC SERVICE CORPORATIONS.

See COMMON CARRIERS. STREET RAILWAYS.

PUIS DARREIN CONTINUANCE.

See PLEADING.

QUESTIONS AND ANSWERS.

See CONSTITUTIONAL LAW. EMINENT DOMAIN.

RAILROADS.

See COMMON CARRIERS. STREET RAILWAYS.

REAL ACTIONS.

In a real action, under the general issue, the burden is on the plaintiff to show the title he has alleged. If he shows no title he cannot prevail, even though the defendant has none. The defendant may rebut the plaintiff's proof by showing title in himself, or in another, or merely that the plaintiff has none, and this may all be shown under the general issue.

Brown v. *Webber*, 60.

RECEIVERS.

See STREET RAILWAYS. TROVER.

When property is lawfully in the hands of a receiver a suit therefor cannot be brought against the receiver except by leave of court.

Chalmers v. *Littlefield*, 271.

RESCISSION.

See SALES.

RECOGNIZANCES.

See BAIL.

RECOMMITMENT TO INSANE HOSPITAL.

See PAUPERS.

REFERENCE.

See ACCOUNTING. OFFICERS.

Where a bill in equity is referred by rule of court, without conditions or limitations, and the referee, having heard the parties, reports the facts found by him, and his conclusions thereon to the court, and his report is accepted, an appeal from a final decree, made in accordance with the terms of the report cannot be sustained. *Armstrong* v. *Munster*, 29.

REGULATIONS.

See FISH AND FISHERIES. TOWNS.

RELEASE.

By R. S., chapter 84, section 59, which is an affirmation of the common law, no action shall be maintained upon a demand settled by a creditor in full discharge thereof by the receipt of money or other consideration however small. This rule applies to actions ex-delicto as well as to actions ex-contractu.
Valley v. *Railroad Co.*, 106.

Before a settlement can be avoided as made under mistake of fact, the sum received must be returned or tendered back.
Valley v. *Railroad Co.*, 106.

A written discharge of all claims for injuries to persons or property signed by the claimant and given for money actually received therefor however small in amount, will not be set aside for fraud unless the fraud be proved by trustworthy evidence consistent with proven circumstances.
Valley v. *Railroad Co.*, 106.

Where the claimant writes on a written discharge with his own hand that he has read it, his uncorroborated testimony that he did not read it is not sufficient to warrant a finding to that effect. *Valley* v. *Railroad Co.*, 106.

That a claimant accepted the money and made the settlement because of the assurances of the other party that he had no cause of action does not vitiate the settlement. He was not justified in relying upon such assurances.
Valley v. *Railroad Co.*, 106.

Where, in an action to recover damages for personal injuries, the defendant pleaded settlement and the money received in settlement was not tendered back, and the frauds alleged in obtaining the settlement were not proved, *held* that the settlement was a defense to the action.
Valley v. *Railroad Co.*, 106.

RELIGIOUS SOCIETIES.

See DEEDS.

REMAINDER.

See WILLS.

REMITTITUR.

See VERDICT.

REPLEADER.

See PLEADING.

REPLEVIN.

See PROCESS.

One who has neither title to the property, general or special, nor the right to possession, cannot maintain replevin. *Clark* v. *Anderson*, 134.

A vendor sold certain furniture on a so called lease, which constituted a conditional sale, the title remaining in the vendor until the furniture was paid for. The vendor then by written assignment assigned and transferred to the plaintiff "all demands of every kind and description" which the vendor had against various persons including the claim which the vendor had against the defendant for the unpaid purchase price of the furniture. The condition of the lease was broken by the defendant. *Held:* That under the assignment given by the vendor to the plaintiff, which was for a valuable consideration, it was the intention of the assignor to convey and of the assignee to purchase all the interest of the assignor in the personal property which had been conditionally sold, and which was in fact retained as security for the debt, and that the plaintiff had sufficient title to maintain replevin in case of breach of condition. *Lazarovitch* v. *Tatilbum*, 285.

"REPLY LETTERS."

See EVIDENCE.

RETURN.

See ATTACHMENT. INTOXICATING LIQUORS.

REVENUE.

See TAXATION.

REVIEW.

See APPEAL. EXCEPTIONS. JUDGMENT. REFERENCE. VERDICT. WILLS.

RIGHT OF WAY.

See EASEMENTS.

ROADS.

See NAVIGABLE WATERS. WAYS.

RULES OF COURT.

See PLEADING.

SALES.

See EVIDENCE.

Material misrepresentation as to its qualities by the vendor of a chattel, made to induce the vendee to purchase, gives the vendee a right to rescind the sale within a reasonable time after the misrepresentation is discovered.
Pitcher v. *Webber*, 101.

Misrepresentation as to the material qualities of a chattel by a person selling the chattel for the owner gives the purchaser a right to rescind the sale.
Pitcher v. *Webber*, 101.

To effect a rescission of a sale it is not necessary actually to redeliver the property to the vendor at the place where delivered by him, if he declares he will not accept redelivery. In such case it is enough for the vendee to offer a redelivery, and, if refused, to hold the property subject to the vendor's order.
Pitcher v. *Webber*, 101.

To preserve a right to rescind a sale it is not necessary for the vendee to rescind immediately upon the first discovery of some material misrepresentation. He may waive that and yet rescind upon subsequent discovery of other material misrepresentations. *Pitcher* v. *Webber*, 101.

When upon notice of some material misrepresentation the vendor suggests further investigation or trial, the vendee may take a further reasonable time therefor without waiving his right to rescind the sale.

Pitcher v. *Webber*, 101.

If the property sold is damaged while in the possession of the vendee without his fault, he is not obliged in order to rescind the sale, to repair the damage before redelivery or offer of redelivery to the vendor.

Pitcher v. *Webber*, 101.

On the 30th day of September, 1905, the defendants agreed to deliver to the plaintiff one thousand bushels of potatoes on board cars either at South Winn or North Lincoln Station, on or before November 1, 1905, and on the same day received the sum of $50 on account of same. Two hundred bushels of the potatoes were then stored in a barn four miles distant from North Lincoln and eight hundred bushels were three miles distant. The cars on board of which the potatoes were to be delivered under the terms of the contract, were to be furnished by the plaintiff, but no car was in fact furnished by the plaintiff until the night of October 31, and the defendants were not informed of the arrival of this car at North Lincoln until eleven o'clock in the forenoon of November 1. It would have required five days to move the potatoes to North Lincoln with the two teams ordinarily used by the defendants in their business and the only teams which would have been available for their use on November 1, after receiving plaintiff's notice. The defendants themselves had once furnished a car and offered to perform the contract.

Held: (1) That as the cars were to be furnished by the plaintiff it was his right to determine the time when the potatoes should be delivered within the limitation prescribed by the contract.

(2) That under the natural and ordinary interpretation of the phrase "on or before" used in the contract and in accordance with the intention of the parties at the time the contract was made, the defendants were entitled to such seasonable notice of the arrival of the plaintiff's cars as would enable them by the use of reasonable diligence to complete the transportation and delivery on the first day of November.

(3) That the contract was an entire one for the delivery of one thousand bushels of potatoes on or before November 1, and as a reasonable opportunity was not afforded the defendants to perform the contract by a delivery of all, they were under no legal obligation to deliver a part of the potatoes on November 1.

(4) That the defendants did not intentionally relinquish any rights secured to them by the contract or agree to any modification of its terms respecting the time for delivery, and that the contract failed of performance not by reason of any fault of the defendants, who had themselves once furnished a car and offered to perform it, but by reason of the negligent omission of the plaintiff to give the defendants a reasonable opportunity to complete the performance on or before November 1. *Pinkham* v. *Haynes*, 112.

SCALER.

See LOGS AND LUMBER.

SEARCH AND SEIZURE.

See INTOXICATING LIQUORS.

SETTLEMENT.

See RELEASE.

SEWERS.

See MUNICIPAL CORPORATIONS.

SHELL-FISH.

See FISH AND FISHERIES. TOWNS.

SHERIFFS AND CONSTABLES.

See ARREST. ATTACHMENT. INTOXICATING LIQUORS. OFFICERS.

SIGNATURES.

See EVIDENCE.

SPECIFIC PERFORMANCE.

The jurisdiction of a court of equity to compel the specific performance of written contracts does not rest upon any distinction between real and personal estate, but upon the ground that damages at law may not in a particular case afford a complete remedy, and that whether or not this equitable remedy will be granted is a matter of sound judicial discretion controlled by established principles of equity and exercised upon a consideration of all the circumstances of the case. *Telegraphone Corporation* v. *Telegraphone Co.*, 444.

A plaintiff, in accordance with the terms of a written contract, assigned a certain patent right to the defendant and received therefor $25,000 in cash and $105,000 in notes and also retained a beneficial interest in the development of the patent by a further provision that it should receive twenty per cent of the capital stock of the defendant company, which was organized to

exploit it, at the time of the delivery of the assignment. It was also agreed that the defendant should raise a working capital of $50,000 or give the plaintiff thirty-four per cent more of its capital stock and the resulting control of the company. Upon the defendant's failure to perform either of these agreements on or before the times specified in the contract, it was further expressly agreed in the same paragraph that the plaintiff should repossess the patent right. It was also covenanted and agreed in a separate paragraph of the contract that time should be "of the essence of the agreement." The defendant failed to perform either of these agreements within the time stipulated and the plaintiff brought a bill in equity to compel the defendant company to perform the contract specifically by transferring the title to the patent back to the plaintiff corporation.

Held: (1) That as the contract relates to a patent right which on the one hand may be superseded by another and better invention and thus become practically worthless, and on the other may become of great value by giving its owner a monopoly of all branches of business to which it is applicable, and that in any event, its value cannot be known with certainty or exactness until after the lapse of time, substantial justice can only be done by a specific performance of the contract.

(2) That there is no evidence to warrant the conclusion that the plaintiff corporation intentionally relinquished its right to insist upon the performance of the contract according to its terms and nothing to justify the defendant company in believing that the plaintiff had waived such right.

(3) That it does not appear that the cash payment received by the plaintiff in consideration of the assignment was more than adequate compensation for the loss suffered by it as a result of the unexplained neglect of defendant to furnish the working capital and develop the business as contemplated by the contract; that the liability to any forfeiture either of the patent right or of the consideration paid for it was not a necessary result of the terms of the agreement when originally made, but arose from the subsequent acts and omissions of the defendant company which its officers have not attempted to justify or explain, and that any apparent hardship arising from such causes and under such circumstances cannot be deemed a sufficient cause for refusing a specific performance as damages at law would not be a full and adequate remedy.

(4) That it appears from the terms of the contract and the circumstances that the parties thereto actually intended to make the time specified an essential element of the contract.

(5) That the defendant's express stipulation in the contract that upon failure to perform its agreement, the assignment of the patent should terminate and become void and that the plaintiff should thereupon have, hold, and repossess the patent as if the assignment had never been made, upon the facts disclosed in the case, created an obligation in equity on the part of the defendant to execute and deliver the necessary legal instruments to transfer the title to the patent back to the plaintiff corporation.

Telegraphone Corporation v. *Telegraphone Co.*, 444.

STATUTES.

See ABATEMENT. DEATH. DESCENT AND DISTRIBUTION. EXECUTORS AND ADMINISTRATORS. FISH AND FISHERIES. HUSBAND AND WIFE. INTOXICATING LIQUORS. LIENS. LOGS AND LUMBER. MORTGAGES. MUNICIPAL CORPORATIONS. PARTNERSHIP. PAUPERS. PROCESS. RELEASE. REPLEVIN. STATUTE OF LIMITATIONS. STREET RAILWAYS. TAXATION. TOWNS.

Revised Statutes, chapter 84, section 59, providing that "no action shall be maintained on a demand settled by a creditor, or his attorney entrusted to collect it, in full discharge thereof, by the receipt of money or other valuable consideration, however small," applies to actions ex-delicto as well as to actions ex-contractu. *Valley* v. *Railroad Co.*, 106.

Whether the expression of one thing in a statute is to operate as the exclusion of another is one of intention to be gathered from an examination of all parts of the statute by the aid of the usual rules of interpretation.
Portland v. *N. E. T. & T. Co.*, 240.

The operation of a penal statute cannot be extended by implication so as to embrace cases which are not plainly included in the express terms and obvious import of the language of the enactment. *State* v. *Peabody*, 327.

It is a fundamental rule for the construction of statutes that they will be considered to have a prospective operation only unless the legislative intent to the contrary is clearly expressed or necessarily implied from the language used. *Deposit Co., Aplt.*, 382.

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

See APPENDIX.

STATUTE MILES.

See MEASUREMENTS.

STATUTE OF LIMITATIONS.

In an action upon a mutual, unsettled account, commenced December 19, 1905, where the account opened January 13, 1894, and was continued with items of debit and credit until December 17, 1898, and there was no other item until November 15, 1902, when a charge of twenty cents was made for merchandise then sold on credit, which charge was specifically paid December 15, 1902, and credit given therefor on the account, *Held:* That the action was not barred by the statute of limitations. *Rogers* v. *Davis*, 405.

When a mutual, unsettled account has been running for nearly four years, and then no other item was charged until nearly four years later when a charge was made for merchandise sold on credit and which charge was specifically paid within a month, such case is not governed by the rule by which partial payments take an account out of the operation of the statute of limitations, but by the statutory rule relating to mutual, unsettled accounts.

Rogers v. *Davis*, 405.

Under the statutory rule relating to mutual, unsettled accounts, R. S., chapter 83, section 90, the statute of limitations begins to run with the last item of the account, and it makes no difference whether it is a debit or a credit item, or which party kept or proved it, or whether it appears in the plaintiff's credits or in the defendant's charges, if only it be an account of mutual dealings between the parties which have not been settled.

Rogers v. *Davis*, 405.

When parties by their mutual dealings, by some item of debit or credit, have extended the time of the operation of the statute of limitations upon the balance of the account, it does not lie in the power of the debtor then to shorten the time by making specific payment of debit items.

Rogers v. *Davis*, 405.

STIPULATIONS.

See CONTRACTS.

STREET RAILWAYS.

See COMMON CARRIERS.

Whenever a franchise or right coupled with a corresponding duty is conferred by the legislature upon a person or corporation and is accepted, such person or corporation is answerable by the common law to a third person who sustains damage by the neglect of that duty. *Milton* v. *Railway Co.*, 218.

An acceptance by a street railway company of a franchise to occupy portions of the streets of a town with its railroad, coupled with the duty of keeping such portions of the street in repair, gives a right of action against the company by a traveler injured by its neglect of that duty.

Milton v. *Railway Co.*, 218.

Where, after a street railway corporation with a franchise for a street railway had been duly organized and a copy of the survey and location of its route had been filed with the railroad commissioners, it proceeded to purchase land for a power house and to make arrangements for rights of way over private property wherever the location was outside of the highway, and subsequently

executed a mortgage of its franchise and all its property, real and personal, then existing and thereafter to be acquired, including roadbed and materials and equipment of every kind, to secure an issue of bonds which were afterwards issued, and the mortgage contained a description of the route of the road as located, by courses and distances, and which said mortgage had been duly recorded both in the registry of deeds in the county and in the town where the railway was wholly located, *Held*: That it was not necessary that the corporation should have been actually possessed of tangible property, at the time the mortgage was given approximating in value the amount of the bonds which the mortgage was given to secure in order that an express provision therefor in the mortgage might be legally operative to include subsequently acquired property. *Chalmers* v. *Littlefield*, 271.

A street railway corporation executed a mortgage of its franchise and all its property, real and personal, then existing and thereafter to be acquired, including roadbed and material and equipment of every kind to secure an issue of bonds, which were afterwards issued, and which said mortgage was duly recorded. *Held*: That the mortgage was valid and included the after-acquired property and that certain steel rails were a part of the after-acquired property. *Chalmers* v. *Littlefield*, 271.

Under the provisions of Revised Statutes, chapter 52, section 59, *held* that the Supreme Judicial Court was clearly authorized to take jurisdiction of a bill in equity for the foreclosure of a mortgage given by a street railway, and to appoint a receiver. *Chalmers* v. *Littlefield*, 271.

A street railroad is a public corporation. It receives all its privileges from the public. It depends upon the public for its income. It invites and induces the public to ride upon its cars. Great experience makes it familiar with the habits of people so riding and with their natural tendency, with or without reason, to move from seat to seat. With its special means of knowledge, it should be held to anticipate, what is even a matter of common knowledge, that a passenger riding upon one of its cars, may, at any place along the line and while the car is in motion, undertake to change his seat.
Cameron v. *Street Railway*, 482.

SURVEYOR.

See LOGS AND LUMBER.

SURVIVAL OF ACTIONS.

See ABATEMENT.

SURVIVING PARTNER.

See PARTNERSHIP.

TAXATION.

A telephone and telegraph company laid certain conduits in the streets of the city of Portland for the purpose of carrying its wires. The city assessed a tax on these conduits as real estate, *Held:* That these conduits were not real estate and not subject to taxation as real estate.

Portland v. *N. E. T. & T. Co.*, 240.

A telephone and telegraph company laid certain conduits in the streets of the city of Portland for the purpose of conveying its wires. *Held:* That these conduits were embraced in the term "property" referred to in Revised Statutes, chapter 8, section 41, providing that the excise tax imposed upon telephone and telegraph companies by the six preceding sections of the same chapter "shall be in lieu of all taxes upon any corporation therein designated, upon its shares of capital stock and its property used in the conduct of its telephone or telegraph business, including the poles, wires," etc., etc.

Portland v. *N. E. T. & T. Co.*, 240.

A statute imposing taxes is not to be interpreted by its own language alone, but in connection with other tax statutes prior and contemporaneous, and also in the light of contemporaneous and subsequent practical understanding of it by taxing officers and the public. *East Livermore* v. *Banking Co.*, 418.

Tax statutes are to be construed strictly against the State, and especially are they to be so construed as to avoid double taxation unless their language interpreted according to recognized principles of statutory interpretation fairly compels a contrary construction. *East Livermore* v. *Banking Co.*, 418.

To tax the shares of a corporation to the shareholders, and to tax at the same time the property of the corporation to the corporation itself, imposes in effect, if not in theory, a double tax burden on the shareholders.

East Livermore v. *Banking Co.*, 418.

To tax to the individual shareholders the shares of a bank and to tax at the same time to the bank the shares owned by it in other banks, imposes to that extent an extra burden on the shareholders of the bank so taxed.

East Livermore v. *Banking Co.*, 418.

While the tax statutes of the State specifically and explicitly subject the real estate of a bank to taxation to the bank, notwithstanding its shares are also subject to taxation, they do not specifically and explicitly subject to such taxation shares in other banks owned by it, and hence it cannot be held liable to taxation upon such shares. *East Livermore* v. *Banking Co.*, 418.

TECHNICALITIES.

See EMINENT DOMAIN. WRITTEN INSTRUMENTS.

TELEGRAPHS AND TELEPHONES.

See TAXATION.

TIME.

See CONTRACTS. SPECIFIC PERFORMANCE.

TORTS.

See EASEMENTS. MASTER AND SERVANT.

TOWNS.

See FISH AND FISHERIES. MUNICIPAL CORPORATIONS. PAUPERS. TAXATION.

The inhabitants of the town of Cushing at the annual meeting held in March, 1906, under an article therefor in the warrant, voted as follows: "To have a clam law as per chapter 161, Public Laws, 1905 and to issue 150 licenses to expire April 1, 1907, price for licenses to be $.25 and not to issue licenses to non-residents." *Held:* That this regulation is invalid as to non-residents, and since it cannot be enforced against the inhabitants of the town without defeating the purpose of the voters in adopting it, the whole regulation is void. *State* v. *Peabody*, 327.

TRADE-MARKS AND TRADE-NAMES.

See ACCOUNTING.

TRIAL.

See EXCEPTIONS. VERDICT.

Where upon the unquestioned facts it is apparent that a plaintiff's action cannot be maintained, it is not only competent but proper for the presiding Justice so to declare by directing a nonsuit. *Bryant* v. *Paper Co.*, 32.

In an action on the case to recover damages for personal injuries where a plaintiff recovered a verdict and that verdict has been set aside, it would be useless for the court to reverse its own action by sustaining exceptions of the plaintiff to the ordering of a nonsuit in the second trial of the same action, unless the evidence on which the nonsuit was ordered differs materially from that introduced at the first trial, either as being of greater weight or proving new facts. *Bryant* v. *Paper Co.*, 32.

TRIAL JUSTICES.

See APPEAL.

TROLLEY POLES.

See COMMON CARRIERS.

TROVER.

See APPEAL. RECEIVERS. STREET RAILWAYS.

In an action of trover where the general issue alone has been pleaded the court does not hold even by implication that a brief statement is necessary to admit the defense that the title to the property described in the declaration is in the defendant. *Willet* v. *Clark*, 22.

An action of trover was brought against certain defendants as individuals for the alleged conversion of certain steel rails which had been purchased by a street railway corporation for use in the construction of its railway. The defendants had been appointed receivers of the corporation and had used these rails in completing the railway. *Held:* (1) That the defendants were legally appointed receivers. (2) That while the action was brought against the defendants as individuals, yet whatever was done by them in using the rails in completing the street railway, was done by them in their capacity as receivers and not as individuals. (3) That under the facts of the case the action was not maintainable. *Chalmers* v. *Littlefield*, 271.

TRUSTEE PROCESS.

A plaintiff bank sought to hold by trustee process certain dividends declared by the referee in bankruptcy in favor of the principal defendant, one Alden. Among the claims against the bankrupt estate allowed by the referee were certain notes in favor of the defendant Alden and also a certain preferred claim in his favor. On these claims the referee declared dividends aggregating $2190, for which checks were drawn at different times by the trustee in bankruptcy and countersigned by the referee and payable to the defendant Alden, but by reason of the service of the trustee process upon the trustee in bankruptcy these checks were not delivered to Alden but were retained by the trustee in bankruptcy. The funds belonging to the bankrupt estate against which the checks were drawn, remained in the bank in which they were deposited by the trustee in bankruptcy.

Held: (1) That in such a case the jurisdiction of the United States bankruptcy court does not cease but that the funds of a bankrupt estate continue in the custody of the law until the trustee in bankruptcy actually pays the distributees the dividends awarded them.

(2) That the established rule exempting money in the custody of the law from trustee process is applicable to the funds of a bankrupt estate in the hands of the trustee in bankruptcy under the circumstances stated.

Savings Bank v. *Alden*, 230.

TRUSTS.

See APPEAL. DEEDS. WILLS.

Although the court will, under proper circumstances, execute a trust which the trustee has neglected or improperly failed to execute it will not interfere to execute a trust which could have been executed in the lifetime of the beneficiary, but which was not so executed, and which under the circumstances it was not then the duty of the trustee to execute. *Bailey* v. *Worster*, 170.

When it appears that a trustee was ready and willing to do his duty, but that the beneficiary objected and prevented his doing so, the court will not execute the trust after the death of the beneficiary. *Bailey* v. *Worster*, 170.

A trustee cannot compel a beneficiary to receive the benefits of the trust, and it is not his duty to execute it against the will of a beneficiary, who is sui juris.

Bailey v. *Worster*, 170.

Where a husband left one half of his estate in trust, the income to be given to his wife, with a provision for a sale of the trust property for the support of the wife, and the wife was unwilling to have the trust property sold but incurred debts for her support, *held* that the creditors of the wife after her death could not enforce their claims against the trust estate.

Bailey v. *Worster*, 170.

A trust should not fail for the want of a trustee, and where a trust was created by a will, *held* that the case should be remanded for the appointment of a trustee to carry into effect the provisions of the will.

Herrick v. *Low*, 353.

TYPEWRITTEN SIGNATURES.

See EVIDENCE.

UNFAIR COMPETITION.

See ACCOUNTING. APPEAL.

UNLAWFUL COMMITMENT TO INSANE HOSPITAL.

See PAUPERS.

VENDOR AND PURCHASER.

See COVENANTS DEEDS. SALES.

VERDICT.

A verdict against a defendant will not be set aside because of alleged misconduct of the plaintiff's counsel in the argument of the cause to the jury when it appears that such alleged misconduct was not prejudicial to the defendant.
Stephenson v. *Railroad Co.*, 57.

When in an action on the case to recover for personal injuries it appears that the plaintiff has suffered some injury for which the defendant is clearly liable but that the damages assessed by the jury are excessive, and a remittitur is ordered, the verdict will be set aside unless remittitur be made as ordered.
Stephenson v. *Railroad Co.*, 57.

Where a plaintiff brought four actions against four separate defendants for one and the same obstruction which had existed but twelve days prior to the commencement of the actions, and the plaintiff recovered a verdict of $142.25 against each defendant, *held* that the damages assessed by the jury must be deemed excessive, but if the plaintiff remit all the verdicts above $50.00 in each action, then the motion for new trials is overruled, and in that event the plaintiff would be entitled to a judgment for $50 and interest against each defendant, but would be entitled to only *one* satisfaction.
Cleaves v. *Braman*, 154.

Where on an issue whether a sale of furniture was conditional or not and the verdict was for the plaintiff, *Held:* That the court did not feel warranted in disturbing the verdict. The evidence was a mass of contradictions, most of the witnesses being related by blood or by marriage, and if the jury were satisfied upon this proposition of fact their conclusion ought to stand.
Lazarovitch v. *Tatilbum*, 285.

Where a plaintiff has recovered a verdict which is manifestly against the weight of evidence, it will not be permitted to stand but will be set aside.
Hoyt v. *Insurance Co.*, 299.

A plaintiff's hotel property and contents were destroyed by fire. At the time of the loss there was $3000 insurance upon the property, divided equally among three companies two of which were the defendants. One company adjusted its loss, but the two defendants refused to pay and thereupon the plaintiff brought suits against them. The two actions were tried together, and a verdict for $600 against each defendant was returned. It was chiefly contended in defense that the property was very largely over insured and that the plaintiff procured one Reed to burn the same. *Held:* That the verdicts were so manifestly against the weight of evidence that they must be set aside.
Hoyt v. *Insurance Co.*, 299.

The court will sustain in favor of a verdict every inference of fact that can be deduced from the evidence, when considered in the light most favorable to the contention of the winning party. *Cameron* v. *Street Railway*, 482.

WAIVER.

See OFFICERS. PLEADING.

A waiver is the voluntary relinquishment of some known right, benefit, or advantage, and which, except for such waiver, the party otherwise would have enjoyed. *Stewart* v. *Leonard*, 128.

Although a waiver is essentially a matter of intention, yet such intention need not necessarily be proved by express declarations but it may be inferred from the acts and conduct of the party. *Stewart* v. *Leonard*, 128.

WATERS AND WATER COURSES.

See EMINENT DOMAIN. NAVIGABLE WATERS. WRITTEN INSTRUMENTS.

A part of the town of Kittery was incorporated under the provisions of chapter 424 of the Special Laws of 1907, by the name of the Kittery Water District, and was authorized to acquire by purchase or by the exercise of the right of eminent domain the "entire plant, property and franchises, rights and privileges" of the Agamenticus Water Company. Said chapter 424 was to take effect "when accepted by a majority vote of the legal voters within said Water District voting at a meeting" specially called for the purpose on or before the first day of May 1907. By section 7 of said chapter it is provided that if the trustees of the Water District failed to agree with the Agamenticus Water Company upon terms of the purchase "on or before June 1, 1907," the Water District might through its trustees on or before June 1, 1907, petition any Justice of the Supreme Judicial Court for the appointment of appraisers to fix the valuation of the Agamenticus Water Company's plant and property. In accordance with the provisions of said chapter a meeting of the inhabitants of said Water District was held April 8, 1907, and at said meeting said inhabitants, by a majority vote voted to accept the aforesaid Act. *Held:* (1) That the warrant calling said meeting was valid although addressed to the "Inhabitants of the Kittery Water District." (2) That said meeting was a legal meeting and the acceptance of said Act valid.
Water District v. *Water Co.*, 25.

The trustees of the Kittery Water District failing to agree with the Agamenticus Water Company upon the terms of purchase, on May 2, 1907, filed a petition for appointment of appraisers, addressed to a Justice of the Supreme Judicial Court, who ordered a hearing thereon before another Justice of said court. The latter Justice, at the hearing, ruled that he had no jurisdiction in the matter and dismissed the petition "without prejudice." The Agamenticus Water Company then claimed costs and the claim was allowed. On

June 1, 1907, the Water District filed another petition for the appointment of appraisers, addressed to a Justice of said court. *Held:* That the petition filed May 2, 1907, and which was dismissed "without prejudice" and on which the Agamenticus Water Company claimed and was allowed costs, was no bar to the petition filed June 1, 1907. *Water District* v. *Water Co.*, 25.

WAYS.

See NAVIGABLE WATERS.

The ordinary highway is open to all suitable methods of use and automobiles are now recognized as legitimate means of conveyance on such highways. The fact that horses unaccustomed to seeing them are likely to be frightened by the unusual sound and appearance of them, has not been deemed sufficient reason for prohibiting their use but it is an element in the question of due care on the part of the drivers of both horses and motor cars, and a consideration to be entertained in determining whether such care has been exercised to avoid accident and injury in the exigencies of the particular situation.

Towle v. *Morse*, 250.

A person with a horse and wagon and a person with an automobile have a right to use the highways with their respective vehicles but it is the duty of each to exercise his right with due regard to the corresponding rights of the other.

Towle v. *Morse*, 250.

A plaintiff and his sister were riding in an open wagon drawn by one horse and discovering the canopy top of an approaching automobile in which the defendant and a companion were traveling, the sister gave the statutory signal by raising the hand for the automobile to stop. The defendant disregarded the signal to stop and ran the automobile out of the highway two or three rods into a dooryard. The plaintiff was thereby induced to believe that he could drive along in safety, but the automobile unexpectedly turned and reappeared in the highway directly in front of the plaintiff frightening his horse and causing personal injuries to the plaintiff. The defendant's explanation of this management of his car was that the team was so far up the road that it had passed out of his mind. This must be deemed thoughtless inattention on his part, and "thoughtless inattention" has been declared by the court of this State to be the "essence of negligence." *Held:* That the defendant's thoughtless inattention under the circumstances stated was a failure of duty on his part toward the plaintiff and the proximate cause of the injury, and that the verdict in favor of the plaintiff was warranted by the evidence.

Towle v. *Morse*, 250.

WIDOW.

See WILLS.

Where under a will a devise was made to certain persons "and their heirs," and one of those persons afterwards died leaving a widow, *Held:* That the widow was not an heir of the deceased legatee. *Herrick* v. *Low*, 353.

WIFE.

See HUSBAND AND WIFE.

WILD LANDS.

See EMINENT DOMAIN.

WILLS.

See EXECUTORS AND ADMINISTRATORS.

A testator made the following provisions in his will: "Item. I give, devise and bequeath to my wife, E. A. M., all my estate both real and personal wherever found and however situate for her use during life.

"Item. At the death of my said wife, whatever remain of said estates, I give, devise and bequeath to my daughter, E. A. Y." *Held:* (1) That a power of sale by the life tenant was annexed by implication to the devise of the life estate in the first item, and that it sufficiently appears that the testator intended the power of sale to extend to both the real and personal estate. (2) That the power of sale as to the real estate having been exercised by the life tenant in her lifetime, the remainder man was thereby divested of her title to the real estate. *Young* v. *Hillier*, 17.

Where a testator devises property to his own child by blood and then over to the "child or children" of that child, if any, otherwise to others of the testator's blood, a child of the latter by legal adoption only is not included and takes nothing under the will, even though adopted before the making of the will. *Woodcock's Appeal*, 214.

A testator's will contained, among other things, the following paragraph: "I will that John L. Herrick shall have the rent of my farm free of cost for the term of ten years for paying the taxes. This is for the improvement that he has made and will make before my decease. The said John L. Herrick shall have the privilege of purchasing the farm at the end of ten years for $1000; and at the end of ten years from my decease, I will that the farm or the $1000, if sold, shall be divided one half to my brother Benjamin E. Low and his heirs; and the other half equally divided between Evans A. Lamson, Addie E. Ames and John L. Herrick and their heirs." The said term of ten years having expired and the executor named in said will having died before the expiration of said term, and no person having succeeded to said trust and the said Benjamin E. Low having died leaving a son and a daughter as his only heirs and the said Evans A. Lamson having died without issue leaving a widow, and one sister as his only heir,

Held: (1) That a trust was created by the will.

(2) That the executor having died, it was unnecessary to decide whether or not he could have acted as trustee in the premises.

(3) That as a trust should not fail for want of a trustee, the case should be remanded for the appointment of a trustee to carry into effect the provisions of the will.

(4) That the widow of the said Evans A. Lamson was neither a donee under the will nor an heir of any of those named therein.

Herrick v. *Low*, 353.

On the hearing of a petition for leave to enter and prosecute an appeal from a decree of the Probate Court, the question whether previous appeal proceedings and the judgment thereon are a bar to the petition is a question of law, to the decision of which by a Justice of the Supreme Court of Probate exceptions will lie. If no exceptions are taken, the ruling is conclusive on the parties, if the court had jurisdiction. *Gurdy, Aplt.*, 356.

On the hearing of a petition for leave to enter and prosecute an appeal from a decree of the Probate Court, the questions whether the failure seasonably to claim or enter the appeal was through accident or mistake, whether it was without the fault of the petitioner, and whether justice requires a revision of the decree, present issues of fact. The determination of the Justice thereon and the exercise of the judicial discretion conferred on him are final and conclusive. *Gurdy, Aplt.*, 356.

When a petition for leave to enter and prosecute an appeal from a decree of the Probate Court, is heard in vacation by agreement of the parties and the Justice hearing such petition enters his decision on the docket as of the last day of the preceding term which he held, the parties are concluded by the entry. *Gurdy, Aplt.*, 356.

When leave is granted to enter and prosecute an appeal from a decree of the Probate Court, by a Justice having jurisdiction, matters of fact or law which were heard and determined by him cannot be heard again upon a motion to dismiss the appeal which he granted. The only question which can be open on such a motion is whether the Justice had jurisdiction to grant leave.

Gurdy, Aplt., 356.

The Supreme Court of Probate has jurisdiction to hear a petition for leave to enter and prosecute an appeal from a decree of the Probate Court at a term later than the first one after the petition is filed. Whether a petitioner has used due diligence in prosecuting his appeal, and giving notice, and whether, for want of diligence, he should be refused relief, are questions addressed to the judicial discretion of the presiding Justice. *Gurdy, Aplt.*, 356.

A decree on a petition for leave to enter and prosecute an appeal from a decree of the Probate Court that an appeal be allowed and prosecuted is equivalent to a decree that an appeal may be entered and prosecuted.

Gurdy, Aplt., 356.

If a decree granting leave to enter and prosecute an appeal fails to designate the term to which the appeal is to be entered, the entry of the appeal at the next term of court is seasonable and authorized. *Gurdy, Aplt.*, 356.

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WRITTEN INSTRUMENTS.

When the meaning of an instrument is just as unmistakable as if more directly expressed, it is sufficient in law although not in the mold of fashion or technical form. *Water District* v. *Water Co.*, 25.

APPENDIX

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